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The Guna Pai Vasantha Pai Foundation

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TO

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ROWE *v.* BRENTON

[Court of King's Bench (Lord Tenterden, C.J., Bayley, Littledale and Parke, JJ.), November 19-25, 1828]

[Reported 3 Man. & Ry. K.B. 133; 8 B. & C. 737; 2 State Tr. N.S. 251; 5 L.J.O.S.K.B. 137; Concanen's Rep. 1; 108 E.R. 1217]

Evidence—Ownership—Acts of ownership—Minerals—Copper ore raised by plaintiff—Removal of ore by owner of shaft in adjoining land—Prima facie evidence of plaintiff's title.

In an action of trover in respect of a quantity of copper ore it was proved that the plaintiff was in possession of land in which he had sunk a shaft and raised the ore in question, and that the ore was taken away by the defendant who had sunk a shaft in an adjoining close and was getting copper ore from the same lode under the plaintiff's land,

Held: this was prima facie evidence of the plaintiff's title to the ore, which must be left to the jury.

Evidence—Document—Public document—Caption of seisin taken to use of royal duke—Admissibility to show rights of duke—Enrolment of lease by Duke of Cornwall.

On account of the interest which the Crown has in the duchy of Cornwall, all acts which affect the possessions or revenues of the duchy are to be considered as public acts. On this ground, a document purporting to be a caption of seisin taken to the use of the first Duke of Cornwall by certain persons assigned by his letters patent to do so,

Held: to be receivable in evidence to show the rights of the duke.

Held, further: the enrolment of a lease granted by the Duke of Cornwall was evidence in the same manner as if it had been granted by the Crown when there was no Duke of Cornwall.

Evidence—Document—Ancient extent of Crown lands—Presumption that duly taken—Distinction from survey or rental of private manor.

An ancient extent of Crown lands found in the proper office, to which it would have been a breach of duty in the custodian of that office to admit any extent not duly taken, purporting to have been taken by a steward of the

king's lands, and following in its construction the directions of a previous statute of 1276,

Held: in distinction from the case of a survey or rental of a private manor, that the document must be presumed to have been duly taken, and, therefore, was receivable in evidence.

Attorney-General—Trial at Bar—Right to demand—Where Crown interested.

Where the Crown is interested the Attorney-General may, as a matter of right, demand a trial at Bar.

Notes. The right of the Crown to demand a trial at Bar is preserved by s. 40 (2) (g) of the Crown Proceedings Act, 1947: 6 HALSBURY'S STATUTES (2nd Edn.) 46. See 11 HALSBURY'S LAWS (3rd Edn.) 19.

Considered: *Evans* v. *Taylor* (1838), 7 Ad. & El. 617; *Dixon* v. *Farrer* (1886), 18 Q.B.D. 43; *Mercer* v. *Denne*, [1905] 2 Ch. 538. Referred to: *R.* v. *Richmond* (1841), 5 Jur. 605; *Anglesey* v. *Hatherton* (1842), 10 M. & W. 218; *Doe d. William IV* v. *Roberts* (1844), 13 M. & W. 520; *Doe d. Dand* v. *Thompson* (1845), 7 Q.B. 897; *Rogers* v. *Brenton* (1847), 10 Q.B. 26; *Re Gorham* v. *Exeter, Ex parte Exeter* (1850), 10 C.B. 102; *Shaw* v. *Beck* (1853), 8 Exch. 392; *Jessop* v. *Jessop* (1861), 30 L.J.P.M. & A. 193; *A.-G. to Prince of Wales* v. *Crossman* (1866), L.R. 1 Exch. 381.

As to proof of acts of ownership and the admissibility in evidence of public documents, see 15 HALSBURY'S LAWS (3rd Edn.) 284, 285, 314, 363 et seq. For cases see 11 DIGEST (Repl.) 602; 22 DIGEST (Repl.) 307 et seq.

Cases referred to:

(1) *Kinnersley* v. *Orpe* (1779), 1 Doug. K.B. 56; 99 E.R. 40; 31 Digest (Repl.) 415, *5438*.

(2) *Duke of Somerset* v. *France* (1725), 1 Stra. 654; Fort. 41; 93 E.R. 762, L.C.

(3) *Lowther* v. *Raw* (1735), 2 Bro. Parl. Cas. 451; Fort. 44; 1 E.R. 1058, H.L.; 13 Digest (Repl.) 26, *292*.

(4) *Roe d. Beebee* v. *Parker* (1792), 5 Term Rep. 26; 101 E.R. 15; 13 Digest (Repl.) 25, *273*.

(5) *Stanley* v. *White* (1811), 14 East, 332; 104 E.R. 630; 2 Digest (Repl.) 88, *531*.

(6) *Tyrwhitt* v. *Wynne* (1819), 2 B. & Ald. 554; 106 E.R. 468; 22 Digest (Repl.) 67, *439*.

(7) *R.* v. *Ellis* (1813), 1 M. & S. 652; 105 E.R. 243; 44 Digest 74, *518*.

Action of trover in respect of a quantity of copper ore. The defendant denied liability.

In 1827 the Attorney-General (Sir Charles Wetherell) appeared, stated that the Crown was interested in the result of this cause, and demanded a trial at Bar as a matter of right, the court not having power to grant a writ of nisi prius where the Crown was a party or where the matter touched the right of the Crown, without a special warrant from the Sovereign or the assent of the king's attorney.

Upon this ground a trial at Bar was granted.

In 1828 the cause came on for trial, when, on behalf of the plaintiff, it was proved that he was in possession of land called Lamellan, or Nansmellyn, in the manor of Tewington, in Cornwall, and that he had sunk a shaft there and raised a quantity of copper ore which was afterwards carried away from the premises by the defendant, who was a shareholder in the East Crumis mine, the shaft of which was sunk in land adjoining to the plaintiff's. On the cross-examination of the plaintiff's witness, it appeared that the workings of the East Crumis mine extended under the plaintiff's land, and that a lode of copper was actually being worked there when the plaintiff sunk his shaft down to the same lode and brought up the ore in question. The plaintiff's counsel refused in the first instance to give any further evidence of title, and it was thereupon contended

for the defendant that he had not established a prima facie case as he had shown no title to the land beyond the presumption arising from the mere fact of possession, and, although that might prima facie extend to the minerals under the soil as well as to the surface, yet no such presumption could arise when it appeared that the defendant was in possession of and working the lode of copper.

LORD TENTERDEN, C.J.—We all think that the court cannot take upon itself to nonsuit the plaintiff. The evidence given must be left to the consideration of the jury.

The Attorney-General (*Sir Charles Wetherell*), with whom was *the Solicitor-General* (*Sir N. C. Tindal*), *the Attorney-General of the Duchy* (*Harrison*), *Scarlett*, *Dampier and Coleridge*, opened the case for the defendant, and stated that he claimed the ore in question as lessee under the Crown in right of the duchy of Cornwall. The plaintiff's land was a conventionary tenement of the manor of Tewington, and, although such tenements were held to the tenants, their heirs and assigns, from seven years to seven years, renewable for ever, they were of a base tenure, and the tenants had no right to the minerals. The same tenure pervaded the whole of the duchy manors, and wherever copper had been worked under them, it was by virtue of leases from the Duke of Cornwall, or the Crown when there was no Duke of Cornwall.

In support of this case there were put in evidence a number of ancient documents and extracts from documents, including an extract from Domesday Book which showed that the Crown held various manors and possessions in Cornwall, three of the manors, Hellestone, Bewingtone (which was the same as Tewington), and Pennehyle, being ancient demesne. The account of the receiver, William de Cusance, for the year 1337, was produced from the King's Remembrancer's office (which was proved to be the proper depository for the minister's accounts of the king and the Duke of Cornwall). It appeared to have been audited and allowed. This account stated that no issues or profits of the manors in question, had been received after May, because Edward Duke of Cornwall had then taken seisin of them. A document was produced from the same office, purporting to be a caption of seisin to the use of the Duke of Cornwall, by James de Wodestocke and William de Monden, assigned by the letters patent of the duke to do the same on Monday, May 12, 1337.

Brougham, *Erskine*, *Patteson* and *Follett* for the plaintiff, objected that this instrument could not be read in evidence. It was not a public document, executed under any public authority, but a mere account of something done under a letter of attorney from the Duke of Cornwall. The Duke of Cornwall was merely a subject, although the highest in the kingdom. The public had no interest in his acts, nor any with respect to the revenues of the dukedom. His acts were, therefore, to be treated as those of any other subject, and, consequently, this instrument could not be used for the purpose of affecting the rights of third persons. It was introduced not merely to prove the fact of seisin having been taken, but to prove circumstances relating to the manors comprised in the grant from the Crown.

Counsel for the defendant contended that this was a public document relating to the property of the Crown, inasmuch as it was the evidence of what had been alienated by Edward III to the Duke of Cornwall.

LORD TENTERDEN, C.J.—The foundation of this objection entirely fails. It has been argued that this instrument cannot be received in evidence, because it is a mere private document, the acts of the Duke of Cornwall being only like those of any other subject. In general, that is true. But with regard to the duchy of Cornwall, the case is very different, for when there is no Duke of Cornwall, the possessions granted to him revert to the Crown. The Crown, representing the public, has an interest in everything relating to the duchy of Cornwall and its revenues, and it is immaterial whether any act affecting them is done by the

Sovereign when there is no Duke of Cornwall, or by the Duke of Cornwall when there is one. The instrument in question is, therefore, a document affecting the interests of the public, and must be received.

The caption of seisin of the manor of Tewington, was then read. It contained a list of the free-tenants

> "rendering, therefore, by the year, at the four usual terms of the year, in equal portions [certain sums]. And for fine of tin at the least of St. Michael 14d., and doing suit at the court of the lord duke, from three weeks to three weeks."

A document purporting to be an extent of the manor of Tewington taken in 1327 by Roger de Gildesburgh was produced from the Lord Treasurer's Remembrancer's office. It was strung together with several others. The first (an extent of Tywarnhale) was described as being per sacramentum; in the title of the others those words were omitted. On the last there was endorsed:

> "Roger de Gildesburg, steward of the lord the king, of the lands of the king which were in Isabel Queen of England on this side Trent, by command of William de Norwich, treasurer, &c., delivers here these rolls the 27th of October, 1331, from the Conquest."

Many extents found in that office had similar endorsements. It was proved that the Lord Treasurer's Remembrancer's office was a proper depository for such documents, and that none was received there unless taken by due authority, but that some extents under the Crown were deposited elsewhere. The document was not signed, nor did it contain within itself any statement of the authority by which it was taken, nor was any commission found. But the order in which the different descriptions of property were mentioned pursued the directions of the statute 4 Ed. 1 [sic]. For the plaintiff it was objected that this could not be received in evidence inasmuch as it did not appear either by any commission or any internal evidence by whom or under what authority the extent was taken. The endorsement merely explained the manner in which the rolls came into the remembrancer's office, and had no relation to the taking of the extents. On the other hand, it was argued that the statute 4 Ed. 1, made it the duty of the king's steward to take extents from time to time, and that the extent in question must have been taken in pursuance of the statute as the various matters contained in it followed each other in the order set down in the statute. Further, that in 1327 there was good reason for taking an extent of the lands, etc., granted to Queen Isabel, inasmuch as that grant expired on the death of Edward II.

LORD TENTERDEN, C.J.—I am of opinion that this instrument must be received. It appears that by the statute 4 Ed. 1, extents such as this are directed to be made. It appears also that King Edward II in the eleventh year of his reign made a grant of the premises in question to Queen Isabel to hold during his pleasure. That grant would expire on his death. Then, in 1331 Gildersburg (who appears to have taken the extent in 1327) by command of the treasurer, delivers in the rolls to the office whence they are now produced. They are found in the office where such things are usually deposited, and the only ground that can be urged against the reception of the evidence is that the extent does not appear to have been taken by any competent authority. But, considering that the extent pursues the directions of the statute, and that it is found in the proper place, it must be presumed that it was duly taken.

BAYLEY, J.—Considering that this document was found in the proper office, and that it would have been a breach of duty in the person having the custody of that office to admit any extent not duly taken, I think we must, at this distance of time, presume that it was taken under competent authority. The statute 4 Ed. 1, says that extents are to be taken, not by whom. I, therefore, think it

A was the duty of each steward under the Crown to take extents from time to time of the lands under his care.

LITTLEDALE, J.—I am of the same opinion. If this had been a survey or rental of a private manor it could not have been received. But an Act of Parliament requires extents to be taken, and in a certain manner. Looking at the exterior B of this roll, we find that the document in question is endorsed in the usual manner, and it comes from the proper office. Looking at the internal contents, we find that the person delivering it in was the person who took it, and was, therefore, the proper person to make the return, and that the matters mentioned in it are those of which the statute directs enquiry to be made. After that, there cannot be a doubt that the extent was taken by virtue of a sufficient authority.

C **PARKE, J.**—It appears to me that this extent precisely follows the directions of the statute. If a commission were necessary to give it validity, we might now presume that such a commission once existed, but has been lost, but I have no doubt that it was the duty of the steward to take it without any express directions.

The extent was then read. It enumerated a number of free tenants, free con- D ventionaries, " Natives, and stock."

The enrolments of several leases of toll-tin, granted by the Crown when there was no Duke of Cornwall, were read, and tollers were examined who had received toll of all tin worked in what was called duchy land, which term was well known throughout the assessionable manors as distinguishing the land of the conventionary tenants from that of the free tenants which was called fee-land.

E The enrolment of a lease was read, whereby in 1695 or 1696 William III demised to Henry Vincent and F. Scobell all mines and minerals of whatosever kind found or to be found, dug, or acquired in any places within the lordships, manors, precincts, or territories of the duchy of Cornwall, as well opened as to be opened, with full power to dig, etc.,

> F " except always and altogether reserved all royal mines, and all mines of tin, and all other minerals within the aforesaid duchy, now granted to any person or persons by letters-patent under the Great Seal of England, or under the seal of the Exchequer; and all tolls, farms, and other dues to us or the farmers there belonging . . . by any custom or demise heretofore made."

Habendum for thirty-one years, rendering one tenth of the clear profits. Covenant G by the lessees not to enter upon any lands in the tenure or possession of any of the tenants of the duchy, or of any person or persons whatsoever, without the consent and permission of the tenants and occupiers of the same lands in that respect before had and obtained. The enrolment of a similar lease granted by the Duke of Cornwall in 1717, upon the surrender of the former, was then produced.

For the plaintiff it was objected that this could not be read until evidence H had been given of the loss of the original lease, the enrolment being of a counterpart. It was said that when the property was in the Crown, the enrolment was evidence, because the Crown can only grant by matter of record, but that the same reason did not apply to a lease granted by the Duke of Cornwall. In *Kinnersley* v. *Orpe* (1), it was said that the act of the officer of the duchy of Lancaster was evidence, but that case was very different from the present. I There the plaintiff, in order to prove his title as lessee of the duchy, produced the original lease, but that contained a proviso that it should be void unless enrolled within a certain time, and the plaintiff relied on a memorandum in the margin, signed by the auditor, whereby it appeared to have been enrolled. BULLER, J., said that the act of the officer was evidence of the enrolment, but that it was unnecessary to decide the point, the lease being admitted by the pleadings. That case, therefore, was rather an authority against the present defendant, for there the original lease was produced. On the other hand it was contended, that the lease in question contained a clause requiring that it should be enrolled.

and that the tenant, by procuring the enrolment, made that evidence. Besides the Crown had an interest in the property which it affected, and, consequently, the lease must be considered as if granted by the Crown. It was decided very soon after the creation of the duchy that the Duke of Cornwall had the possessions of the duchy with the same privileges as the King, because it had never been disannexed from the Crown: FITZ. ABR. PREROG., pl. 16. The same evidence must, therefore, be admissible to prove grants of duchy property either by the King or the Duke of Cornwall.

LORD TENTERDEN, C.J.—I am of opinion that this enrolment must be received as evidence. The estate of the Duke of Cornwall is of a very peculiar nature, and there is nothing else like it known in this country. The property is vested in the Duke of Cornwall whenever there is such a person, and in the Crown when there is not. Whether there is a Duke of Cornwall or not, there is an office called the Duchy Office, there is an auditor of the duchy accounts, and there are other officers for managing the affairs of the duchy. To say that one rule of evidence as to their proceedings shall prevail when the property is in the Crown and another when it is in the Duke of Cornwall, would be to introduce infinite confusion. Looking at the lease in question (and we must look at it to ascertain whether it be admissible or not), we find in it a clause requiring it to be enrolled. Can any lawyer doubt that the enrolment of such a lease, granted when there was no Duke of Cornwall, would be evidence against the Crown at any future time? On account of the peculiar nature of the dukedom and the interest which the Crown has in the possessions of the dukedom, I think that all the same rules must be applicable to it, whether it be at any particular time vested in a Duke of Cornwall or in the King.

BAYLEY, J.—I cannot, as to this point, make any distinction between the King and the Duke of Cornwall. To use the phrase of LORD HOBART: "Dux censetur una persona cum rege." The King cannot alienate the possessions of the Crown but by matter of record, and, as the fee of the possessions of the duchy is alternately in the Duke of Cornwall and the Crown, if the duke could grant without a record, the Crown would be bound without a record. It is, therefore, necessary for the protection, as well of the tenants as the Crown, that all grants of duchy property should be by a record. Then there is a regular office and an auditor for managing these matters, whose duty it is to enrol authentic documents only. On these grounds, I think that the enrolment in question must be received as evidence of the lease.

LITTLEDALE, J.—For the purpose of this question, I think that the King and the Duke of Cornwall must be considered as identified. It would be very inconvenient if one rule of evidence should prevail when there is a Duke of Cornwall, and another when there is not.

PARKE, J.—I am of the same opinion, on account of the identity of interest between the Duke of Cornwall and the Crown. There can be no doubt that the lease would be binding on the Crown and the enrolment good evidence if the Crown alone were interested, and I think it cannot be less so because the Crown and the Duke of Cornwall are jointly interested.

The lease in question, and several subsequent leases of a similar nature, were read.

For the plaintiff it was objected that evidence ought not to be received of that which was done in the other manors. It was contended that the evidence was not relevant, unless to show an incident of tenure or a custom. The defendant could not be allowed to give evidence of any incident of tenure in another manor to affect Tewington, unless he first showed that the tenure was the same in each. Nor could any evidence of custom in one manor be admitted to prove a custom in another unless both before the time of legal memory were in the possession of

A the same person and formed a part of the same district, for a custom to be binding must have existed from time immemorial. In the present case it had been proved that the tenure was not the same throughout the assessionable manors, Tewington, Helleston, and Clymeston being ancient demesne where the tenants had peculiar privileges, and the other fourteen manors not being so. Again, in the caption of seisin the free conventionary tenants in Tewington were said to pay a certain B fine of tin, and the same appeared in the inquisition post mortem Edmundi, but that was not said of the conventionary tenants in other manors. So also in the Parliamentary survey, although it was stated as to each manor that there was an assession court holden every seven years to which the tenants must resort, and that their estates did not then cease, yet it was not stated that in each they held to them and their heirs for ever, from seven years to seven years, which was stated C of the tenants in Tewington and Helleston. The tenure was, therefore, very different, for in those manors the tenants would, according to that statement, take a freehold in interest, but not in the others. In order to get rid of this difficulty, and show the tenure the same, the surrenders and admittances in the different manors should have been produced.

D According to the opinion of FORTESCUE, J., in *Duke of Somerset* v. *France* (2), the evidence of things done in other manors could not be given in evidence to affect the manor where the dispute arose, unless the tenure be the same. At first he was the only member of the court who thought the evidence admissible even under those circumstances, but RAYMOND, C.J., and REYNOLDS, J., consented to receive the evidence upon the assurance that it had been done upon the northern E circuit, and not because they were convinced of the propriety of it. It was somewhat remarkable, that in a subsequent case of *Lowther* v. *Raw* (3), FORTESCUE, J., rejected such evidence, but the judgment was reversed on the authority of *Duke of Somerset* v. *France* (2). All the subsequent cases on the point had been determined on the same authority. In *Roe d. Beebee* v. *Parker* (4), and *Stanley* v. *White* (5), *Duke of Somerset* v. *France* (2) was said by LORD KENYON and LORD ELLENBOROUGH F to have proceeded upon the ground that all the manors then in question were parcel of the same district and subject to the same border law, which must mean that the tenants of all held by the same tenure. In the present case the tenure had not been proved to be the same. Again, in *Stanley* v. *White* (5), LORD ELLENBOROUGH assumed that all the belt of land to which the evidence applied originally belonged to one person who had granted it out to others, reserving G certain rights. Here it had been proved by the early documentary evidence that all the manors did not originally belong to one person. The tenants of those manors must, therefore, have derived their rights from different persons, and there was no ground for the presumption upon which the court proceeded in *Stanley* v. *White* (5).

The evidence in question could not, then, be received to prove an incident of H tenure. Neither could it be admitted to prove a custom. In *Duke of Somerset* v. *France* (2), FORTESCUE, J., although he thought the evidence admissible to show the quality of the tenure, observed that there was a great difference between that and receiving it to prove a custom. No custom could be good unless it had existed from time immemorial, and, therefore, no common custom could affect those manors unless before that time they were in the hands of the same I person, which had been disproved. Again, by some of the evidence given by the defendant, it would appear that the plaintiff and others similarly situated, had not a customary estate, but a mere conventionary estate as leaseholders. No custom could attach to an estate of that nature and the defendant ought not to be allowed for one purpose to treat them as conventionary tenants, and for another as customary tenants.

On behalf of the defendant it was argued that the evidence tendered was not evidence to prove a custom, but to prove what interest the lord had in those lands which in the seventeen manors have been granted out to the conventionary

tenants. Custom and tenure were very different things. The tenure must first be established, and then the custom showed in what course that tenure should go. It was very difficult to say what was the tenure of the conventionary tenants in these manors, and that very obscurity was the ground for receiving the evidence. If they were ascertained to be copyholders or leaseholders the rights arising from such tenure would be easily ascertained, but all that was known of the tenants in question was that in each of the manors ever since 1333, and perhaps long before, there had been conventionary tenants, and that in each there was an assession court holden once in seven years, at which the conventionary tenants came and renewed their holdings. In all the manors they took for seven years, although from long usage it could not now be said that their rights ceased at the end of that term. This similarity, affecting all the seventeen manors, was sufficient to show that they formed one district under the same lord, where he had in all probability reserved throughout similar rights to himself in the grants made to the tenants bearing the same description. Evidence of rights exercised by the lord over conventionary tenements in one of these manors might, therefore, be received to show what rights he had reserved throughout the district. In *Tyrwhitt* v. *Wynne* (6) it was held that leases of minerals under one part of a waste were evidence of the lessor's right to the minerals under another part, both being proved to be parcels of the same district. The principle was recognised by LORD ELLENBOROUGH in *R.* v. *Ellis* (7), where he cited *Lord Barclay's Case* from HALE, DE JUR. MAR. 35, and observed that the evidence as to other manors was not so properly to be considered evidence of the custom of one manor to prove the custom of another, but evidence to prove one and the same custom affecting a whole district of manors. That was consistent with the doctrine of SIR M. WRIGHT [WRIGHT'S TENURES, 1768 ed., p. 36], who says, that in considering the nature of fends, the nature of the province where they lay was to be kept in view.

LORD TENTERDEN, C.J. I am of opinion that the court are bound to receive this evidence. It appears by the documents which have been produced that before and at the time of the creation of the duchy courts called assession courts were or ought to have been held every seventh year under a commission from the lord of the soil desiring certain persons to repair to these manors, which were then all in one hand, and let the lands to the best advantage of the owner. A distinct court, under the same commission, was held for each manor, and we find by the returns that there were a class of tenants called free conventionary tenants, distinguished from free tenants and from native conventionaries, as long as the latter class (which now appears to be extinct) continued to exist. In each manor the free conventionary tenants are said to come and take their lands for seven years. If there were no other evidence they would be pure leaseholders, but by the Parliamentary survey it appears that certain commissioners were sent down to enquire into the possessions of the duchy, and in every manor these tenants claim substantially the same rights, although with some minute variations as to the descent of their estates or the rights of their widows. They state that they must attend the assession courts and renew their holdings, but that their right does not cease at the expiration of the seven years.

Thus, if we take the earlier evidence alone they are all leaseholders; if we take the latter, also, the same character (whatever that may be) belongs to them all. It may be very difficult to say precisely what that character is. It is very peculiar and not known in any other part of the country, but it certainly belongs to all those called free conventionaries in this district. Must we not then, in fairness, in order to ascertain what are the relative rights of the lord and these tenants in one part of this district, inquire what are their rights in another? It appears to me that plain reason and common sense require it, without resorting to decided cases or nice and subtle distinctions whether the matter in dispute be in the nature of tenure or custom. This is not, properly speaking, a question

of tenure nor a question of custom, such as the course of descent attached to the tenure, but a question as to what the lord parted with to those who are called conventionary tenants.

BAYLEY, J.—Generally speaking a party cannot be allowed to prove the custom of one manor by evidence of a custom in another unless a connection between them be first established. But when, in a case circumstanced as this is, we find a certain class of tenants existing from a very early period down to the present time, the terms of whose tenancy are expressed in language that leaves their rights in doubt, and when we find in each manor contemporaneous grants to the same class of tenants in the same words, may we not enquire what was enjoyed under those words in one manor in order to ascertain what was granted by them in another. It has been the constant practice to construe documents by usage. Thus, where a grant is made to hold to *A.*, *B.*, and *C.* "successive," usage explains the meaning of that word. Looking at the extent of these manors in 1327, we find free conventionary tenants mentioned, but the terms of the convention are not stated. The same observation applies to the caption of seisin. There, indeed, a fine of tin is spoken of, but it is quite silent as to the right of minerals in general. Similar language is used with respect to the free conventionaries in each of these manors. I am, therefore, of opinion, that the usage which has prevailed in one part, and is, therefore, evidence to explain the meaning of the grant there, is evidence to explain a grant expressed in similar terms as to any other part of the district.

LITTLEDALE, J., said, that having examined the authorities, he concurred in the opinion expressed by LORD TENTERDEN and BAYLEY, J.

PARKE, J., was absent during the argument, and gave no opinion.

Several witnesses were then called, who proved the receipt of toll of copper worked in duchy land in other manors.

The answers of the tenants to certain interrogatories put to them at the assession court in 1558 were then tendered, and objected to, because the interrogatories were not produced. It was proved that search had been made for them, but they could not be found.

LORD TENTERDEN, C.J.—We must allow the answers to be read. If there is any obscurity in them for want of the questions that will destroy their effect.

LORD TENTERDEN, C.J., in summing-up the case to the jury, said that the question was whether the owner of a conventionary tenement was entitled to the copper found under it, or, whether it belonged to the Duke of Cornwall. There was no question here as to the right to enter and dig for it. In many manors it happened that the lord of the soil was entitled to the minerals, but had no right to enter upon the lands of the copyhold tenants to search for and obtain those minerals without the consent of the tenants, and all the evidence given by the plaintiff as to the interruption of workings might be explained by the right of the tenant to prevent the owner of the minerals from digging for them without his consent. HIS LORDSHIP directed the attention of the jury to the evidence, and observed that, even allowing the conventionary tenants to have in their estates the largest interest that they had ever claimed, viz., from seven years to seven years renewable for ever, that would not give them a right to the minerals, and, although a distinct positive usage for the conventionary tenants to take the minerals might be valid in law, it was incumbent on them to prove it, for otherwise the right would remain in the lord.

Verdict for defendant.

KEPPELL AND OTHERS *v.* BAILEY AND OTHERS

[Lord Chancellor's Court (Lord Brougham, L.C.), January 18, 20, 21, 29, 1834]
[Reported 2 My. & K. 517; Coop. temp. Brough. 298; 39 E.R. 1042]

Landlord and Tenant—Sale of land—Covenant running with the land—Absence of privity of estate between covenantor and covenantee—Position of assignees of covenantor.

A covenant will not be held to run with the land in the absence of any privity of estate between the covenantor and the covenantee, or any connection of which the law can take notice, as, e.g., the privity which the right of reversion creates between a lessor and his assigns and the assigns of the lessee.

Landowners and owners of iron works, among others the lessees of the B. works, formed a joint stock company, and, under powers given by a local Act, constructed a railroad connecting the T. quarry with the iron works and with the railroads of a canal company. In the partnership deed of the railroad company the lessees of the B. works covenanted for themselves, their heirs, executors, administrators, and assigns, with the other shareholders, their executors, administrators, and assigns, so long as the covenantors, their executors, administrators, or assigns should occupy the B. works, to procure all the limestone used in the works from the T. quarry, and to convey all such limestone and also all the ironstone from the mines to the works along the T. railroad, and to pay a toll of 5d. a ton per mile for the same. Upon a bill filed by the shareholders of the railroad company to enforce this covenant against a person who had purchased the B. works, with notice of the partnership deed,

Held: the covenant did not run with the land so as to bind assignees at law, and a court of equity would not, by holding the conscience of the purchaser to be affected by the notice, give the covenant a more extensive operation than the law allowed to it.

Contract—Illegality—Public policy—Restraint of trade—Reasonableness—Burden on party relying on contract to prove contract reasonable—Test of reasonableness—Circumstances at time contract made—Irrelevance of altered circumstances.

Per Lord Brougham, L.C.: The policy of the law is against contracts in restraint of trade, and the burden is on those who rely on them to show that they are reasonable and not detrimental to the interests of the public. A covenant in partial restraint of trade will be supported if on its true construction it appears to be just and honest and does not operate to the detriment of the public. The reasonableness of the covenant depends on the circumstances in existence when the contract was entered into and is not to be measured by the presence of altered circumstances when the validity of the covenant is called in question which have resulted in a diminution of the benefit to the covenantor. A party who, with his eyes open, makes a bargain for his own benefit, which was really beneficial at the time, cannot escape by showing that it has become less advantageous than he expected, or actually detrimental.

Easement—Nature of rights which can be created—Limitation to those well-known to the law—Inability of landowner to attach to land new kind of incorporeal right.

Per Lord Brougham, L.C.: The easements which can be created over land are limited in character to those which are well known to the law. Incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of an owner. Great detriment would arise and much confusion of

rights if persons were allowed to invent new modes of holding and enjoying real property, and to impress on their lands and tenements a peculiar character which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a different fashion, and it would be hardly possible to know what rights the acquisition of any parcel conferred or what obligation it imposed, e.g., if one man bound his messuage and land to take lime from a particular kiln, another to take his coals from a certain pit, and a third to load his property with future obligations to employ one blacksmith's forge.

Notes. Considered: *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C. 300. Referred to: *Tulk* v. *Moxhay*, [1843–60] All E.R. Rep. 9; *Ackroyd* v. *Smith*, [1843–60] All E.R. Rep. 512; *Rowbotham* v. *Wilson* (1857), 8 E. & B. 123; *Bailey* v. *Stevens* (1862), 31 L.J.C.P. 226; *Hill* v. *Tupper*, [1861–73] All E.R. Rep. 696; *Richards* v. *Harper* (1866), 35 L.J. Ex. 130; *Aspden* v. *Seddon*, *Preston* v. *Seddon* (1876), 34 L.T. 906; *Luke* v. *Dennis* (1877), 7 Ch.D. 227; *Haywood* v. *Brunswick Permanent Benefit Building Society* (1881), 45 L.T. 699; *Great Northern Rail. Co.* v. *I.R. Comrs.*, [1901] 1 K.B. 416; *Lord Strathcona Steamship Co., Ltd.* v. *Dominion Coal Co., Ltd.*, [1925] All E.R. Rep. 87; *Re Ellenborough Park*, *Re Davies*, *Powell* v. *Maddison*, [1955] 2 All E.R. 38.

As to covenants running with the land, see 23 HALSBURY'S LAWS (3rd Edn.) 644–651, and ibid., vol. 34, pp. 367-369. For cases see 31 DIGEST (Repl.) 149 et seq.; 40 DIGEST (Repl.) 328, 329.

Cases referred to:

(1) *Flint* v. *Brandon* (1803), 8 Ves. 159; 32 E.R. 314; 44 Digest (Repl.) 23, *130.*

(2) *Barret* v. *Blagrave* (1800), 5 Ves. 555; 31 E.R. 735, L.C.; on appeal (1801), 6 Ves. 104, L.C.; 31 Digest (Repl.) 173, *3062.*

(3) *Smith* v. *Fromont* (1818), 2 Swan. 330; 1 Wils. Ch. 472; 36 E.R. 642, L.C.; 36 Digest (Repl.) 598, *1586.*

(4) *Collins* v. *Plumb* (1810), 16 Ves. 454; 33 E.R. 1057, L.C.; 28 Digest (Repl.) 818, *641.*

(5) *Duke of Bedford* v. *British Museum Trustees* (1822), 2 My. & K. 552; 1 Coop. temp. Cott. 90; 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 44 Digest (Repl.) 53, *399.*

(6) *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 45 Digest (Repl.) 395, *110.*

(7) *Young* v. *Timmins* (1831), 1 Cr. & J. 331; 1 Tyr. 226; 9 L.J.O.S.Ex. 68; 148 E.R. 1446; 45 Digest (Repl.) 452, *328.*

(8) *Crutwell (or Cruttwell)* v. *Lye* (1810), 1 Rose, 123; 17 Ves. 335; 34 E.R. 129; 45 Digest (Repl.) 520, *1048.*

(9) *Jones* v. *Edney* (1812), 3 Camp. 285; 170 E.R. 1384, N.P.; 40 Digest (Repl.) 254, *2136.*

(10) *Cooper* v. *Turbill* (1808), 3 Camp. 286, n.; 31 Digest (Repl.) 117, *2582.*

(11) *Holcombe* v. *Hewson* (1810), 2 Camp. 391, N.P.; 31 Digest (Repl.) 115, *2559.*

(12) *Doe d. Calvert* v. *Reid* (1830), 10 B. & C. 849; 8 L.J.O.S.K.B. 328; 109 E.R. 664; 31 Digest (Repl.) 115, *2551.*

(13) *Morris* v. *Colman* (1812), 18 Ves. 437; 34 E.R. 382, L.C.; 45 Digest (Repl.) 487, *739.*

(14) *Williams* v. *Williams* (1818), 1 Coop. temp. Cott. 95; 2 Swan. 253; 1 Wils. Ch. 473, n.; 36 E.R. 612, L.C.; 45 Digest (Repl.) 510, *973.*

(15) *Spencer's Case* (1583), 5 Co. Rep. 16a; 77 E.R. 72; 31 Digest (Repl.) 153, *2907.*

(16) *Anon.* (1587), Godb. 120; 78 E.R. 73; sub. nom. *Purfrey's Case*, Moore, K.B. 243; 31 Digest (Repl.) 151, *2894.*

(17) *Bally* v. *Wells* (1769), Wilm. 341; 3 Wils. 25; 97 E.R. 130; 31 Digest (Repl.) 154, *2919.*

(18) *Congleton Corpn.* v. *Pattison* (1808), 10 East, 130; 103 E.R. 725; 31 Digest (Repl.) 152, *2903.*

(19) *Canham* v. *Rust* (1818), 2 Moore, C.P. 164; 8 Taunt. 227; 129 E.R. 370; 31 Digest (Repl.) 151, *2897.*

(20) *Hartley* v. *Pehall* (1792), Peake, 178, N.P.; 31 Digest (Repl.) 115, *2555.*

(21) *Vyvyan* v. *Arthur* (1823), 1 B. & C. 410; 2 Dow. & Ry. K.B. 670; 107 E.R. 152; sub nom. *Vivyan* v. *Arthur*, 1 L.J.O.S.K.B. 138; 31 Digest (Repl.) 239, *3726.*

(22) *Lord Uxbridge* v. *Staveland* (1747), 1 Ves. Sen. 56; 27 E.R. 888, L.C.; 31 Digest (Repl.) 151, *2893.*

(23) *Manchester Mills Case* (1757), 1 Doug. K.B. 222, n.; 99 E.R. 145; 21 Digest (Repl.) 263, *417.*

(24) *Holmes* v. *Buckley* (1691), Prec. Ch. 39.

(25) *Brewer* v. *Hill* (1794), 2 Anst. 413.

(26) *Jourdain* v. *Wilson* (1821), 4 B. & Ald. 266; 106 E.R. 935; 31 Digest (Repl.) 155, *2932.*

(27) *Vernon* v. *Smith* (1821), 5 B. & Ald. 1; 106 E.R. 1094; 31 Digest (Repl.) 400, *5295.*

(28) *Sampson* v. *Easterby* (1829), 9 B. & C. 505; 4 Man. & Ry. K.B. 422; 5 L.J.O.S.K.B. 291; 109 E.R. 188; affirmed sub nom. *Easterby* v. *Sampson* (1830), 6 Bing. 644; 1 Cr. & J. 105; 4 Moo. & P. 601; 130 E.R. 1429, Ex. Ch.; 31 Digest (Repl.) 154, *2920.*

(29) *Barclay* v. *Raine* (1823), 1 Sim. & St. 449; 57 E.R. 179; 40 Digest (Repl.) 174, *1374.*

(30) *Steyne at Brighton Case*, unreported.

(31) *Furnival* v. *Crew* (1744), 3 Atk. 83; 9 Mod. Rep. 446; 26 E.R. 850, L.C.; 31 Digest (Repl.) 81, *2340.*

(32) *City of London* v. *Richmond* (1701), Prec. Ch. 156; 2 Vern. 421; 2 Eq. Cas. Abr. 86; 23 E.R. 870; affirmed sub nom. *Richmond* v. *City of London* (1702), 1 Bro. Parl. Cas. 516, H.L.; 31 Digest (Repl.) 454, *5804.*

(33) *Pakenham* v. *Prior of* — (1368), Y.B. 42 Edw. 3, fo. 3, pl. 14; sub nom. *Pakenham's Case*, Co. Litt. 385a; 40 Digest (Repl.) 339, *2765.*

(34) *Horne's Case* (1400), Y.B. 2 Hen. 4, fo. 6, pl. 25.

(35) *Tatem* v. *Chaplin* (1793), 2 Hy. Bl. 133; 126 E.R. 470; 31 Digest (Repl.) 162, *2988.*

(36) *Webb* v. *Russell* (1789), 3 Term Rep. 393; 100 E.R. 639; 31 Digest (Repl.) 471, *5972.*

(37) *Collison* v. *Lettsom* (1815), 6 Taunt. 224; 2 Marsh. 1; 128 E.R. 1020; 31 Digest (Repl.) 152, *2904.*

Motion for an order to dissolve an injunction restraining the defendants from conveying certain minerals over a railway owned by a company of which the plaintiffs were shareholders.

In 1792 the Monmouthshire Canal Navigation Act (a local Act) was passed whereby certain persons therein named were incorporated under the name of the Company of Proprietors of the Monmouthshire Canal Navigation, and were empowered to make several navigable canals, railways, wagonways, and roads, within the district, in the manner, and subject to the regulations and conditions therein stated. The company were authorised to charge for the conveyance of different kinds of minerals, goods, and merchandise along the line of their canals and railways sums not exceeding a scale of tolls specified in the Act. According to that scale it was provided that for all ironstone, iron ore, coal, charcoal, lime, and for all tiles, bricks, limestone, flag-stones, and other stone conveyed upon the canals or railways a sum not exceeding 2½*d.* per ton per mile should be charged;

for all hay, straw, and corn in the straw, all materials used in repairing the roads, and manure, a sum not exceeding 1½*d.* per ton per mile; and for all other articles not before specified, a sum not exceeding 5*d.* per ton per mile. The Act also contained a provision, in s. 108, whereby, as soon as the company of proprietors were enabled out of their clear profits to make a dividend among the shareholders of £10 per cent. upon the capital contributed, certain commissioners were empowered to reduce the rates chargeable for the conveyance of minerals and goods along the company's canals and railways according to their discretion.

By s. 128 (commonly known by the name of the eight-mile clause) it was enacted that, if the owners of any lands containing mines, minerals, or quarries, or the proprietors, lessees, or occupiers of any iron furnaces lying within the distance of eight miles from any part of the canals or railways, should find it necessary that any railways or roads should be made over the lands of any other persons for the purpose of conveying the produce of their mines or quarries to the canals or railways of the company, and if the company should refuse to make any such railway or road for the space of three months after an application had been made to them in writing for that purpose at a general meeting of the proprietors, the persons who had made the application might, at their own expense, after the expiration of the three months, without the consent of the owners of the lands, make such railways or roads, tendering satisfaction for the damage which might be thereby occasioned to the lands, such damage to be ascertained in the manner therein mentioned. All such railways or roads, when completed, were to be open to the public for the conveyance of any minerals and goods on payment to the persons at whose expense the railways or roads had been made, and their heirs or assigns, of such tolls, rates, or duties as should, for the time being, be payable to the Monmouthshire Canal Navigation Co. for the conveyance of such minerals and goods upon the railways to be made by them. The canal company were further empowered by s. 129 of the Act, in cases where persons might thereafter be desirous to have a railway or wagonway constructed for their use communicating with the main line of the company's canals and railways, to enter into an agreement with such persons, at their request to construct railways and wagonways accordingly, and to take and demand for the conveyance of ironstone, iron ore, lime, limestone, and other goods and merchandise thereupon, such tolls as should be mutually agreed upon, not exceeding the rate of 5*d.* per ton per mile.

In 1795 the proprietors or lessees of three furnaces and iron works, viz., William Barrow and Matthew Monkhouse, of the Sorwy or Sirhowy Furnace, Edward Kendall and Jonathan Kendall, of the Beaufort Iron Works, and James Harford and Jeremiah Homfray, of the Ebbw Vale Iron Works, in conjunction with a number of other persons, formed themselves into a joint stock company for the construction of a railroad called the Trevil Railroad, under the powers given by s. 128. The railroad was accordingly constructed, and the legal estate in it was vested, by a demise for a term of 2000 years, in trustees upon trust for the several shareholders in the railway company, in the proportions to which these had contributed towards the expense of the undertaking. A body of rules and regulations was, at the same time, framed for the government of the shareholders of the railroad as a company, and by an indenture, dated Aug. 16, 1795, which was executed by the proprietors of the aforesaid furnaces and iron works, and by the other subscribers, and in which all these regulations were embodied, it was witnessed that each of the parties thereto, for himself, his heirs, executors, administrators, and assigns, covenanted with the others of them, and their and his executors, administrators, and assigns, mutually and reciprocally, that they, or their respective executors, administrators, or assigns, would remain co-partners and proprietors of the Trevil railroad, and the profits to be divided therefrom during the continuance of the demise which they had obtained subject to the conditions and regulations therein specified. The indenture went on to declare that the railroad and the profits thereof should be divided into fifty-five shares,

which should be vested in the parties and their executors, administrators, and assigns, for their use and benefit in proportion to the sums of money subscribed by them respectively, and it then specified the number and particulars of the shares allotted to the several subscribers, of which shares the five numbered from 7 to 11 inclusive were stated to belong to Edward Kendall and Jonathan Kendall, their executors, administrators, and assigns, as joint-tenants.

The indenture proceeded to recite that the proprietors of the iron furnaces, parties thereto, necessarily made use of great quantities of limestone in their furnaces which for a long time past they had procured from a quarry called the Trevil quarry, and carried to their furnaces at great expense, for the more convenient carriage of which the Trevil railroad was chiefly intended, and that it was in consideration of the quantity of limestone which would be carried upon the railroad for the use of the furnaces and of the quantity of ironstone which would also be carried upon the railroad that the other parties became subscribers to the undertaking; that at the time of the subscription it was understood that the proprietors of the furnaces would enter into an engagement to procure all the limestone which they might want from the Trevil quarry and convey it along the Trevil railroad, and also pay to the proprietors of the railroad a toll of 5*d*. per ton per mile for all such limestone as well as for all ironstone and for all other goods, except stone for building, which was to pay a toll of 1½*d*. per ton per mile; and that it was also understood that the proprietors of the furnaces should engage to carry upon such part of the railroad as should lie between their mines and their furnaces all such ironstone as they should have occasion to convey to their furnaces. As regarded Edward Kendall and Jonathan Kendall, who were the proprietors of the furnace called the Beaufort Iron Works, it was witnessed that they did thereby for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with all the other parties thereto that they the said Jonathan Kendall and Edward Kendall, their executors, administrators, or assigns, would from time to time, and at all times thereafter while they or any of them should be proprietors or lessees or occupiers of the Beaufort Iron Works, procure all the limestone which should be wanted for the use of the iron works, or for any new furnace and works thereafter to be erected by them near the same, from the Trevil quarry, and should cause all such limestone to be carried from the quarry to the iron works on the Trevil railroad, and should also cause all the ironstone which they had occasion to convey from their mine works to the Beaufort Iron Works, or to a new furnace, to be carried along such part of the railroad as lay between the mine works and the furnaces; and also should pay, or cause to be paid to the collectors to be appointed by the proprietors of the railroad to receive the tolls for the conveyance of goods thereon, a toll of 5*d*. per ton per mile, for all limestone, ironstone, or mine, goods, wares, merchandises, and commodities whatever, except stone for building, and a toll of 1½*d*. per ton per mile for all stone for building, belonging to them, the said Edward Kendall and Jonathan Kendall, which should be carried or conveyed upon the railroad, or any part thereof, and so in proportion for any greater or less quantity than a ton. The indenture also contained covenants on the part of Messrs Barrow and Monkhouse, and Messrs. Harford and Humfray, with reference to their iron works, similar in point of form to the covenant entered into by the Kendalls.

Edward Kendall and Jonathan Kendall held the Beaufort Iron Works by a lease for a long term of years from the Duke of Beaufort. The Trevil quarry was also the property of the Duke of Beaufort, who was in the habit of permitting such of the neighbouring iron masters as held their works under demises from himself, and among the rest the Kendalls, to procure from it an unlimited supply of the limestone required for the use of their furnaces. The Trevil railroad was completed soon after the date of the indenture of Aug. 16, 1795, and, subject to changes occasioned by the deaths of shareholders, sales of shares, and other contingencies, continued to be carried on and managed in pursuance of the regulations set forth

in that indenture. Edward Kendall died in 1807, and Jonathan Kendall in 1812. In consequence of the deaths of the Kendalls, the deaths of succeeding partners, and other circumstances, changes from time to time took place in the proprietorship of the Beaufort Iron Works between 1795 and 1821. In the last mentioned year the works became the partnership property of Edward Kendall (the son of Edward Kendall, deceased), William Henry West and William Hibbs Bevan, who in January 1833 contracted with Joseph Bailey and Crawshay Bailey to sell to them all their interest in the Beaufort Iron Works for the residue of the term of years for which the works were demised, giving them full notice of the liabilities to which they were subject under the indenture of August, 1795. Messrs. Bailey paid part of the purchase-money in pursuance of this contract, and entered into possession of the premises at Lady Day, 1833, before any conveyance or assignment was executed. Shortly afterwards they commenced the formation of a new railroad from the Beaufort Iron Works to certain other lime quarries situate to the eastward of the Trevil quarry.

The present bill, which was filed by the shareholders of the Trevil railroad, prayed an injunction to restrain Messrs. Bailey and their agents from using this new railroad, or any other railroad except the Trevil railroad agreeably to the stipulations contained in the indenture of August, 1795. An ex parte injunction having been obtained in August, 1833, a motion was now made upon affidavit that the injunction might be dissolved.

Pepys, *Jacob* and *Humphry* for the motion.

Sir Edward Sugden, *Knight* and *Lynch*, in support of the injunction.

The principal points raised and contested in the course of the argument, and the authorities referred to as bearing upon them, were the following: (i) whether the word "assigns" used in the covenant of the Kendalls applied to the assigns of the Beaufort Iron Works or only to their assigns of the railroad shares; (ii) whether the plaintiff's remedy, if any, was not more properly by an action at law for damages or by a simple bill in equity for an account, without insisting upon a compulsory performance of the covenant: *Flint* v. *Brandon* (1), *Barret* v. *Blagrave* (2); (iii), whether the contract, either as it stood originally, or as it had subsequently, from the change of circumstances become, was not of so unfair and oppressive a character that it would not be equitable to enforce it by injunction; *Smith* v. *Fromont* (3), *Collins* v. *Plumb* (4), and *Duke of Bedford* v. *British Museum Trustees* (5); (iv) whether the contract was not ineffectual, if not at law, at all events in equity, upon grounds of public policy and by reason of its operating injuriously in restraint of trade: *Mitchel* v. *Reynolds* (6), *Young* v. *Timmins* (7), *Cruttwell* v. *Lye* (8), *Jones* v. *Edney* (9), *Cooper* v. *Twibill* (10), *Holcombe* v. *Hewson* (11), *Doe d. Calvert* v. *Reid* (12), *Morris* v. *Colman* (13), and *Williams* v. *Williams* (14); (v) whether covenants like the one in question, inasmuch as they created upon the property a burden which tended to a perpetuity, and placed land in a great measure extra commercium, were deserving of encouragement or assistance in this court: THIRD REPORT OF THE REAL PROPERTY COMMISSIONERS (*p.* 54); (vi) whether the provision securing to the shareholders in the railroad a toll of 5*d.* a ton per mile upon the minerals conveyed, being double the toll permitted to be charged upon the railways belonging to the canal company, was not a violation of the letter and spirit of the Canal Act, a fraud upon the legislature, the canal company, and the public, and, therefore, not to be enforced by injunction; (vii) whether the covenant entered into by the Kendalls did or did not run with the land so that an action could be maintained upon it against their assigns: *Spencer's Case* (15), *Anon.* (16), *Bally* v. *Wells* (17), *Congleton Corpn.* v. *Pattison* (18), *Collins* v. *Plumb* (4), *Canham* v. *Rust* (19), *Hartley* v. *Pehall* (20), *Duke of Bedford* v. *British Museum Trustees* (5), the cases on brewers' leases already cited, *Vyvyan* v. *Arthur* (21), *Lord Uxbridge* v. *Staveland* (22), *Manchester Mills Case* (23), *Holmes* v. *Buckley* (24), *Brewer* v. *Hill* (25), *Jourdain* v. *Wilson* (26), *Vernon*

v. *Smith* (27), *Sampson* v. *Easterby* (28), and *Barclay* v. *Raine* (29); (viii) whether, assuming the covenant to be inoperative at law as against assigns, it might not still be held effectual here on the ground that the notice which, prior to their purchase, the defendants had received of the existence and nature of the covenant imposed an obligation which bound them in conscience and which a court of equity would not suffer them to violate: *Steyne at Brighton Case* (30), *Furnival* v. *Crew* (31), TREATISE OF EQUITY (bk. 1, ch. 5, s. 4), *City of London* v. *Richmond* (32), *Collins* v. *Plumb* (4), THIRD REPORT OF THE REAL PROPERTY COMMISSIONERS, and *Barclay* v. *Raine* (29).

Cur. adv. vult.

Jan. 29, 1834. **LORD BROUGHAM, L.C.**—This case was argued with much learning on both sides, and was presented to the court in every view that could be taken of the various points raised. Into the whole of the matters discussed at the Bar it will not be necessary to enter. But I shall advert to some of them beyond those upon which the decision turns, on account of their intrinsic importance.

HIS LORDSHIP dealt with an argument that the covenant in question was repugnant to the rules relating to perpetuity, but his remarks on this matter have been disapproved (see 29 HALSBURY'S LAWS (3rd Edn.) 301, note (a)); and continued: I am, therefore, clearly of opinion, that the covenant to take the lime at the Trevil works and carry the iron by the Trevil railway is not bad on the ground of its tending to a perpetuity, or constituting a shift, whereby the rules of law on that head may be evaded. There appears, at first, to be more weight in the objection which was also urged, that covenants of this description are in restraint of trade. The covenant, here is not contended to be in general restraint of trade which would, beyond all doubt, make it void in whatever way the purpose was effected—whether by promise or bond, with or without consideration. The restraint is only partial, and then the law will support it if, to use the words of PARKER, C.J., in his elaborate judgment in *Mitchel* v. *Reynolds* (6),

> "in the opinion of the court, whose office it is to determine upon the circumstances, it appears to be a just and honest contract."

In that case, the covenantor restrained himself from exercising his trade of a baker for five years in the premises demised to him for that term by the same instrument, and the court dwelt on the period of the restriction being co-extensive with the term as proof of adequate consideration. But though the court is to judge, generally speaking, whether or not the consideration be adequate [but see now *Hitchcock* v. *Coker* (1837), [1835–42] All E.R. Rep. 452; 6 Ad. & El. 438, and 38 HALSBURY'S LAWS 3rd Edn.) p. 36, note (f)], the court, plainly, has no very delicate scales for weighing the adequacy, and comparing it with the restraint. That the covenantors in the present case derived considerable benefit from their bargain cannot be doubted. The contract enabled them, as well as the other parties, to obtain the advantage of the railway, which, but for this arrangement, would, probably, never have been constructed. The public, moreover, obtained the like benefit, and although, in the course of time and the progress of improvement, that advantage has ceased and it is said that great detriment arises, both to the three iron works and to the community, from the continuance of the restriction, it is plainly as incorrect as it is unjust in such a case to judge by the event and to measure the consideration for originally submitting to the restraint by the benefit now derived from the works then erected, making the adequacy of that consideration depend upon all that has happened in altered circumstances, or, in other words, allowing a party, who, with his eyes open, made a bargain for his own benefit which was really beneficial at the time, to escape by showing that it has eventually become less advantageous than he expected or even actually detrimental. No case can be found where such a rule has been applied, or where any standard has been resorted to for trying the consideration except the circumstances inherent in the contract itself, independent of accidents and events. The want of mutuality is urged

against this covenant. It is said that, though one party is bound to use the railway, the other is not bound to maintain it, and this is likened to *Young* v. *Timmins* (7) in the Exchequer, and *Smith* v. *Fromont* (3) in this court. I think there is some ground for this argument though, upon the whole, it would not be decisive against the covenant if the covenant could stand in other respects, for, besides that an undertaking to keep the railway in repair may be implied upon the construction of the whole, it seems sufficient to say that, if the covenant were otherwise binding, the covenantors or their assignees might have their remedy, if not upon such implied covenant, certainly by being released from their own obligation as soon as the railway failed them.

The utmost, therefore, that can be said upon this branch of the case is that such contracts deserve no particular favour. They are at all times somewhat improvident with respect to the individuals, and the public interest is upon the whole more likely to lose than to gain by them. The policy of the law is against them, the proof is thrown upon those who support them, and claim under them, and that proof should, with everything belonging to the case that rests on them, be narrowly watched.

Bearing this in mind, I now come to an objection of a very serious nature which appears to me of itself sufficient to dispose of the present application for the interposition of the court by way of injunction. The Trevil railroad was made under the powers given by the Monmouthshire Canal Act for the formation of that canal and the cuts belonging to it, and of railways and stone roads communicating from them to the adjacent iron works in the counties of Monmouth and Brecon. By s. 91 of that Act, the company are limited to certain rates of toll on the railways as well as on the cuts. The rate charged on limestone, iron, etc., is not to exceed 2½d. per ton per mile, and by s. 128, if any persons are minded to make a railway within the distance of eight miles, they are to give the company notice, and if the latter refuse or neglect for a given time, they may themselves undertake it, but no greater rate is to be paid on that railway than the 2½d. which the company are authorised to charge. By s. 129, however, persons may agree with the company and induce them to undertake such railways on payment of tolls, not exceeding 5d. per ton per mile.

Two objects are here manifestly in the contemplation of the legislature, and form the governing policy of this important part of the Act. First, a preference is given to the company who, rather than any private individuals, are to make the railway, and it is only on their refusal or declining that any other parties are to be at liberty to undertake it. Secondly, the public, that is, the proprietors of adjoining closes, are not to be subject to the strong powers of the Act (powers which it has in common with all such Acts, but which are always to be most strictly pursued), unless there is the reasonable certainty that there will be a considerable traffic on the road—a traffic sufficient to maintain it at the limited rate of charge. The agreement of 1795 violates both these provisions by the covenant among the parties to pay 5d. per ton. It deprives the company of its prior right to make the road subject to the higher rate of charge, and it deprives the neighbouring owners of the security intended to be given them that their property should not be invaded unless a traffic of a certain amount was to be expected. All courts have, for obvious reasons, at all times construed such provisions most strictly. Whatever is required to be done as condition precedent to exercising the extraordinary right of making roads over private property has always been exacted to the letter, and the party omitting been held a trespasser. Here the ground cannot, perhaps, be said to have been taken by the railroad company until they had performed the things previously ordered to be done, but the Act of Parliament, having given a general security against the encroachment unless a certain state of things existed, that provision has been evaded by an arrangement among the parties wholly contrary to the plain intention of the legislature, and in fraud, if not in defiance, of it.

Although I consider this as being a sufficient ground for dissolving the injunction, it is far from being the only ground, and I shall now add that upon the best consideration which I can give to the nature of the covenant it appears to me very clearly that the covenant does not run with the land, and, therefore, it is not binding upon the assignees of the Kendalls. This is the opinion which I have entertained from the moment I saw it, which further reflection has only served to confirm. Between the estates of the occupiers of the three iron works, and the estates or the persons of their associates in the railway speculation with whom they covenant, there is no privity, no connection whatever of which the law can take notice. There is no relation at all in point of fact, any more than in point of law. The Kendalls, for instance, upon whose covenant the present plaintiffs rely, contending that it binds the defendants as purchasers of the Beaufort Iron Works, did not stand in any such relation to the other shareholders as from its nature could enure to affect the property sold by them. There was no unity of title in the estates of the contracting parties; the iron works and the lime-pits or railway did not come to them severally from the same owner; they were not held by them severally under the same landlord; but what is of more importance, inasmuch as it is by no means clear that even the kinds of privity I have mentioned would suffice, the parties did not stand in the relation of lessor and lessee towards each other, and there is, therefore, no reversionary interest now in the covenantees to which the right claimed against the assignees of the covenantors may be annexed, and those assignees are called upon to perform the covenant solely in respect of the estate which they have purchased and, in respect of persons who, except under that covenant, have no connection whatever with the estate. It is the case of mere strangers; it is a covenant by the owner of a messuage and land with the owner of a neighbouring lime work and railroad, that he and his executors and assigns, will always use that lime work and railroad, for making iron at, and carrying it from, such messuage.

Whether the word " assigns " in this covenant, used as it is in a very peculiar manner several times in the deed, means assigns of the works, or only of the railway shares, has been made a question; and if it were necessary to decide it I incline much to the latter construction, which, if adopted, would render it unnecessary to pursue the argument further. But I think this admits of sufficient doubt to make it more advisable that the decision should not turn upon it.

Assuming, then, for the present that the Kendalls covenanted for their assigns of the Beaufort works, could they, by such a covenant with parties who had no relation whatever to those works except that of having a lime quarry, and a railway in the neighbourhood, bind all persons who should become owners of those works, either by purchase or descent, at all times to buy their lime at the quarry and carry their iron on the railway? Or could they do more, if the covenant should not be kept, than give the covenantees a right of action against themselves and recourse against their heirs and executors as far as these received assets?

Consider the question first upon principle. There are certain known incidents to property and its enjoyment—among others, certain burdens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner, all which incidents are recognised by the law. In respect of possession, the property may be in one, while the reversion is in another; in respect of interest, the life estate in one, the remainder in tail in a second, and the fee in reversion in a third. So in respect of enjoyment, one may have the possession and the fee simple, and another may have a rent issuing out of it, or the tithes of its produce, or an easement, as a right of way upon it or of common over it. And such last incorporeal hereditament may be annexed to an estate which is wholly unconnected with the estate affected by the easement, although both estates were originally united in the same owner, and one of them was afterwards granted by him with the benefit while the other was left subject to the

A burden. All these kinds of property, however, all these holdings, are well-known to the law and familiarly dealt with by its principles. But it must not, therefore, be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of the owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves B and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow, but great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote. Every close, every messuage, C might thus be held in a several fashion, and it would hardly be possible to know what rights the acquisition of any parcel conferred or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may D load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body in various operations upon the premises, besides many other restraints as infinite in variety as the imagination can conceive, for there can be no reason whatever in support of the covenant in question which would not extend to every covenant that can be devised.

E The difference is obviously very great between such a case as this and the case of covenants in a lease whereby the demised premises are affected with certain rights in favour of the lessor. The lessor or his assignees continue in the reversion while the term lasts. The estate is not out of them, although the possession is in the lessee or his assigns. It is not at all inconsistent with the nature of property that certain things should be reserved to the reversioners all the while F the term continues; it is only something taken out of the demise, some exception to the temporary surrender of the enjoyment; it is only that they retain, more or less partially, the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end. Yet even in that case, the law does not leave the reversioner the absolute licence to invent covenants which shall affect the land in the hands of those who take by assign- G ment of the term. The covenant must be of such a nature as "to inhere in the land," to use the language of some of the cases, or "it must concern the demised premises and the mode of occupying them," as it is down in others; "it must be quodam-modo annexed and appurtenant to them," as one authority has it, or, as another says, "it must both concern the thing demised, and tend to support it and support the reversioner's estate." Within such limits restraints upon H the land demised may be imposed which shall follow it into the hands of persons who are strangers to the contract of lease and only become privy to the lessor through the estate which they take by assignment in the demised premises. But this is no more than saying that, within such limits, the owner of the land may retain to himself and his assignees of the reversion a certain control over, or use of, the property which remains in himself, or which he has conveyed to those I assignees, and that he may so retain it, into whose hands soever, as lessee, the temporary possession may have come. Even he, the continuing owner, is confined within certain limits by the view which the law takes of the nature of property, and, if beyond those limits he were to imagine a stipulation, the covenant in which he should embody it would not run with the land, but only bind the lessee personally and his representatives.

It only requires a little attention to the cases, to satisfy us, first, that even where the privity of lessor and lessee exists, there are bounds so narrow to the province of real covenants as would make the one in question lie on the extreme

verge of it, if it did not fall without it; secondly, that there can be no doubt of such a covenant being one personal, collateral, or in gross, where there does not exist that, or some other privity of estate, which according to one or two of the authorities only, which I venture to doubt, has been held to render real, covenants which would otherwise have been personal; and thirdly, that those covenants which have been held real, excepting, indeed, such as relate to title, would have been deemed collateral had there been no privity in respect of reversion or other unity of title. As all these propositions are proved or illustrated by most of the cases, there would be no convenience in arranging them under these heads; it would only lead to repetition; and, therefore, having stated the propositions as the doctrine which may be extracted from them, applicable to this case especially, indeed, but embracing the subject at large, it will be better to take the authorities in succession.

Spencer's Case (15) was an action by a lessor against the assignee of the lessee upon a covenant by the lessee for himself, his executors and administrators, that he, his executors, administrators, or assigns, would build a wall on the premises demised. So, at least, is the statement of the case and so it has always been taken, particularly in the excellent abstract of the resolutions given in *Bally* v. *Wells* (17), although the second resolution is somewhat ambiguously worded. The rule there laid down is that the assignee, being named, shall be bound by the covenant to build on the land demised because he is to take the benefit of it, but that he shall not be bound where the covenant is to build on land of the lessor not parcel of the demise. It is hardly necessary to inquire whether this resolution would have supported such a covenant as the present had that occurred in a lease and the action had been brought on the reversion against the assigns of the lessee, but assuredly the obligation to carry off the produce of a farm or mine by a particular way and on certain terms must be allowed to have a very different species of annexation to the land from the covenant to build upon it. Such a covenant can with difficulty be said to be annexed to and inherent in the thing demised, and certainly is not in support of it.

Pakenham's Case (33) referred to by Sir Edward Coke, was an action by the feoffee of a manor against a prior and convent upon a covenant with the feoffor to sing in a chapel, parcel of the manor. It appears from the report that it had been a chantry time out of mind. It is not stated whether the convent was on the manor or had lands by grant from the lord, but it is admitted both there and in *Horne's Case* (34) that the covenant would not have run with the land had it been to sing in a chapel not belonging to the covenantee. Upon the former of these cases it was observed that the covenant was by a corporation, and consequently no question arose as to its binding the assignee of the covenantor, but only whether it ran with the land in favour of the covenantee's assignee. There the Chief Justice, in the course of the argument, throws out a remark with respect to the plaintiff being, though a feoffee, yet of the blood of the covenantee, his grandson and one who might be his heir. But laying these things aside, could it now be maintained that a covenant by the purchaser of a messuage within a manor to exercise any trade then beneficial to the lord or his tenant, as continually to keep school or continually to have a blacksmith's or other shop, could be sued upon by a purchaser of the manor; nay, more, that such covenant would run with the land, though made, as in *Pakenham's Case* (33), by a party or corporation not a purchaser of the messuage; nay, as must be contended in order to make that case applicable here, that the lord or his vendee of the manor could sue any one who might at any distance of time become, by purchase from the covenantor, owner of the messuage for not exercising therein the stipulated trade? In a word, will the law recognise the devoting a house to this or that trade, and impressing upon it, into whose hands soever it may come, the obligation to carry on the trade for the benefit of the manor or of the other property of the party covenantee,

A to whom the house originally belonged? The law cannot do so, without sanctioning the creation of a new species of tenure by means of such covenants.

Lord Uxbridge v. *Staveland* (22) arose upon a covenant in a lease, but the opinion of Lord Hardwicke is merely an obiter dictum, the covenant on which he decided being held not to run with the land. It is not only obiter, but the opinion is faintly stated. His Lordship said (1 Ves. Sen. at p. 56):

B

> "Had it been covenanted to grind all the corn they should spend ground, it might relate to the premises, and, running with the land, bind the assignees."

But he afterwards added that, setting all this aside and supposing the assigns to be bound, they were not there shown to be assigns. Even, therefore, in the case of such a covenant as he supposes occurring in a lease, and upon a question C with the reversioner, this is but a slight authority.

I shall mention *Vyvyan* v. *Arthur* (21) next, because it relates to a similar covenant, and must, I think, be allowed to go further than any other case of the kind. That was an action of covenant by the devisee of the lessor against the personal representative of the lessee, upon a lease containing, in the reddendum, a reservation of suit to the lessor's mill by grinding there all the corn grown upon D the land demised, which mill the lessor had devised to the plaintiff along with the reversion of the land demised. The court decided that the action lay, upon the ground that both the mill and the reversion were in the ownership of the assignee of the covenantee. Bayley, J., expressly says that his judgment is founded entirely upon this unity of title, and Holroyd, J., adopts nearly the same view regarding the thing to be done as a rent service to the lessor by the tenant. It is difficult E to reconcile this decision with *Spencer's Case* (15) and the others which hold that the thing to be done must be on the demised premises, and it is equally difficult to avoid a suspicion that the peculiar nature of the thing in question—grinding at a mill of the lessor—had some influence upon the court in supporting the covenant as real. The familiar idea of a lord's mill, and of the mill service due from the soke, not unnaturally mixes itself with the consideration of such F cases, and leads one to forget for the moment the origin of that service in the feudal relation of the lord of the mill and the manor and the tenants of the manor. Accordingly, the court speaks of "rent service," and says that this was in the nature of such a render. Perhaps cases might be put, in which a covenant would not have been so certainly held real. Suppose it had been to carry all the cattle or poultry raised on the farm to market where the lessor had pickage and stallage, G or to purchase all cloth used upon it at the lessor's shop. It is not necessary, for supporting the view I take of the case at Bar, to determine whether, in a lease, such covenants would have been collateral, but it would probably have been found more difficult to hold them real, as being in the nature of rent service, than where the obligation referred to grinding at the landlord's mill.

H *Sampson* v. *Easterby* (28) went upon the assumption that the lessor had a right to erect buildings on the waste, and that, when erected, they became his. The court, therefore, held the lessee's covenant (or rather implied covenant, for there was none per directum) to build on the waste as running with the mineral demised, because such building was wholly connected with the mines and tended to their support, the building he was bound to raise being a smelting house.

I In *Tatem* v. *Chaplin* (35) a covenant to reside in the demised premises during the term was held to bind the assignees, though not named, on the authority of the first and sixth resolutions in *Spencer's Case* (15), being, it was said, quodammodo annexed and appurtenant to the thing demised and plainly tending to support it. Suppose there had been no demise and no privity by the reversion, could a covenant to reside in a given messuage bind assignees of a purchaser and be sued upon by the seller of the messuage? In other words, can a man, by a covenant with a seller of a house, bind all who may ever live in that house after he shall have sold it, and his vendees have sold it over and over again, to

reside constantly in it? The question answers itself, but it also marks the distinction between such cases and the one at Bar. A

The like observation arises upon *Jourdain* v. *Wilson* (26), which was a covenant to supply the house demised with water at a given rate; and upon *Vernon* v. *Smith* (27), where an Act of Parliament had, as it were, connected the covenant to insure with the reversion by directing the money received from the office to be bestowed on the demised premises; and upon *Bally* v. *Wells* (17), which was on B a covenant by the lessee of tithes not to let the farmers of the parish have any of their tithes without leave of the lessor, who was the parson, and the court held this to be a covenant to compel whoever had the perception of tithe to take in kind for the purpose of excluding circumstances that might be made the ground of setting up moduses. They considered such a covenant as only prescribing a mode of managing or occupying the thing demised, likened it to an obligation to C spend the muck on the land, and regarded it as clearly tending to support the estate, but they added what is very material for our present purpose :

" Here is a reversion in the lessor, and a privity between him and the assignee."

In the same spirit, LORD KENYON, when delivering the judgment of the court on the much contested and well considered case of *Webb* v. *Russell* (36), distinctly D said (3 Term Rep. at p. 402) :

> " It is not sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties."

Whether he would have held the privity to be sufficient, which existed in E *Vyvyan* v. *Arthur* (21), by the unity of the title in the lessor's assignee to the premises demised and to the mill where the thing was to be done it is not necessary here to inquire. At least, it may be said that there was, in that case, the privity of the reversion. Nor is it, perhaps, very easy to reconcile the principle of the latter case with *Congleton Corpn.* v. *Pattison* (18), where the thing to be done was upon the demised premises although the interest to which that thing related was F not immediately and directly in the lessors. But it is of more importance to observe that the present question cannot be determined in favour of the covenant binding the assignee, if *Congleton Corpn.* v. *Pattison* (18) is law, which never has been doubted.

This will appear still more plainly on reference to *Collison* v. *Lettsom* (37), decided in the Common Pleas upon the authority of that case. The covenant there was G by the lessor, owner of lands near the premises demised, for himself, his heirs and assigns, to give the lessee, his executors, administrators, or assigns, the pre-emption of that neighbouring land not demised. The lessor sold both the one parcel and the other, and it was held no breach of the covenant. In the course of the argument the counsel for the plaintiff abandoned the ground that the covenant ran with the premises demised, admitting, upon the authority of H *Congleton Corpn.* v. *Pattison* (18), that it was collateral—a proposition to which the court assented. So, if the case had been reversed, and the lessee had covenanted to give pre-emption of other land to the lessor, it follows that the assignee of the lessee, though also owner of that other land, would not have been bound by the covenant.

In deciding *Bally* v. *Wells* (17), the court appears to have felt the force of I *Purfrey's Case* (16), and they avoided it by showing that the covenant supported the thing demised and concerned the mode of occupying it. It is plain from the manner in which the Chief Justice alludes to that case that he would have found it much more difficult to evade its force, had he been deciding, as the court was called upon to decide in *Vyvyan* v. *Arthur* (21) that a covenant to do something on premises not demised with the produce of the demised premises bound the assignee of the lessee, or could be sued upon by the devisee of the lessor.

A I have said nothing of *Duke of Bedford* v. *British Museum Trustees* (5) because the point analogous to the present was not there determined. Having been furnished with the notes of what passed upon the appeal motion in that case, I find that LORD ELDON carefully guarded against being supposed to give any opinion on the question whether the covenant ran with the land. The decision turned upon another view of the case which prevented the question from going to a court of B law, as the vice-chancellor had directed, but I have reason to believe that, upon the question whether the covenant ran with the land, the opinion of, at least, some of the common law judges was in the negative.

It is unnecessary to go into the discussion of the covenant in brewers' leases to take beer only at the lessor's brewery. I am not aware of any decision having ever authorised the position that such a covenant binds the assigns of the lessee. C LORD KENYON, having occasion to mention the subject at nisi prius in *Hartley* v. *Pehall* (20) said it was a question of some nicety, but he was not called upon to decide it. In *Doe d. Calvert* v. *Reid* (12), the learned judges, as far as they handle the question, seem to think that such covenants do not run with the land. LORD TENTERDEN apparently guards himself against being supposed to hold that they do, and BAYLEY, J., upon the question whether the covenant did or did D not run with the land, expressly says:

> "I think it would be very difficult to show that *Congleton Corpn.* v. *Pattison* (18) does not govern this case."

As the law at present stands, I have no hesitation in saying that whoever would make sure of the benefit of such a covenant, must provide against assignment E without licence, which may enable him to renew the covenant with the assignee of the lease.

A careful examination of the authorities, then, confirms my view that there would be considerable difficulty in holding such a covenant as the one in question to run with the land even if there existed between the original parties to it, the covenantor and covenantee, that privity which the enuring right of reversion F creates between the lessor or his assigns and the assigns of the lessee. The cases, taken altogether and sifted, are adverse to such a covenant being real and inherent even in that case of privity, but where no such privity can be pretended to exist, as in the present instance, the covenant is plainly collateral, and binds not the assignees.

G If such would be its construction at law, does the notice which the purchaser had of its existence alter the case in this court upon an application for an injunction, or would it, upon the application, of a co-relative and co-extensive nature, for a specific performance? Certainly not. The knowledge by an assignee of an estate that his assignor had assumed to bind others than the law authorises him to affect by his contracts, had attempted to create a real burden upon property which H is inconsistent with the nature of that property, and unknown to the principles of the law, cannot bind such assignee by affecting his conscience. If it did, then the illegality would be of no consequence, and, however wild the attempt might be to create new kinds of holding and new species of estate, and however repugnant such devices might be to the rules of law, they would prove perfectly successful in the result because equity would enable their authors to prevail, nay, not only I to compass their object, but to obtain a great deal more than they could at law, were their contrivances ever so accordant with strict legal principle. This court would be occupied in compelling persons by way of injunction and decree, to perform covenants which the law repudiated, and for the breach of which no damages could ever be recovered.

A case like this bears no analogy to the ordinary case of a purchase with notice of a prior agreement by the vendor to sell the premises to another. Such a purchaser has done an unconscientious act, or at least made himself accessory to the unconscientious act of his vendor in selling another man's property, and,

therefore, his bargain cannot protect him against the prior claim, but that of which he there had notice was the legal and valid act of the vendor, whereas that of which the assignees here had notice was their assignor's covenant affecting to bind the land, on which, by law, it could not operate. Observe how this would apply to all assignments of leaseholds. Every assignee of a lease has notice of the lessor's covenants; consequently no covenant, however absurd, could be made by a lessee, that would not of necessity run with the land in equity into whose hands soever the land might come, and, all the decisions that have been made by the courts with respect to such covenants being collateral or in gross, would be of no avail because, though no damages could be recovered for the breach of them, yet the performance of them could be enforced against every assignee of the term as a party necessarily fixed with notice. So a person who had conveyed land, and subjected it to covenants in the hands of his vendee, could at once make sure of those burdens following it into the hands of all holders to whom it might pass by taking the precaution of notifying the covenants in some effectual though easy manner, as by publication in some place near the premises where the purchaser must needs observe the announcement. This court will never interfere, by way of injunction, or in any other more direct manner, to enforce such covenants when satisfied that they could receive no support or countenance at law.

It is clear, therefore, that the case for this injunction fails upon these grounds, either of which is sufficient to support the decision: (i) that the agreement was in violation of the provisions and policy of the local Act; and (ii) that the covenant on which the relief is claimed is not binding on the assignees. The injunction must, therefore, be dissolved.

Order accordingly.

PETER *v.* KENDAL

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Easter Term, 1827]

[Reported 6 B. & C. 703; 5 L.J.O.S.K.B. 282; 108 E.R. 610]

Ferry—Disturbance—Action—Plaintiff—Person in possession—Neglect to keep ferry available—Annulment of grant—Proceeding by Crown—Quo warranto—Scire facias.

Landlord and Tenant—Lease—Surrender—Change in character of occupation—Tenant becoming servant of landlord.

The plaintiff claimed to be in possession of an ancient ferry, and that his possession was disturbed by the defendant operating a boat in opposition. The plaintiff had previously demised the ferry by parol to A, but A, finding it unprofitable, became the servant of the plaintiff, acting as his boatman, and accounting to the plaintiff for all money received from the passengers. There was evidence that, before the defendant set up in opposition, the ferry had been badly served.

Held: (i) there had been in law a surrender of A's interest in the ferry, and the plaintiff was, therefore, in possession at the material time; (ii) in an action for disturbance of a ferry it was sufficient for the plaintiff, as against a person not claiming title to the ferry, to prove that he was in possession of the ferry; (iii) neglect by a person in whom a ferry was vested did not destroy the right, although in such a case the Crown might annul the grant by quo warranto or scire facias and vest it in some other person; and (iv) the owner of a ferry must have a right to use the land on both sides of the water for the purpose of embarking and disembarking his passengers, but he need not have any property in the soil on either side.

Notes. Considered: *Metcalfe* v. *Bouce*, [1927] 1 K.B. 758; *Bournemouth-Swanage Motor Road and Ferry Co.* v. *Harvey & Sons*, [1929] 1 Ch. 686. Referred to: *R.* v. *Great Northern Rail. Co.* (1852), 22 L.J.M.C. 9; *Matthews* v. *Peache* (1855), 20 J.P. 244; *Regal* v. *Yarley* (1872), 20 W.R. 903; *A.-G.* v. *Simpson*, [1901] 2 Ch. 671; *Hammerton* v. *Dysart*, [1916] 1 A.C. 57; *Layzell* v. *Thompson* (1926), 43 T.L.R. 58; *A.-G.* (*Allen*) v. *Colchester Corpn.*, [1955] 2 All E.R. 124.

As to ferries, see 17 HALSBURY'S LAWS (3rd Edn.) 233–244; as to surrender of lease by change in character of occupation of tenant, see 23 HALSBURY'S LAWS (3rd Edn.) 687–688; as to quo warranto, see 11 HALSBURY'S LAWS (3rd Edn.), 145 et seq.; as to scire facias, see ibid 153–154; and for cases see 24 DIGEST (Repl.) 1153.

Cases referred to in argument:

Blissett v. *Hart* (1744), Willes, 508; 125 E.R. 1293; 24 Digest (Repl.) 1142, *35*.

Heddey v. *Welhouse* (1597), Moore, K.B. 474; Cro. Eliz. 558, 591; 72 E.R. 705; 24 Digest (Repl.) 936, *9483*.

Rule Nisi obtained by the defendant to enter a nonsuit or for a new trial in an action on the case for the disturbance of a ferry.

The declaration stated that the plaintiff was lawfully possessed of an ancient ferry over a certain river, from a place called Rock, otherwise Black Rock, in the parish of Saint Minver, in Cornwall, to Padstow, in the same county, and from Padstow to Rock, for carrying and conveying within the said ferry all passengers and other persons having occasion for the same, and the horses and goods of all such passengers and persons, in boats kept by and by the authority of the plaintiff there for that purpose, taking for the same reasonable freights and ferryages to plaintiff in that behalf due and of right payable; that defendants wrongfully carried divers passengers, etc., for hire in a certain boat over and across the river where plaintiff had such ferry, and upon the said ferry, whereby the plaintiff lost great gains and profits, and was disturbed in his possession of the ferry. The second count stated the wrongful carrying to be in a boat of the defendant's, and near to the said ferry of the plaintiff.

At the trial before GASELEE, J., at the Bodmin Assizes, in July, 1826, it appeared that by copy of a court roll of the manor of Penmaine of Dec. 28, 1748, Humphrey Arthur, one of the customary tenants, surrendered one moiety of the passage from Black Rock, within the parish of Minver, in Cornwall, parcel of the customary lands of the said manor, and part of the ancient duchy of Cornwall, with all its rights, etc., together with one boat, etc., on condition that Joseph Peter might be admitted tenant for the same, to him, his heirs and assigns for ever, according to the custom of the said manor. The admission of Peter upon this surrender, and his admission to the other moiety upon the surrender of Anne Arthur, were also proved; and it was shown that the plaintiff was grandson of Joseph Peter, the surrenderee, and was possessed of the ferry, with a horse boat, and small boat, which carried passengers from different points on the Saint Minver side to the quay at Padstow, or to the beach above or below the town, according as the tide served. The land on the Saint Minver side was within the duchy manors, but on the Padstow side the land belonged to different private persons. At Christmas, 1825, the plaintiff entered into a verbal agreement to let the ferry to Brown for a year, for £14; but a few weeks afterwards, Brown finding it unprofitable, it was agreed that the plaintiff should take the earnings, and allow him 1s. 9d. a day; and he continued the boatman of the plaintiff under this agreement, and accounted to him for all he received, and was allowed the stipulated sum per day. The defendant Kendal, who had for ten years rented the ferry in conjunction with Brown, began in February, 1826 to ply with his boat to carry passengers across the river. He never made any charge, but received what the passengers chose to give him.

Upon this evidence, it was contended by the defendant's counsel that the plaintiff

by reason of the demise to Brown, was out of possession, and that the action ought, therefore, to have been brought in the name of Brown. Secondly, that there could not by law be a ferry unless the owner had the right of soil on both sides of the water; and in support of that position, SAVILE, 11, pl. 29, was cited, where it is said to have been held for law in the Exchequer Chamber,

> " that a ferry is in respect of the landing-place, and not of the water; that the water may belong to one, and the ferry to another; and that in every ferry the land on both sides of the water ought to belong to the owner of the ferry, for otherwise he cannot land on the other side."

Thirdly, that the ferry was not shown to have a legal origin either by customary grant or prescription, the duchy having been in the Crown within the time of legal memory, and, therefore, that the allegation that this was an ancient ferry was not made out.

The learned judge thought that this being a possessory action, the plaintiff had made out a sufficient case to go to the jury; but on these points he reserved liberty to the defendant to move to enter a nonsuit in the event of a verdict being found for the plaintiff.

On the part of the defendant it was then proved that until the opposition boat had been set up, the ferry had been badly served; that the public sustained much inconvenience, and private boats had often put passengers across in consequence of the neglect; and that the fare formerly taken was 1d., but that now 2d. was claimed and paid.

The learned judge told the jury, that although there appeared to have been great neglect, for which the plaintiff might have been liable to an action, yet as it was admitted there was no abandonment of the ferry, the plaintiff was entitled to recover. The jury having found a verdict accordingly with 1s. damages, a rule nisi was obtained for a nonsuit, on the grounds that the action ought to have been brought by Brown; and that there was no proof that the ferry was an ancient ferry; or for a new trial on the ground that the facts proved on the part of the defendant were an answer to the action.

Carter and *Coleridge* for the plaintiff, showed cause against the rule.
Manning for the defendant, supported the rule.

BAYLEY, J.—I think this case does not admit of any doubt. The first objection is that the plaintiff was out of possession, and that this action ought to have been brought by Brown, who was entitled to possession as tenant under the demise. To that there is a very satisfactory answer. It appeared at the trial, that when Brown found out that he could not keep the ferry at £14 per annum, he said to the plaintiff: Will you allow me to be your servant? They settled afterwards upon that footing, and Brown became the servant instead of the tenant of the plaintiff, and the latter received the profits of the ferry, and paid Brown wages for his services as boatman. A new relation which, in regard to this property, was wholly inconsistent with that of landlord and tenant, then took place, with the consent of both parties. That operated as a surrender, by operation of law, of the tenant's interest in the ferry.

It was next objected that the evidence did not show this to be an ancient ferry, either by customary grant or prescription. The present plaintiff was proved to be in possession. It seems to me that it was not necessary to prove the copy of the court roll; it was quite sufficient to support this action, to prove that the plaintiff was in possession of the ferry; and it was shown that the ferry had existed for a long period of time.

It is then said that the neglect of the plaintiff has destroyed his right to the ferry. I am of opinion that that neglect does not, ipso facto, destroy the right to the franchise. The proceeding by quo warranto supposes the party in actual, though not in legal possession, and, therefore, judgment of ouster is necessary

A to dispossess him. In the case of an abuse of a franchise by negligence, the Crown may repeal the grant by scire facias or quo warranto, and may vest it in some other person, if that is thought necessary. But mere negligence in the party in whom the ferry is vested does not destroy the right.

Then it is said that this is not a good ferry, because the land on both sides does not belong to the owner of the ferry. I am of opinion, that it is not necessary B that the owner of a ferry should have the property in the soil on either side. He must have a right to land upon both sides, but he need not have the property in the soil on either. It is sufficient if the landing-place be in a public highway. This is perfectly consistent with the principle laid down in SAVILE. That principle is that a ferry is in respect of the landing-place, and not of the water. But I cannot agree to what is stated as a conclusion resulting from that principle, "that C every owner of a ferry must have the land on both sides of the water, for otherwise he cannot land." The reason given for his having the property in the soil is insufficient, for he may have a right to land on both shores without having any property in the soil of either. The original owner of the land may have granted the soil of it, and reserved out of the grant to himself, his heirs, and assigns, the right of using the land on both sides for the purpose of embarking and disembark- D ing passengers. I think also, that it was not necessary for the plaintiff to allege in his declaration the payment of any specific sum for passage money, and what need not be alleged need not be proved. This rule must, therefore, be discharged.

HOLROYD, J.—I think, that what is laid down in SAVILE is not law to the extent to which it is there stated. The owner of the ferry must, as incident to the E ferry, have such right to use the land on both sides as to enable him to embark and disembark his passengers; but he need not for that purpose have any property in the soil. It is sufficient if he has a right to use the land for all the purposes of his ferry. That is a right to use the land of another for a particular purpose, and is an incorporeal hereditament.

I think, also, that it was not necessary for the plaintiff to produce the court F rolls; it was sufficient to prove possession and enjoyment of the ferry.

LITTLEDALE, J., concurred.

Rule discharged.

A

DEARLE AND ANOTHER *v.* HALL AND OTHERS LOVERIDGE AND OTHERS *v.* COOPER AND ANOTHER*

[ROLLS COURT (Sir Thomas Plumer, M.R.), June, July 1, 8, December 3, 8, 26, 1823]

[LORD CHANCELLOR'S COURT (Lord Lyndhurst, L.C.), May 8, November 8, 9, 1827, December 24, 1828] B

[Reported 3 Russ. 1; 38 E.R. 475]

Chose in Action—Equitable interest in fund under will—Legal interest in executors.

By his will, dated Sept. 11, 1794, a testator directed that part of the residue of his personal estate and of the money arising from the sale of his real estates should be invested and the interest paid to his son for life. C

Held: the interest which the son had under the testator's will was simply a right to a chose in action, the legal interest in the share of residue being vested in the executors.

Personal Property—Transfer—By delivery of possession. D

Chose in Action—Assignment—Notice—Need for notice to be given by assignee—Duty of assignee's solicitor—Priority of notice—Preference of subsequent over prior assignee.

Personal property passes by delivery of possession. In the case of the transfer of a chose in action consisting of a right to the produce of a fund in which other persons have the legal interest it is not possible for the transferor to transfer the possession of the fund which must remain with those other persons, but there is a mode of dealing with it which a court of equity considers tantamount to possession, namely, by giving notice to the legal depositary of the fund. By such notice the legal holders are converted into trustees for the transferee and are charged with responsibility towards him, and the transferor is deprived of the power to carry the same security repeatedly into the market and induce third persons to advance money on it under the erroneous belief that it still belongs to him absolutely, free from incumbrance. That precaution is always taken by diligent purchasers and incumbrancers. If it is not taken, there is neglect, and the solicitor who conducts the business for the transferee is responsible for that neglect. He who contracts for a chose in action and does not give notice gives personal credit to the individual with whom he deals, but to perfect his title, to give a complete right in rem and not merely a right against him who conveys his interest, notice is necessary. E F G

The maxim "Qui prior est in tempore potior est in jure" as an equitable rule admits of exception, and gives way when the question does not lie between bare and equal equities. If there appears to be, in respect of circumstances independent of priority of time, a better title in a subsequent purchaser than in the purchaser who preceded him in date, the case ceases to be a balance of equal equities, and the preference which priority of date might otherwise have given is done away with and counteracted. In a court of equity a plaintiff cannot be heard who asks the interposition of the court to indemnify him against the effects of his own negligence at the expense of another who has used all diligence, and, if he is to suffer loss, will suffer it by reason of the negligence of the very person who prays relief against him. H I

Notes. Distinguished: *Peacock* v. *Burt* (1834), 4 L.J.Ch. 33. Considered: *Foster* v. *Cockerell* (1835), 9 Bli. N.S. 332. Distinguished: *Foster* v. *Hargreaves* (1836), 1 Keen, 281; *Timson* v. *Ramsbottom* (1837), 2 Keen, 35. Considered: *Jones* v.

* See Note post 41.

Jones (1838), 8 Sim. 633; *Meux* v. *Bell* (1841), 1 Hare, 73. Distinguished: *Meek* v. *Kettlewell* (1842), 11 L.J.Ch. 293. Considered: *Re Daintry and Ryle*, *Re Ravenscroft*, *Ex parte Arkwright* (1843), 3 Mont. D. & De G. 129. Applied: *Etty* v. *Bridges* (1843), 2 Y & C. Ch. Cas. 486. Considered: *Wilmot* v. *Pike* (1845), 5 Hare, 14. Distinguished: *Watson* v. *Parker* (1846), 15 L.J.Ch. 400. Considered: *Watts* v. *Porter* (1854), 3 E. & B. 743. Distinguished: *Rooper* v. *Harrison* (1855), 2 K. & J. 86. Followed: *Lee* v. *Howlett* (1856), 2 K. & J. 531. Applied: *Re Barr's Trust* (1858), 4 K. & J. 219. Distinguished: *Scott* v. *Hastings* (1858), 4 K. & J. 633; *Haly* v. *Barry* (1868), 18 L.T. 491; *Re Middleton*, *Ex parte Allen*, *Ex parte Page* (1870), L.R. 11 Eq. 209; *Re Pooley*, *Ex parte Rabbidge* (1878), 8 Ch.D. 367. Considered and Applied: *Re Freshfield's Trusts* (1879), 11 Ch.D. 198. Considered: *West of England Bank* v. *Batchelor* (1882), 51 L.J.Ch. 199. Distinguished: *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20; *Gorringe* v. *Irwell India Rubber and Gutta Percha Works* (1886), 34 Ch.D. 128; *Mutual Life Assurance Society* v. *Langley* (1886), 32 Ch.D. 460. Considered: *Re Richards*, *Humber* v. *Richards* (1890), 45 Ch.D. 589; *Ward* v. *Duncombe*, [1893] A.C. 369. Applied: *Stephens* v. *Green*, *Green* v. *Stephens*, [1895] 2 Ch. 148. Considered: *Re Wasdale*, *Brittin* v. *Partridge*, [1899] 1 Ch. 163. Applied: *Lloyds Bank* v. *Pearson*, [1901] 1 Ch. 865; *Re Lake*, *Ex parte Cavendish*, [1903] 1 K.B. 151; *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26. Considered and Applied: *Re Dallas*, [1904] 2 Ch. 385. Distinguished: *Perham* v. *Kempster*, [1907] 1 Ch. 373. Considered: *Re Pawson's Settlement*, *Higgins* v. *Pawson*, [1917] 1 Ch. 541. Distinguished: *Hill* v. *Peters*, [1918] 2 Ch. 273. Applied: *Ipswich Permanent Money Club* v. *Arthy*, [1920] 2 Ch. 257. Referred to: *Wilkinson* v. *Charlesworth* (1836), 5 L.J.Ch. 172; *Bugden* v. *Bignold* (1843), 2 Y. & C. Ch. Cas. 377; *Murray* v. *Pinkett* (1846), 12 Cl. & Fin. 764; *Warburton* v. *Hill*, *Stent* v. *Wickens* (1854), 2 Eq. Rep. 441; *Lord* v. *Colvin* (1862), 2 Drew. & Sm. 82; *Thompson* v. *Tomkins* (1862), 2 Drew. & Sm. 8; *Withington* v. *Tate* (1869), 17 W.R. 559; *McCreight* v. *Foster* (1870), 5 Ch. App. 604; *Blackwood* v. *London Chartered Bank of Australia* (1873), L.R. 5 P.C. 92; *Palmer* v. *Locke* (1881), 18 Ch.D. 381; *Arden* v. *Arden* (1885), 29 Ch.D. 702; *Bean* v. *Wade* (1885), 2 T.L.R. 157; *Re Patrick*, *Bills* v. *Tatham* (1890), 63 L.T. 752; *English and Scottish Mercantile Investment Trust* v. *Brunton*, [1892] 2 Q.B. 1; *Mack* v. *Postle*, [1894] 2 Ch. 449; *Wigram* v. *Buckley*, [1894] 3 Ch. 483; *Garland* v. *Archer-Shee* (1930), 142 L.T. 443.

As to the enumeration and equitable assignment of choses in action, see 4 HALSBURY'S LAWS (3rd Edn.) 480–483, 492 et seq.; and for cases see 8 DIGEST (Repl.) 543–545, 573 et seq.

Cases referred to:

(1) *Evans* v. *Bicknell* (1801), 6 Ves. 174; 31 E.R. 998, L.C.; 35 Digest (Repl.) 542, *2217*.

(2) *Ryall* v. *Rowles* (1750), 1 Ves. Sen. 348; 1 Atk. 165; 9 Bli. N.S. 377; 27 E.R. 1074, L.C.; 25 Digest (Repl.) 214, *314*.

(3) *Twyne's Case* (1602), 3 Co. Rep. 80b; 76 E.R. 809; sub nom. *Chamberlain* v. *Twyne*, Moore, K.B. 638; 25 Digest (Repl.) 185, *109*.

(4) *Wright* v. *Lord Dorchester* (1809), cited in 3 Russ. at p. 49; 2 L.J.O.S.Ch. 78; 38 E.R. 496; 28 Digest (Repl.) 762, *175*.

(5) *Tourville* v. *Naish* (1743), 3 P. Wms. 307; 24 E.R. 1077; 8 Digest (Repl.) 603, *463*.

(6) *Stanhope* v. *Earl of Verney* (1761), 2 Eden, 81; 28 E.R. 826, L.C.; 35 Digest (Repl.) 545, *2241*.

Also referred to in argument:

Goodtitle d. Norris v. *Morgan* (1787), 1 Term Rep. 755; 99 E.R. 1360; 35 Digest (Repl.) 545, *2237*.

Peter v. *Russell* (1716), Gilb. Ch. 122; 2 Vern. 726; 25 E.R. 85, L.C.; 35 Digest (Repl.) 543, *2224*.

Willoughby v. *Willoughby* (1756), 1 Term Rep. 763; 2 Ves. Sen. 685; Amb. 282; 99 E.R. 1366, L.C.; 35 Digest (Repl.) 507, *1942*.

Brace v. *Duchess of Marlborough* (1728), 2 P. Wms. 491; Mos. 50; 24 E.R. 829; 35 Digest (Repl.) 492, *1783*.

Davies v. *Austen* (1790), 1 Ves. 247; 3 Bro. C.C. 178; 30 E.R. 325, L.C.; 23 Digest (Repl.) 421, *4918*.

Burrowes v. *Lock* (1805), 10 Ves. 470; 32 E.R. 927; 35 Digest (Repl.) 34, *265*.

Ex parte Knott (1806), 11 Ves. 609; 32 E.R. 1225, L.C.; 35 Digest (Repl.) 492, *1784*.

Bill for an order that certain moneys be applied to meet the claims of the plaintiffs, and that the trustees of the fund from which the moneys were derived be restrained from applying the moneys in any other way.

By his will, dated Sept. 11, 1794, the testator, Peter Brown, after bequeathing some legacies and giving an annuity of £40 to a granddaughter, made the following disposition of a part of the residue of his personal estate and of the money to arise by the sale of his real estates:

> "I do hereby direct my said executrix and executors, and the survivors and survivor of them, and the executors and administrators of such survivor, to place one moiety of the said residue of my personal estate and of the money to arise from the sale of my real estates, out at interest upon government or real security during the life of my son Zachariah Brown, and to pay the interest and produce thereof unto him my said son Zachariah Brown during his life."

Ann Bircham, William Foster the elder, William Foster the younger, and William Unthank (a solicitor), the executrix and executors of Peter Brown, invested the clear residue of the testator's estate, amounting to £4,600, on real securities. The share of the interest yielded by these securities, which was payable to Zachariah Brown, came to about £93 a year.

By an indenture, dated Dec. 19, 1808, and made and executed by and between Zachariah Brown, of the first part, Charles Martin Demages, of the second part, William Bircham, of the third part, and William Dearle, of the fourth part, which recited that Zachariah Brown was, under the will of his father Peter Brown, entitled for life to the yearly annuity of £93, and had agreed, in consideration of the sum of £204, to sell to Dearle an annuity of £37 a year during the natural life of him, Zachariah Brown, the payment of which was to be secured by the covenant and warrant of attorney of Zachariah Brown, and also of Charles Martin Demages, and William Bircham, who had agreed to become jointly and severally sureties for him, it was witnessed that, in pursuance of the agreement and of the sum of £204 paid to Zachariah Brown, they, Zachariah Brown, Charles Martin Demages and William Bircham, did, for themselves, their executors and administrators, jointly and severally covenant with William Dearle, his executors, administrators, and assigns, that they, their heirs, executors, or administrators, or some or one of them, should pay or cause to be paid unto William Dearle, his executors, administrators, and assigns, during the natural life of Zachariah Brown, one annuity of £37, free of and clear from all taxes, charges, and deductions, by equal quarterly payments, on Mar. 19, June 19, Sept. 19 and Dec. 19, in every year. The indenture further witnessed that for the better and more effectually securing the payment of the aforesaid annuity, he, Zachariah Brown, granted, bargained, sold, and assigned unto William Dearle, his executors, administrators, and assigns, the annuity of £93, to which he, Zachariah Brown, was entitled for life under the will of Peter Brown, but, nevertheless, upon trust to permit and suffer Zachariah Brown and his assigns to receive and take the same until default should be made for the space of twenty-one days in payment of some quarterly instalment of the annuity or part thereof, in which case William Dearle, his executors, administrators, or assigns should receive and take the assigned interest, dividends, and proceeds, and should thereout retain the amount of the annuity, or so much

thereof as should be in arrear, and should pay or otherwise permit him, Zachariah Brown, or his assigns, to receive and take the residue, if any, for his and their own use and benefit.

By another indenture, dated Sept. 26, 1809, and made between Zachariah Brown, of the first part, William Bircham, of the second part, and Caleb Sherring, of the third part, in consideration of the sum of £150 Zachariah Brown sold to Caleb Sherring an annuity of £27 for his (Brown's) life, it being witnessed that, for the "better and more effectually securing the payment of the aforesaid annuity," Brown assigned to Sherring, his executors, administrators, and assigns, the already mentioned annuity of £93, and all arrears thereof. This assignment took no notice of the indenture of Dec. 19, 1808, but was expressed in similar language, and was upon similar trusts.

The annuity of £37 was paid up to June 19, 1811, and that of £27, up to June 26, 1811. From those dates both annuities had been unpaid, save only that, in May, 1813, Dearle, having arrested the surety, Demages, in an action upon the covenant, compelled him to pay the arrears of his annuity for one year and three quarters up to Mar. 19, 1813.

Notwithstanding these assignments, Brown, early in 1812, advertised his life interest in the £93 for sale as an unencumbered fund, and this advertisement led to a negotiation with Joseph Hall who proposed to become the purchaser. Hall's solicitor, Mr. Patten, used all due diligence in scrutinising Brown's title. No notice of the assignments to Dearle and Sherring had been given to the executors, and as Mr. Unthank, the solicitor executor of the testator, was in complete ignorance of the existence of such instruments, none of his letters made any mention of or allusion to any encumbrance as affecting the property. Under these circumstances, the contract between Brown and Hall was carried into effect by an indenture dated Mar. 20, 1812, and made between Hall, of the one part, and Brown, of the other part, which, after reciting Brown's title and contract with Hall, witnessed that for the sum of £711 3s. 6d. Brown assigned to Hall, his executors, administrators, and assigns, all the annual income, interest, and dividends of the moiety of the residuary estate of the testator consisting (among other things) of the several sums of money due upon certain mortgages and securities specified in an annexed schedule, to receive and take the interest and dividends from Dec. 25 then last past, during Brown's life. Brown also covenanted for quiet enjoyment, and that he had done no act to encumber the fund, and he constituted Hall, his executors, administrators, and assigns, the attorney and attorneys of him, Brown, for the purpose of receiving the dividends. The testator's executors had been requested to become parties to the deed, but they had refused.

On April 25 Hall served a written notice on the executors requiring them to pay to him, as assignee of Brown, the moiety of the dividends of the residuary fund during Brown's life, and, in July, 1812, Mr. Unthank remitted to Hall £31 12s. 10d. on account of the yearly dividends so assigned. On Oct. 17 following, the executors, for the first time, received notice of the assignments to Dearle and Sherring, and thenceforward they declined to pay the interest to any of the claimants, until their rights should be ascertained. On June 17, 1819, Dearle and Sherring filed their bill against Hall, Brown, the sureties for the payment of their respective annuities, and the personal representatives of the testator. The bill charged that, even if Hall had given the executor notice of his assignment before Dearle and Sherring gave notice of their encumbrances, the preferable title, which they acquired by reason of the prior date and execution of the instruments under which they claimed, could not be prejudiced by that circumstance; that Hall did not, before he completed his purchase, make or cause to be made any inquiries of the testator's executors for the purpose of ascertaining whether they had received notice of any encumbrances affecting the funds out of which the annuity was to be paid; that it was incumbent on Hall and his agents, before the completion of his purchase, to have searched, or caused search to be made, at the proper

offices, for the purpose of ascertaining whether there were any prior encumbrances affecting the funds; that he and they were guilty of laches in omitting to make such search; and that, if such search had been made, Hall would have ascertained that the plaintiffs were entitled respectively to their annuities of £37 and £27. The prayer in substance was that the arrears and growing payments of the annuity of £93 a year might be applied in satisfying to the plaintiffs, according to their priorities, what should be found due to them on their several annuities, and their costs in recovering the same, and that the executors of the testator might be restrained from paying any part of the arrears or growing payments of the £93 a year to Hall or to any other person than the plaintiffs until all the arrears due to them in respect of their annuities should have been satisfied.

Hall, by his answer, relied on the indenture of Mar. 20, 1812 and the priority of his notice, and further stated that before the execution of the assignment to him and the completion of his purchase he, by his solicitors, made inquiries of the executors respecting the title of Zachariah Brown to the dividends in question and the securities on which the fund was invested, and that, though a correspondence on the subject took place between his solicitor and Mr. Unthank, no notice or intimation of the existence of any encumbrance on Brown's life interest was given to him (Hall) or to any person on his behalf, either by the executors or by any other individual. But he admitted that he did not, before he completed his purchase, make, or cause to be made, any inquiries of the testator's executors expressly for the purpose of ascertaining whether they had received notice of any encumbrance or encumbrances affecting Brown's life interest in the moiety of the dividends of the residuary estate, and that he did not make, or cause to be made, any search at any of the offices in order to ascertain whether any such encumbrances existed. Zachariah Brown stated by his answer that, at the date of the assignment to Hall, he believed the former annuities to have been redeemed.

Sugden and *Phillimore* for the plaintiffs.
Horne and *Barber* for the defendant Hall.
Roupell for the defendant trustees.

Dec. 26, 1823. **SIR THOMAS PLUMER, M.R.**—It is observable, in the first place, that the right which Zachariah Brown had under the will of his father was simply a right to a chose in action. The legal interest in the residue was vested in the executrix and executors, and they were to hold this moiety of the residue so long as Zachariah Brown lived. They were to pay him the dividends during his life, but it is clear from the terms of the will that they were not to part with the legal interest. Dearle, when he entered into this contract, seems to have been anxious to secure the payment of the annuity in many different modes. He took the precaution to have, not only Brown's covenant, but also the joint and several security of Demages and Bircham, and he further took a warrant of attorney to confess judgment. In fact, the fund in question was the last security resorted to, and is specified as a further and collateral security.

One of the terms of the contract was that Brown and his assigns were to be permitted to receive the £93 a year until default should be made for the space of twenty-one days in payment of the annuity. Not only, therefore, was the contract not followed by possession of the fund, but there was an express stipulation to the contrary, so that the transaction with Dearle, at the time when it happened, was nothing more than an equitable contract for a collateral security to be issuing out of a chose in action, not followed by equitable possession, nor by anything tantamount thereto. It was not possible for Brown to transfer the legal interest; that could not but remain with the executors; but wherever it is intended to complete the transfer of a chose in action, there is a mode of dealing with it which a court of equity considers tantamount to possession, namely, notice given to the legal depositary of the fund. Where a contract respecting property in the hands of other persons who have a legal right to the possession is made behind the back of those

A in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of, that is, by giving notice of the contract to those in whom the legal interest is. By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him, and the cestui que trust is deprived of the power of carrying the same security B repeatedly into the market and inducing third persons to advance money upon it under the erroneous belief that it continues to belong to him absolutely, free from encumbrance, and that the trustees are still trustees for him and for no one else.

That precaution is always taken by diligent purchasers and encumbrancers. If it is not taken, there is neglect; and it is fit that it should be understood that the solicitor who conducts the business for the party advancing the money is responsible C for that neglect. The consequence of such neglect is that the trustee of the fund remains ignorant of any alteration having taken place in the equitable rights affecting it. He considers himself to be a trustee for the same individual as before, and no other person is known to him as his cestui que trust. The original cestui que trust, though he has, in fact, parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and D disposition of the property as absolutely as ever, so that he has it in his power to obtain, by means of it, a false and delusive credit. He may come into the market to dispose of that which he has previously sold, and how can those who may chance to deal with him protect themselves from his fraud? Whatever diligence may be used by a puisne encumbrancer or purchaser—whatever inquiries E he may make in order to investigate the title and to ascertain the exact state of the original right of the vendor, and his continuing right—the trustees, who are the persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them that the fund remains the sole absolute property of the proposed vendor. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees, F and they must be considered as foreseen by those who, in transactions of that kind, omit to give notice, for they are the consequences which, in the experience of mankind, usually follow such omissions. To give notice is a matter of no difficulty, and whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title, they do not do all that is necessary in order to make the thing belong G to them in preference to all other persons, and they become responsible, in some respects, for the easily foreseen consequences of their negligence.

It was as easy for Dearle, or his solicitor, to have given notice in 1808 of the equitable contract with Brown, as in 1812. In not doing so, he was guilty of negligence, gross negligence which exposed the property to all that has since happened; which enabled Brown to practise on another innocent individual so as H to induce him to lend his money without any suspicion of the existence of a preceding conveyance; which, leaving the trustees in ignorance of the fact, led them into the erroneous belief that Brown was the owner of the whole equitable right, and induced them to represent him as the owner to the individual who, at a period long subsequent, became the purchaser of the fund. In June, 1811, Dearle's annuity fell into arrear, and, from that time was in arrear for much more than I twenty-one days. Dearle had then a right to take immediate possession of the fund, yet he allowed Brown to continue in undisturbed enjoyment of it, and, for more than a year afterwards, he took no step towards obtaining possession of the £93 a year, which was a collateral security for the payment of what was due to him. Not even then did he give notice of the existence of his encumbrance to the executors, and they continued to hand over the income to Brown as the only person having any claim to it.

The deed, under which the other plaintiff, Caleb Sherring, claims, is, with little variation, similar to the deed to Dearle, and was probably drawn by the same

professional gentleman, yet no notice is taken in it of the prior conveyance to Dearle, nor is anything done by Sherring to obtain immediate possession of the fund. On the contrary, in this as in the other indenture, it is expressly stipulated that Brown and his assigns should be permitted to receive the £93 a year till default be made for twenty-one days in the payment of the annuity. Sherring's annuity of £27 was paid up to June, 1811, and then fell into arrear, but no step was taken to reach the fund. It was not till Oct. 17, 1812, that notice of these two annuities was, for the first time, given to the executors. The act of then giving notice shows that the annuitants were aware that notice was necessary, in order to complete their security, but their tardiness in giving notice constitutes the negligence which has produced all the mischief. For Brown, having, by the conduct of Dearle and Sherring, been thus left at liberty to deal with the property as he pleased, availed himself of this power, and was even so confident as to advertise his life interest for sale, publicly inviting purchasers to treat with him as for an unencumbered fund. In March, 1812, more than half a year before Dearle and Sherring gave the executors notice of their annuities, the contract was made between Brown and the defendant Hall, and in the same month an indenture of assignment was executed, reciting Brown's right under his father's will to the £93 a year, by which, in consideration of £700 and upwards, Brown transferred that £93 a year to Hall.

In concluding this contract, Hall conducted himself in a way very different from that in which the plaintiffs had acted, for, before he paid his money, he took the precaution of making, by his solicitor, all due inquiries of the trustees and executors, not trusting to his personal contract with Brown, but going immediately to the legal holders of the fund, strictly investigating the title, and employing a very exact and scrutinising industry to ascertain whether the fund was as represented by Brown, and whether Brown could completely transfer the interest which he stated himself to have. [His Lordship referred to the correspondence between Mr. Patten, the solicitor of Hall, and Mr. Unthank, the acting executor, which commenced early in February, 1812, and said that that correspondence afforded a complete answer to a topic which was strenuously urged in favour of the plaintiffs when it was said that Hall had not exercised due diligence because the question whether there was any prior encumbrance on the fund was not put directly either to Brown or to the executor. It was true that the question was not put in express words, but it was put in substance. The inquiries were such as drew from Mr. Unthank what was tantamount to an assurance that there was an absolute title in Brown, and, if Mr. Unthank had received any intelligence of a prior encumbrance and yet had acted and written in the manner in which he had, he would have involved himself in all the responsibilities which would affect an individual who stood by and saw another person, upon the faith of the representations made by him, entering into a contract and parting with his money on the supposition that a certain fund, known by him who so stood by to have been already pledged, was free from encumbrances. With respect to the circumstance that the question was not put directly to Brown, he had covenanted in the deed of assignment that the fund was free from encumbrances, and, consequently, the necessity of making inquiries of him was superseded.]

These proceedings are antecedent to the execution of the contract. After so much precaution, the assignment of Brown's interest is executed and Hall pays the purchase-money. Does he content himself with remaining in this situation? After having given notice to the legal holder of the fund and having obtained from him an engagement to pay the interest to him (Hall) as readily as it had been before paid to Brown, Hall is let into possession. Mr. Unthank fulfils his promise. Having become a trustee for a new cestui que trust, he accounts to him, and, in July, 1812, pays over to him his share of the income of the residuary fund. Thus, Hall is actually admitted into the enjoyment of the thing which had

A been assigned to him. On July 6 Mr. Unthank writes a letter to Patten, in which he says:

> "As I have not been instructed as to the means by which Mr. Hall wishes to have his moiety of the interest of Mr. Brown's residuary estate conveyed to him, I have enclosed you a draft for £31 19s. 10d., belonging to him, and now in my hands."

B

He then goes on to render an account, to show that, as a trustee, he has accounted to his cestui que trust for all that was in his hands, and he begs Mr. Patten to communicate to him Mr. Hall's orders, "if you would have me in future make any remittances directly to him." Thus, Mr. Unthank becomes virtually a party to the transaction, giving Hall all the assurance a purchaser C could have. Such is the contrast between the conduct of the subsequent encumbrancer and of the encumbrancer who stands first in point of time. Some months afterwards, on Oct. 17, 1812, Dearle and Sherring caused notice of their annuities to be given to the executors, accompanied with an intimation that the £93 a year must not be paid any longer to Hall inasmuch as they were entitled to have their demands first satisfied out of it. Upon receiving that notice, the executors, D acting like cautious men, who thought that it was not for them to enter into any contest, stayed their hands, and did not make any further payment, but, had the notice not been given, they would have continued to have paid the interest of the moiety of the residue to Hall.

The present suit was instituted on June 17, 1819, six years and a half after the date of the notice, when ten years had elapsed from the date of Sherring's E assignment, and eleven from the date of the assignment to Dearle, and long after a former bill had been dismissed for want of prosecution. What the plaintiffs seek by this new suit is that a court of equity shall at this remote period, interpose to stop the £93 a year from being paid to Hall, to throw upon him the loss which must be sustained by some one or other, and to direct the fund to be F applied in satisfaction of the arrears and growing payment of their annuities.

The ground of this claim is priority of time. They rely upon the well-known maxim, borrowed from the civil law, which in many cases regulates equities:— "Qui prior est in tempore potior est in jure." If, by the first contract, all the thing is given, there remains nothing to be the subject of the second contract, and priority must decide. But it cannot be contended that priority in time must decide, G where the legal estate is outstanding. For a maxim, as an equitable rule, admits of exception, and gives way, when the question does not lie between bare and equal equities. If there appears to be, in respect of any circumstance independent of priority of time, a better title in the puisne purchaser to call for the legal estate than in the purchaser who precedes him in date, the case ceases to be a balance of equal equities, and the preference which priority of date might otherwise have H given is done away with and counteracted. The question here is not which assignment is first in date, but whether there is not, on the part of Hall, a better title to call for the legal estate than Dearle or Sherring can set up? Rather, the question is: Shall these plaintiffs now have equitable relief to the injury of Hall?

What title have they shown to call on a court of justice to interpose on their behalf in order to obviate the consequences of their misconduct? All that has I happened is owing to their negligence (a negligence not accounted for) in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually prevented all the mischief which has followed. Is a plaintiff to be heard in a court of equity who asks its interposition in his behoof to indemnify him against the effects of his own negligence at the expense of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the very person who prays relief against him? The question here is not, as in *Evans* v. *Bicknell* (1), whether a court of equity is to deprive the plaintiffs of any right—whether it is to take from them, for instance,

a legal estate, or to impose any charge upon them. It is simply whether they are entitled to relief against their own negligence. They did not perfect their securities; a third party has innocently advanced his money, and has perfected his security as far as the nature of the subject permitted him; is this court to interfere to postpone him to them?

They say, that they were not bound to give notice to the trustees, for that notice does not form part of the necessary conveyance of an equitable interest. I admit, that, if you mean to rely on contract with the individual, you do not need to give notice, from the moment of the contract, he, with whom you are dealing, is personally bound. But if you mean to go further and to make your right attach upon the thing which is the subject of the contract, it is necessary to give notice, and, unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been that personal property passes by delivery of possession, and it is possession which determines the apparent ownership. If, therefore, an individual who in the way of purchase or mortgage contracts with another for the transfer of his interest does not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner as before, he must take the consequences which may ensue from such a mode of dealing. That doctrine was explained in *Ryall* v. *Rowles* (2), before Lord Hardwicke and three of the judges. If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties on the hypothesis of his being the owner of that which in fact belongs to you. The principle has been long recognised, even in courts of law. In *Twyne's Case* (3), one of the badges of fraud was that the possession had remained in the vendor. Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences. In Maxims of the Law, maxim 16, Lord Bacon says:

> "When a man is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued."

It is true that a chose in action does not admit of tangible actual possession, and that neither Zachariah Brown nor any person claiming under him were entitled to possess themselves of the fund which yielded the £93 a year. But in *Ryall* v. *Rowles* (2) the judges held that, in the case of a chose in action, you must do everything towards having possession which the subject admits, you must do that which is tantamount to obtaining possession, by placing every person, who has an equitable or legal interest in the matter, under an obligation to treat it as your property. For this purpose, you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession, and under the absolute control, of another person.

Is there the least doubt that, if Zachariah Brown had been a trader, all that was done by Dearle and Sherring would not have been in the least effectual against his assignees, but that, according to the doctrine of *Ryall* v. *Rowles* (2), his assignees would have taken the fund, because there was no notice to those in whom the legal interest was vested? In that case it was the opinion of all the judges that he who contracts for a chose in action and does not follow up his title by notice gives personal credit to the individual with whom he deals. Notice, then, is necessary to perfect the title, to give a complete right in rem, and not merely a right as against him who conveys his interest. If you are willing to trust the personal credit of the man and are satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not

necessary, for against him the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket-conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated. You had priority, but that priority has not been followed up, and you have permitted another to acquire a better title to the legal possession. What was done by Dearle and Sherring did not exhaust the thing (to borrow the principle of the civil law), but left it still open to traffic. These are the principles on which I think it to be very old law, that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he, who does not obtain such possession, must take his chance.

I do not go through the cases which constitute exceptions to the rule that priority in time shall prevail. A man may lose that priority by actual fraud or constructive fraud—by being silent, for instance, when he ought to speak; by standing by, and keeping his own security concealed. By such conduct, even the advantage of possessing the legal estate may be lost. The principle, which I have stated, is recognised in many authorities. In *Evans* v. *Bicknell* (1), Lord Eldon says (6 Ves. at p. 192):

> "If, therefore, in this case I could be perfectly satisfied that the intention was, according to the allegations in this bill, taken altogether, that he might represent himself as entitled to credit as owner of the premises, and obtain credit in his trade by representing himself as owner of the premises, and that Bicknell acceded to that purpose, so understood, I should be strongly disposed to hold Bicknell liable to the extent in which Stansell's holding himself out as owner had involved a third party."

Wright v. *Lord Dorchester* (4), though a qualified and conditional determination and made without prejudice to a final decision, yet, considering the known habits and caution of the great judge by whom that interlocutory order was pronounced, and the weight due even to the first impressions of his Lordship, is entitled to considerable authority. The preference given in that case to the puisne encumbrancer who had made inquiry of the trustees over the prior encumbrancer, who had not, must have proceeded on the principle which I have applied to the present case. The puisne encumbrancer was not put into permanent possession in that case by a power of attorney to receive the dividends more than by actual payment of the current interest in the present case, and a promise of regular payment in future.

In *Ryall* v. *Rowles* (2), Lord Hardwicke puts his opinion principally on the ground that, when a vendor is left in possession of that which he has disposed of, he "gains a delusive credit by a false appearance of substance." He observed (1 Atk. at p. 185):

> "I will not say, but some inconveniences may arise on each part. . . . But this I will say, that very great inconveniences may arise by giving an opportunity to people to make such securities, and yet appear to the world as if they had the ownership of all those goods of which they are in possession, when, perhaps, they have not one shilling of the property in them."

Burnet, J., said (1 Ves. Sen. at pp. 359–361):

> "Where the neglect naturally tended to deceive creditors, it has been held a badge of fraud, where left in his hands. . . . It is difficult, unless in very special cases, to assign a reason why an absolute or conditional vendee of goods should leave them with the vendor, unless to procure a collusive credit: and it is the same, whether in absolute or conditional sales. . . . If the conditional vendee, on paying his money for the goods, will not insist upon delivery to him, he confides in the vendor, not in the goods; and, therefore, should come in the same case with other creditors, especially as he has been the bait to draw other creditors in."

Then he argues, with respect to the assignment of a bond-debt or other chose in action (ibid. at pp. 362, 363): A

> "Why is not delivery as requisite on such an assignment as a delivery in the conveyance of a thing in possession? . . . Why will not the means of reducing into possession be considered in the same light as a conveyance of the thing itself at law? . . . The debt, by the assignor's continuing it in his hand, is in his order and disposition, as he may receive the money due, and cancel the bond, and assign it over to another creditor; and cannot have this bond, but by consent of the true owner in equity; and, therefore, as he is not obliged to accept a defective security, it is his own fault. As to bulky goods, the means of reducing into possession has been held sufficient: why not, then, in the case of a chose in action?" B C

PARKER, C.B., expresses himself thus (ibid. at p. 367)*:

> "It is said, there can be only an equitable assignment of a chose in action: which is true; and yet, in case of bonds assigned (for bills of exchange, or promissory notes, are assignable at law), they must be delivered; and such delivery of the bond, on notice of assignment, will be equivalent to the delivery of the goods; for the debtor cannot afterwards justify payment to the assignor: DOMAT. lib. I. This clause extends to things in action; and all has not been done to divest the right from the bankrupt, and to vest a right in the mortgagee; for no notice appears to be given." D

So LEE, C.J. (ibid. at p. 369), spoke

> "of an honest creditor or mortgagee [who has had a conveyance made to him for valuable consideration, but] is not to have any preference to another creditor, because he does not give notice to other creditors, by having that delivery to him to which he was entitled." E

I cite these authorities to show, that, in assignments of choses in action, notice to the legal holder has always been deemed necessary, and it would be very dangerous for the solicitor of the purchaser to neglect it. A solicitor who should neglect it would find it difficult to make out that he had not become responsible to his client. F

It was said that Hall had himself been negligent, for he had not searched in the enrolment office where he would have found memorials which would have given him notice of these encumbrances. I answer that Hall, in contracting for the purchase of Brown's life interest, was not in any respect called upon by the nature of the transaction to search for memorials of annuities. If the fund could not have been transferred or encumbered without a memorial, he would have been bound to search in the enrolment office, but there was nothing to lead him to search in that quarter, and the transfer of an interest in the £93 did not, taken by itself, call for a memorial. How, then, could he be expected to look for documents which had no natural connection with the transference of the fund? It was the mere accident that the prior charges had been created by way of security for the payment of annuities which caused memorials to be made, and memorials would have been equally necessary if the annuities had not been secured on the fund in question. It would be too much to impose on a purchaser the obligation of making a search, to which there is nothing to lead him. In affairs of great importance, a careful individual would probably search everywhere. But G H I

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* This passage of the judgment of the LORD CHIEF BARON is given by ATKYNS (1 Atk. at p. 177) in the following words: "If a bond is assigned, the bond must be delivered, and notice must be given to the debtor; but in assignments of book-debts, notice alone is sufficient, because there can be no delivery; and such acts as are equal to a delivery of goods which are capable of delivery. DOMAT. lib I, t. 2, s. 2, para. 9, says, 'Things incorporeal, such as debts, cannot properly be delivered.' This is to show the nature of assignments of debts by notice to the debtor. This clause, therefore, extends to things in action; and all has not been done that might have been done by the assignee to vest the right of them in himself, and to take away from the bankrupt the power and disposition of them, for no notice has been given to the debtors."

it is impossible to say that Mr. Hall was bound to conjecture that Brown had raised money by granting an annuity, and had secured that annuity by pledging his life interest under his father's will.

On these grounds, I think that the plaintiffs have not shown a title to call on a court of equity to interpose in their behalf and to take the fund from an individual who has used due diligence in order to give it to those whose negligence has occasioned all the mischief. There is no equality of equities between the defendant Hall, and the plaintiffs. What opportunities of fraud would be afforded if a party who, having obtained an equitable conveyance, conceals it from everybody and lies by for years while intermediate transactions are taking place, could at any time come forward with his secret deed, and say to a subsequent purchaser who had advanced his money in ignorance of the existence of such a claim: "My deed is in date prior to yours, and, therefore, whatever may have been my negligence, or your diligence, the property belongs to me." Good sense, reason, authority, and equity are all on the other side. The bill, therefore, must be dismissed, but, as against Hall, without costs. I do not make the plaintiffs pay costs to Hall, because they may have been losers without any intention to commit a fraud, and I am unwilling to add to their loss. Constructive fraud is the utmost that can be imputed to them.

I may mention, further, that the language of text writers (though, of course, I do not refer to them as authorities) shows that the rule, as I have stated it, is in accordance with what has been the current practice and the understanding of the profession on the subject of priorities. In Powell's Law of Mortgages, by Coventry, p. 451, note T, it is stated:

> "On the mortgage of a chose in action, it should never be omitted to give notice of the transfer to the trustee; for, upon the authority of the cases quoted in the text, *Tourville* v. *Naish* (5) and *Stanhope* v. *Earl of Verney* (6), Butl. Co. Litt. 290 b, n (1) s. 15, it has been thought (and indeed, as it should seem, with a great degree of reason), that, if a mortgagee of this equitable right neglect to give notice of his encumbrance to the trustee, and such equitable right be afterwards assigned to a second mortgagee, who takes the precaution of giving the trustee proper notice, the first mortgagee will be postponed."

The plaintiffs appealed.

Nov. 8, 9, 1827. *Sugden* and *Phillimore* for the plaintiffs.
Horne and *Barber* for the defendant Hall.

Cur. adv. vult.

Dec. 24, 1828. **LORD LYNDHURST, L.C.**—In this case Zachariah Brown was entitled, during his life, to about £93 a year, being the interest arising from a share of the residue of his father's estate which, in pursuance of the directions in his father's will, had been converted into money and invested in the names of the executors and trustees. Among those executors and trustees was a solicitor of the name of Unthank, who took the principal share in the management of the trust. Brown, being in distress for money, in consideration of a sum of £204, granted to Dearle, one of the plaintiffs in the suit, an annuity of £37 a year, secured by a deed of covenant and a warrant of attorney of the grantor and a surety. By way of collateral security, Brown assigned to Dearle all his interest in the yearly sum of £93, but neither Dearle nor Brown gave any notice of this assignment to the trustees under the will. Shortly afterwards, a similar transaction took place between Brown and the other plaintiff, Sherring, to whom an annuity of £27 a year was granted. The securities were of a similar description, and on this occasion, as on the former, no notice was given to the trustees. These transactions took place in 1808 and 1809. The annuities were regularly paid till June, 1811, and then, for the first time, default was made in payment.

Notwithstanding this circumstance, Brown, in 1812, publicly advertised for

sale his interest in the property under his father's will. Hall, attracted by the advertisement, entered, through his solicitor, Mr. Patten, into a treaty of purchase, and it appears from the correspondence between Mr. Patten and Mr. Unthank that the former exercised due caution in the transaction, and made every proper inquiry concerning the nature of Brown's title, the extent of any encumbrances affecting the property, and all other circumstances of which it was fit that a purchaser should be apprised. No intimation was given to Hall of the existence of any previous assignment, and, his solicitor being satisfied, he advanced his money for the purchase of Brown's interest, and that interest was regularly assigned to him. Mr. Patten requested Mr. Unthank to join in the deed; but Mr. Unthank said:

> "I do not choose to join in the deed; and it is unnecessary for me to do so, because Z. Brown has an absolute right to this property, and may deal with it as he pleases."

The first half-year's interest, subject to some deductions, which the trustees were entitled to make, was duly paid to Hall, and shortly afterwards Hall for the first time ascertained that the property had been regularly assigned, in 1808 and 1809, to Dearle and to Sherring.

Sir Thomas Plumer, M.R., was of opinion that the plaintiffs had no right to the assistance of a court of equity to enforce their claim to the property as against the defendant Hall, and that, having neglected to give the trustees notice of their assignments, and having enabled Brown to commit this fraud, they could not come into this court to avail themselves of the priority of their assignments in point of time in order to defeat the right of a person who had acted as Hall had acted, and who, if the prior assignments were to prevail against him, would necessarily sustain a great loss. In that opinion I concur.

It was said that there was no authority for the decision of the Master of the Rolls—no case in point to support it—and certainly it does not appear that the precise question has ever been determined or that it has been even brought before the court except, perhaps, so far as it may have been discussed in an unreported case of *Wright* v. *Lord Dorchester* (4). But the case is not new in principle. Where personal property is assigned delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person, who, in fact, is not the owner. This doctrine is not confined to chattels in possession, but extends to choses in action, bonds, etc. In *Ryall* v. *Rowles* (2) it is expressly applied to bonds, simple contract debts, and other choses in action. It is true that *Ryall* v. *Rowles* (2) was a case in bankruptcy, but the Lord Chancellor called to his assistance Lee, C.J., Parker, C.B., and Burnet, J., so that the principle on which the court there acted must be considered as having received most authoritative sanction. These eminent individuals, and particularly the Lord Chief Baron and Burnet, J., did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application. Parker, C.B., says that, on the assignment of a bond debt, the bond should be delivered and notice given to the debtor, and he adds that, with respect to simple contract debts for which no securities are holden, such as book-debts, notice of the assignment should be given to the debtor in order to take away from the debtor the right of making payment to the assignor, and to take away from the assignor the power and disposition over the thing assigned. In cases like the present, the act of giving the trustee notice, is, in a certain degree, taking possession of the fund. It is going as far towards equitable possession as it is possible to go, for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. It is upon these grounds that I am disposed to come to the same conclusion with the late Master of the Rolls.

I have alluded to *Wright* v. *Lord Dorchester* (4) which was cited as an authority in support of the opinion of the Master of the Rolls. In that case a person of the name of Charles Sturt was entitled to the dividends of certain stock which stood in the names of Lord Dorchester and another trustee. In 1793 Sturt applied to Messrs. Wright & Co., bankers at Norwich, for an advance of money, and, in consideration of the moneys which they advanced to him, granted to them two annuities, and assigned his interest in the stock as a security for the payment. No notice was given by Messrs. Wright & Co. to the trustees. It would appear that Sturt afterwards applied to one of the defendants, Brown, to purchase his life interest in the stock. Brown then made inquiry of the trustees, and they stated that they had no notice of any encumbrance on the fund. On this Brown completed the purchase, and received the dividends for upwards of six years. Messrs. Wright then filed a bill and obtained an injunction, restraining the transfer of the fund or the payment of the dividends but, on the answer of Brown disclosing the facts with respect to his purchase, LORD ELDON dissolved that injunction, but only on condition that Brown should give security to refund the money, if, at the hearing, the court should give judgment in favour of any of the other parties. That case was attended also with the particular circumstance that the party who pledged the fund stated by his answer that, when he executed the security to Wright & Co., he considered that the pledge was meant to extend only to certain real estates. For these reasons, I do not rely on *Wright* v. *Lord Dorchester* (4) as an authority. I rest on the general principle to which I have referred, and, on that principle, I am of opinion that the plaintiffs are not entitled to come into a court of equity for relief against the defendant Hall. The decree must, therefore, be affirmed, and the deposit paid to Hall.

Appeal dismissed.

NOTE

LOVERIDGE v. COOPER

A similar point was raised in this case, and it was argued at the same time as DEARLE v. HALL in both courts.

Robert Johnson, by his will dated August 31, 1802, directed that his trustees and executors should stand possessed of a sum of £12,500 4 per cent. bank annuities upon trust to pay the annual sum of £500, being the dividends of the £12,500 4 per cent. bank annuities, into the hands of his wife, Ann Johnson, during her life, and after her decease upon trust to transfer £6,250 4 per cent. bank annuities, being one moiety of the fund, and all the dividends thenceforth to grow due on the same, unto and equally among all and every the sons who should be then living, of the testator's brother, Richard Johnson. The testator died in 1803. His brother, Richard Johnson, had four sons living. In September, 1816, John Harrison Loveridge and Robert George Arrowsmith, being trustees of a sum of money for the separate use of Elizabeth Wright, entered at her request into a contract with Richard Johnson, one of the four sons of the testator's brother, for the purchase of a redeemable annuity of £24, payable quarterly during the life of Richard Johnson. The annuity was to be secured by the joint and several bond of Richard Johnson and of John Wall as a surety, and by an assignment of a part of that one fourth share of the £6,250 4 per cent. bank annuities, to which Richard Johnson was then entitled in reversion expectant on the death of the testator's widow and subject to the contingency of his surviving her. To carry this agreement into effect, an indenture was executed dated Sept. 5, 1816. No notice of this transaction was communicated to any of the trustees of the testator's will till April 29, 1818. On Aug. 24, 1819, the annuity, being then considerably in arrear, was assigned to Henry Loveridge, by a conveyance which purported to be made in consideration of £200, and to which John Harrison Loveridge and Robert George Arrowsmith, as well as Mrs. Wright and her husband were parties. In 1821 the testator's widow died, and, shortly afterwards, a notice in writing of the indenture of Aug. 24, 1819, was served on Cooper, the surviving trustee

and executor under the will. The notice stated that the annuity was in arrear from June 5, 1818, and required Cooper to stand possessed of the £700 4 per cent. bank annuities, and the dividends thereof, upon the trusts of the indenture of Sept. 5, 1816. Shortly after the grant of the annuity, Richard Johnson entered into a contract for the sale to William Hodges of his interest in the one fourth share of the £6,250 stock. This contract was carried into execution by a deed dated Dec. 3, 1816, by which Richard Johnson, in consideration of £600, assigned to William Hodges the sum of £1,562 10s. stock, being his one fourth part of the £6,250 4 per cent. bank annuities, and all the dividends which should accrue due thereon after Ann Johnson's decease. The deed contained a covenant on the part of the vendor that he had not previously assigned or encumbered the fund. Before this deed was executed, or the purchase-money paid, the solicitor of Hodges had inquired of Cooper, the surviving trustee, whether there was any charge or encumbrance on the interest of Richard Johnson in the £6,250 stock, and received for answer, that he, Cooper, knew of no such charge or encumbrance. On Mar. 28, 1817, a copy of the indenture of Dec. 3, 1816, was sent to Cooper.

Under these circumstances, Cooper, when applied to by the persons claiming under the indenture of Sept. 5, 1816, refused to apply any part of Richard Johnson's share of the stock in discharge of the arrears of the annuity, and a bill was filed by them for the purpose of having the £700 4 per cent. bank annuities transferred in order to secure payment of the annuity, and of having the dividends, which had accrued due on that amount of stock since Ann Johnson's death, applied in discharge of the existing arrears. It charged that the assignment to Hodges, if ever made, was subsequent in date to the indenture of Sept. 5, 1816, and insisted that, in consequence of this priority of date, the persons claiming under the indenture of Sept. 5, 1816, were entitled to the possession of the fund in preference to all other persons. Hodges claimed priority, in consequence of having given notice of his claim to the legal holder of the fund, before notice was given of any other encumbrance. Cooper, the surviving trustee at the time when the transaction took place, stated by his answer that the first notice of the indenture of Sept. 5, 1816, was received by him on April 29, 1818; that a second notice was served on him on April 11, 1821; that, previously to the month of December, 1816, the solicitor of Hodges applied to him to be informed whether he knew of any charge or encumbrance made by Richard Johnson upon his interest in the sum of £6,250 4 per cent. bank annuities; and that he, in answer, informed the solicitor, as the fact was, that he, Cooper, knew of no such charge or encumbrance.

SIR THOMAS PLUMER, M.R., said that the case made on the part of the plaintiff was priority of title under the assignment of September, 1816, and the subsequent conveyance, and he prayed the assistance of the court to prevent the stock from being transferred to Hodges, who claimed under a subsequent assignment, and to compel a transfer of it to the plaintiff himself. [His Lordship continued:] The answer, which Hodges makes is that, before the executor in whose name the stock was standing had any notice of the assignment of September, 1816, he (Hodges) purchased the whole of Johnson's interest in the fund, had an assignment of it to him duly executed, and notified that assignment to Cooper, the trustee and executor. The assignment to Hodges was executed in December, 1816, and before the purchase was made his solicitor was assured by Cooper, that he (Cooper) knew of no charge or encumbrance on the property. On Mar. 28, 1817, a copy of the indenture of December, 1816, was delivered to Cooper on behalf of Hodges, verbal notice having been previously given. It appears that on April 29, 1818, notice was, for the first time, given to Cooper of the assignment of September, 1816, and on that occasion Cooper writes to Hodges a note in which he states that he had received a notice from Arrowsmith, one of the trustees for Mr. and Mrs. Wright, and that he had told Arrowsmith in reply, that there had been an assignment of the stock to Hodges of which he (Cooper) had received notice long before. It is most extraordinary that Arrowsmith should have thus received, in 1818, notice of the transfer to Hodges, and yet that in the following year the annuity should be sold for its full original price. Independently of that circumstance, however, this case cannot in principle be distinguished from the last. The purchase in September, 1816, not having been followed by notice, all the observations, which I have before made on that subject,

apply to it. On the same principles on which I determined the other case, I must decide here, that Loveridge has made out no title to relief in a court of equity. Therefore, let the bill be dismissed with costs as against the trustee, Cooper, and without costs as against the defendants, Hodges and Johnson.

The plaintiffs appealed.

Shadwell and *Sidebottom*, for the plaintiffs.
Sugden and *Treslove* for Hodges.
Seton for the trustee.

Dec. 24, 1828. **Lord Lyndhurst, L.C.,** said that although the circumstances were somewhat different the case was the same in principle as *Dearle* v. *Hall*, and the same decision must follow.

Appeal dismissed.

FLIGHT *v.* BOOTH

COURT OF COMMON PLEAS (Tindal, C.J., and other judges), November 24, 1834]

[Reported 1 Bing. N.C. 370; 1 Scott, 190; 4 L.J.C.P. 66; 131 E.R. 1160]

Sale of Land—Contract—Rescission—Absence of fraud—Subject-matter of contract materially affected—Effect on mind of purchaser—Misdescription. Auctioneer -Sale of land—Verbal statement by auctioneer- Substantial misdescription of lease contained in particulars of sale—Lease read out at auction—Right of purchaser to rescind.

Leasehold premises were sold to the plaintiff at a public auction. The particulars stated that under the lease " no offensive trade is to be carried on; and the premises cannot be let to a coffee-house keeper, or working hatter." In fact the lease contained a provision prohibiting the businesses of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruiterer, herb-seller, coffee-house keeper, working-hatter, and many others, and the sale of coals, potatoes, or any provisions. One of the conditions of sale stated that " if, through any mistake, the estate should be improperly described or any error or misstatement be inserted in that particular, such error or misstatement shall not vitiate the sale," but compensation should be payable. At the auction, the auctioneer read the lease, but it was not proved that the plaintiff heard it read or that he had inspected it before signing the contract. The plaintiff, who paid a deposit, claimed to rescind the agreement and the return of his deposit. It was found as a fact that there was no fraud in connection with the misdescription.

Held: (i) in determining what misstatement or misdescription in the particulars justified a rescinding of the contract and what was a ground of compensation only, the cases showed that fraud avoided the contract altogether, and where the misdescription, although not proceeding from fraud, was in a material and substantial point, so far affecting the subject-matter of the contract that it might reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract was avoided altogether and the purchaser was not bound to resort to the clause of compensation; (ii) the reading of the lease by the auctioneer was no excuse for the misdescription of the terms of the lease in the particulars of sale; and (iii) the misdescription was so substantial as to entitle the purchaser to rescind and recover his deposit, notwithstanding the condition excluding rescission for misdescription.

Notes. Explained: *Pope* v. *Garland* (1841), 4 Y. & C. Ex. 394. Considered: *Re Davis and Covey* (1888), 40 Ch.D. 601; *Re Fawcett and Holmes' Contract* (1889), 42 Ch.D. 150; *Jacobs* v. *Revell*, [1900] 2 Ch. 858. Applied: *Re Puckett*

and Smith's Contract, [1900-3] All E.R. Rep. 114. Distinguished: *Shepherd* v. *Croft*, [1911] 1 Ch. 521. Applied: *Re Courcier and Harrold's Contract*, [1923] All E.R. Rep. 497. Distinguished: *Re Belcham and Gawley's Contract*, [1930] 1 Ch. 56. Considered: *Ridley* v. *Oster*, [1939] 1 All E.R. 618. Applied: *Watson* v. *Burton*, [1956] 3 All E.R. 929. Referred to: *Dykes* v. *Blake* (1838), 6 Scott, 320; *Gibson* v. *D'Este* (1843), 2 Y. & C. Ch. Cas. 542; *Pemsel and Wilson* v. *Tucker*, [1907] 2 Ch. 191; *Lee* v. *Rayson*, [1917] 1 Ch. 613.

As to the duties of disclosure by a vendor of land, see generally 34 HALSBURY'S LAWS (3rd Edn.) 216–223; as to conditions relating to rescission and compensation, see ibid. 245–255; as to repudiation by the purchaser, see ibid. 324–328; as to verbal statements by auctioneer, see 2 HALSBURY'S LAWS (3rd Edn.) 80–81; and for cases see 40 DIGEST (Repl.) 112–116.

Cases referred to:

(1) *Duke of Norfolk* v. *Worthy* (1808), 1 Camp. 337; 170 E.R. 977, N.P.; 40 Digest (Repl.) 104, *791*.

(2) *Wright* v. *Wilson* (1832), 1 Mood. & R. 207; 40 Digest (Repl.) 113, *875*.

(3) *Jones* v. *Edney* (1812), 3 Camp. 285; 170 E.R. 1384, N.P.; 40 Digest (Repl.) 254, *2136*.

(4) *Waring* v. *Hoggart* (1824), Ry. & M. 39; 171 E.R. 935; 40 Digest (Repl.) 145, *1108*.

(5) *Stewart* v. *Alliston* (1815), 1 Mer. 26; 35 E.R. 587, L.C.; 40 Digest (Repl.) 104, *792*.

Also referred to in argument:

Trower v. *Newcome* (1813), 3 Mer. 704; 36 E.R. 270; 44 Digest (Repl.) 59, *457*.

Coverley v. *Burrell* (1821), 5 B. & Ald. 257; 106 E.R. 1186; 3 Digest (Repl.) 16, *122*.

Brealey v. *Collins* (1831), You. 317; 159 E.R. 1014; 44 Digest (Repl.) 27, *176*.

Sherwood v. *Robins* (1828), 3 C. & P. 339; Mood. & M. 194; 172 E.R. 447, N.P.; 40 Digest (Repl.) 115, *891*.

Tomkins v. *White* (1806), 3 Smith, K.B. 435; 40 Digest (Repl.) 148, *1131*.

Hall v. *Smith* (1808), 14 Ves. 426; 33 E.R. 584; 20 Digest (Repl.) 346, *744*.

Walter v. *Maunde* (1820), 1 Jac. & W. 181; 37 E.R. 344; 40 Digest (Repl.) 151, *1157*.

Oldfield (*or Bowles*) v. *Round* (1800), 5 Ves. 508; 31 E.R. 707, L.C.; 40 Digest (Repl.) 46, *281*.

Scott v. *Hanson* (1829), 1 Russ. & M. 128; 39 E.R. 49, L.C.; 40 Digest (Repl.) 52, *337*.

Drewe v. *Hanson* (1802), 6 Ves. 675; 31 E.R. 1253, L.C.; 44 Digest (Repl.) 158, *1377*.

Rule Nisi obtained by the defendant to enter judgment for himself under a special award by an arbitrator to whom this cause had been referred under an order of nisi prius.

The arbitrator found that the declaration in this action was for money paid by the plaintiff for the defendant's use, and for money received by the defendant to the plaintiff's use, to which the general issue was pleaded; and the action was brought to recover the sum of £100 paid by the plaintiff as a deposit on the purchase by auction of certain premises situated in the Piazza, Covent Garden, and held under a lease from the Duke of Bedford. The premises were described in the printed particulars of sale, on the back of which the plaintiff had signed the memorandum of the contract, as calculated for an extensive business in carpets, haberdashery, drapery, paper, floor-cloth, upholstery, grocery, tea trade, or coach-building. It was also stated in the same particulars, that, by a clause in the lease:

"the lessee is to insure the premises for £3,000, and no offensive trade is to be carried on; they cannot let to a coffee-house keeper, or working hatter."

Printed conditions of sale followed; and by the sixth it was provided, that if, through any mistake, the estate should be improperly described or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale, but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money, as a compensation either way. By the last condition it was, among other things, provided, that if the purchaser should neglect or fail to complete the purchase within a day, which had expired previously to the commencement of the action, the deposit money should become forfeited to the vendor.

The sale took place, and the contract was signed, on May 16, 1833. On June 10 an abstract of title was delivered by the vendor's solicitor to the plaintiff's, which contained the following note of the proviso hereinafter set out:

> "Proviso for re-entry in case of non-payment of rent, or non-performance of covenants, or carrying on any particular trade without a licence for that purpose under the hand of the Duke of Bedford first had and obtained."

At the date of the sale and contract the lease was a valid and subsisting one. The plaintiff's solicitor made several objections upon the abstract to the completion of the purchase, which the arbitrator found to have been either insufficient in themselves or satisfactorily removed; but the plaintiff's solicitor never required to see the lease. On July 15 the plaintiff, so far as in him lay, rescinded the contract; and having demanded back again the deposit, without success, brought the action in question.

At the trial of the cause the lease was produced, and appeared to contain the following proviso:

> "Provided always, that if the yearly rent hereby reserved, or any part thereof, shall be unpaid for fifteen days next after any of the said days of payment; or if, at any time during the continuance of the said term, the trades or businesses of a brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheesemonger, fruiterer, herb-seller, coffee-house keeper, distiller, dyer, brazier, smith, tinman, farrier, dealer in old iron, pipe-burner, tallow-chandler, soap-boiler, working hatter, or any or either of them, shall be used or exercised in or upon the said demised premises, or any part thereof; or any auctions or public sales of household goods, or other things, be made in or upon the said premises or any part thereof; or the same be used as a shop or place for the sale of coals, potatoes, or any provisions whatever; or if the lessees, their executors, administrators, or assigns, shall, at any time during the last seven years of the said term, assign or set over this indenture, or any part of the premises, and their estate and interest therein, without a licence for that purpose under the hand of the said duke, his heirs or assigns; or on breach or non-performance of any or either of the covenants and agreements hereinbefore contained; then and thenceforth, and in either of such cases, it shall be lawful for the said duke, his heirs and assigns, to re-enter."

It was not proved before the arbitrator that the plaintiff, at the time of the sale, or of the signing the contract, had ever seen the lease or heard it read, or that he or his solicitor were aware of the terms of the proviso until the day of the trial. Evidence was offered, on the part of the defendant, to prove that the lease was produced at the sale, and that the proviso had been publicly read. That evidence was objected to on the part of the plaintiff's counsel; the arbitrator received it only to negative any wilful concealment or misrepresentation by the defendant of the terms of the lease; and found that none such was proved against him. No claim was made by the defendant, before the arbitrator, for damages for the non-performance of the plaintiff's contract, nor any attempt to compel a specific performance.

Upon these facts, the arbitrator found that the plaintiff had good cause of action against the defendant, and ordered that the verdict should be reduced to the sum of £100; for which sum, and the costs of the cause when taxed, he directed that

the plaintiff should be at liberty to sign judgment on the sixth day of Trinity Term then next ensuing, and not before. And if the facts above set out did not authorise the plaintiff, in the opinion of the court, to rescind the contract of sale, then the arbitrator directed the verdict to be entered for the defendant, and that he should be at liberty to enter up the judgment for himself. *Serjeant Taddy* obtained a rule nisi to enter up judgment for the defendant under this award.

Serjeant Wilde for the plaintiff, showed cause against the rule.

Serjeant Taddy and *Cresswell* for the defendant, supported the rule.

Cur. adv. vult.

Nov. 24, 1834. **TINDAL, C.J.,** delivered the following judgment of the court.—The question in this case arises upon the special facts found by the arbitrator on his award, and it is whether the plaintiff was at liberty under the circumstances stated in the award to consider the contract of sale to be rescinded. If the contract is to be rescinded, the plaintiff is entitled to recover the deposit as money had and received to his use, but if the contract is still unrescinded and open, the present action is not maintainable, but whatever injury the plaintiff has sustained by the misdescription must form the subject of a special action on the contract of sale.

The arbitrator having expressly found that no wilful concealment or misrepresentation was proved against the defendant, we must consider the case as standing clear from any fraud, and take the misdescription of the premises to have originated either from ignorance, inadvertence, or accident. The question, therefore, is narrowed to the single point whether the misdescription in the printed particulars of sale of the premises to be sold was such as to entitle the purchaser to rescind the contract altogether; or whether it was such as was contemplated by the sixth condition of the printed particulars of sale, by which it was provided, that

> "if through any mistake the estate should be improperly described, or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale thereof; but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money as a compensation, either way."

It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. With respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases, some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only: *Duke of Norfolk* v. *Worthy* (1), *Wright* v. *Wilson* (2); while other cases lay down the rule that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale: *Jones* v. *Edney* (3), *Waring* v. *Hoggart* (4), and *Stewart* v. *Alliston* (5). In this state of descrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones* v. *Edney* (3), where the subject-matter of the sale was described to be "a free public house," while the lease contained a proviso, that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal.

In the case under discussion the particulars represent the house as calculated for an extensive business in various trades therein enumerated; to which it was added "that no offensive trades are to be carried on: the premises cannot be let to a coffee-house keeper or working hatter." Any person reading this particular, and having no information but what he derives from it, that is, perhaps, every person attending the sale, would conclude that he was not prevented by the terms of the lease from carrying on any trade in it, except those which were of a class generally acknowledged to be offensive, and the two enumerated trades of coffee-house keeper and working hatter. He would never suppose, nor have any reason to suppose, that he was prevented from carrying on the trade of a baker, a fruiterer, or a herb-seller, in a house situated in the piazza of Covent Garden market, much less that the lease was to become void, if the house, so situated, was used as a place for the sale of any provisions whatever. The latter restriction would extend to prevent trades of the most innocent and inoffensive kinds from being exercised on the premises; such as a flour factor, a biscuit seller, or the like; yet such are the restrictions found to exist in the lease when it is first submitted to the inspection of the purchaser. Under these circumstances, it appears to us that a lease which is described as containing a restriction against offensive trades, and a lease containing restrictions not only against offensive trades but also against some trades that are inoffensive, are not one and the same thing, but a different subject-matter of contract; and that where a man purchases by the former description, it may very well be supposed that he would not have become the purchaser, whether he bought for the purpose of carrying on trade upon the premises himself, or for a money investment, if he had known the lease had contained the larger and more extensive restrictions; and, indeed, the very terms of the sixth condition of sale scarcely apply to a case where the difference of value is so uncertain and arbitrary as in the present case.

The condition that the parties are to pay or allow a proportionate value according to the average, will comprehend a case where there is half an acre more or less than is described, or cases which resolve themselves into simple calculations of that nature; but how will it govern such a misstatement as the present? What action at law can be framed upon it? It would at least involve the purchasers in great difficulties. The lease being in the hands of the vendor, he had peculiarly, and indeed exclusively, the means of knowledge of the exact restrictions contained in it; the purchaser at the auction had none. For the reading the lease at the auction by the auctioneer has been decided to be no excuse for a misdescription of the terms of the lease in the particulars of sale: *Jones* v. *Edney* (3). As to any laches on the part of the purchaser in not sooner demanding an inspection of the lease, which was urged as an argument on the part of the defendant, he had not the most distant reason to suspect any misdescription, until the abstract was delivered, and then the suspicion would come too late; for the question is whether he was bound or not at the time the contract was made. If, indeed, there had been any waiver of the objection in this case, our decision would have been different; but a waiver should have been found by the arbitrator: and so far as can be inferred from the facts found upon the award, the lease was never seen by the purchaser, nor the objection ever taken, until the trial of the cause. He stood then, as he might do, upon his legal right to recover the deposit.

Upon the whole, we see no reason to be dissatisfied with the arbitrator's award, and therefore, the rule for entering the verdict for the defendant must be discharged.

Rule discharged.

FORBES *v.* COCHRANE AND ANOTHER

[Court of King's Bench (Bayley, Holroyd and Best, JJ.), Michaelmas Term, 1824]

[Reported 2 B. & C. 448; 2 State Tr. N.S. 147; 3 Dow. & Ry. K.B. 679; 2 L.J.O.S.K.B. 67; 107 E.R. 450]

Conflict of Laws—Foreign law—Enforcement—Law violating the law of England, nature, or God—Refusal to enforce—Slavery—Escape of slave to British ship.

English courts will not recognise the law of another country in any case in which that law violates the law of England, the law of nature, or the law of God.

The right to have slaves, even in a country where that right is recognised by the law of that country, must be considered as founded, not on the law of nature, but on the particular law of the country in question, and so it will not be recognised by English courts.

A law permitting slavery is a law in invitum, and, if a slave gets out of the territory where it prevails and out of the power of his master, and gets under the protection of another Power, without any wrongful act by the party giving that protection, the right of the master, being founded on the municipal law of the particular place only, does not continue, and he has no right of action against a person who receives the slave without doing any wrongful act.

A person who is on board a British ship outside territorial waters is subject to the law of England and that law alone. Accordingly, the moment a slave puts his feet on board a British ship, not lying within the waters of the country whence the slave has escaped (where, undoubtedly the laws of that country would prevail), he becomes subject only to the law of England, and, consequently, is free.

Notes. Considered: *The Slave, Grace, R.* v. *Allan* (1827), 2 Hag. Adm. 94. Referred to: *R.* v. *Lopez, R.* v. *Sattler* (1858), Dears. & B. 525; *R.* v. *Gordon-Finlayson, Ex parte An Officer*, [1941] 1 K.B. 171.

As to the enforcement by English courts of foreign law, see tit. Conflict of Laws, 7 Halsbury's Laws (3rd Edn.) 1 et seq., and as to the jurisdiction of English courts, see tit. Courts, ibid., vol. 9, pp. 350 et seq. For cases see 11 Digest (Repl.) 317 et seq.; 16 Digest (Repl.) 109 et seq.

Cases referred to:

(1) *The Fortuna* (1811), 1 Dods. 81; 1 Eng. Pr. Cas. 193, n.; 165 E.R. 1240; 45 Digest (Repl.) 388, *55*.
(2) *The Donna Marianna* (1812), 1 Dods. 91; 45 Digest (Repl.) 388, *57*.
(3) *The Amedie*, cited in 1 Dods. at p. 84; 165 E.R. 1241.
(4) *Butts* v. *Penny* (1677), 2 Lev. 201.
(5) *Smith* v. *Gould, The Prince George* (1842), 4 Moo. P.C.C. 21; 6 Jur. 543; 13 E.R. 208, P.C.; 41 Digest 275, *1252*.
(6) *Smith* v. *Brown* (1705), 2 Salk. 666; 91 E.R. 566; 45 Digest (Repl.) 387, *43*.
(7) *Somerset* v. *Stewart* (1772), Lofft, 1; 98 E.R. 499; sub nom. *Sommersett's Case*, 20 State Tr. 1; 45 Digest (Repl.) 387, *44*.
(8) *Blake* v. *Lanyon* (1795), 6 Term Rep. 221; 101 E.R. 521; 34 Digest (Repl.) 213, *1501*.
(9) *Madrazo* v. *Willes* (1820), 3 B. & Ald. 353; 1 State Tr. N.S. App. A. 1345; 11 Digest (Repl.) 453, *896*.
(10) *Chamberlain* v. *Harvey* (1696), 1 Ld. Raym. 146; Carth. 396; 5 Mod. Rep. 186; 91 E.R. 994; 45 Digest (Repl.) 387, *42*.

Action for enticing away certain persons the slaves of the plaintiff, wrongfully harbouring, detaining, and keeping the slaves from the plaintiff's service, and for doing so after notice given to the defendants and request made to the defendants to deliver them up. The defendants denied liability.

A At the trial before ABBOTT, C.J., at the London sittings after Trinity Term, 1822, a verdict was found for the plaintiff, damages £3,800, subject to the opinion of the court on a Case. The Case stated that the plaintiff was a British merchant in the Spanish provinces of East and West Florida, where he had carried on trade for a great many years, and was principally resident at Pensacola in West Florida. East and West Florida were part of the dominions of the king of Spain, and Spain was B in amity with Great Britain. The plaintiff, before and at the time of the alleged grievances, was the proprietor and in the possession of a cotton plantation, called San Pablo, lying contiguous to the river St. John's, in the province of East Florida, and of about 100 negro slaves whom he had purchased and who were employed by him upon his plantation. The river St. John's was about thirty or forty miles from the confines of Georgia, one of the United States of America, which was C separated from East Florida by the river St. Mary, and Cumberland Island was at the mouth of the river St. Mary on the side next Georgia, and formed part of that State. During the war of independence between Great Britain and America, in February, 1815, the defendant, Vice-Admiral Sir Alexander Inglis Cochrane was commander-in-chief of His Majesty's ships and vessels on the North American station. The other defendant, Rear-Admiral Sir George Cockburn, was the second D in command upon the said station, and his flagship was the *Albion*.

The British forces had taken possession of Cumberland Island, and at that time occupied and garrisoned the same. The *Albion*, *Terror Bomb*, and others of His Majesty's ships of war, formed a squadron under Sir George Cockburn's immediate command off that island, where the head quarters of the expedition were. Sir E Alexander Cochrane was not off Georgia during the war, and at the time of the capture of the island he was at a very considerable distance to the southward of Cumberland Island, but Sir George Cockburn was in correspondence with him while he was at the island. In 1814, a proclamation had been published by Sir Alexander Cochrane as commander-in-chief, stating that it had been represented to Sir Alexander

F "that many persons then resident in the United States had expressed a desire to withdraw therefrom, with a view of entering into His Majesty's service, or of being received as free settlers into some of His Majesty's colonies; and that all those who might be disposed to emigrate from the United States would, with their families, be received on board His Majesty's ships or vessels of war, or at the military posts that might be established upon or near the coasts of the G United States, when they would have their choice of either entering into His Majesty's sea or land forces, or of being sent as free settlers to the British possessions in North America or the West Indies, where they would meet with all due encouragement."

One of these proclamations was seen on Amelia Island, East Florida, which was H less than a mile from Cumberland Island, and about thirty miles from San Pablo plantation. In the night of Feb. 23, 1815, a number of the plaintiff's slaves deserted from his plantation, and on the following day thirty-eight of them were found on board the *Terror Bomb*, part of the squadron at Cumberland Island, entered on her muster-books as refugees from Saint John's.

On Feb. 26 Sir George Cockburn received from the plaintiff a memorial stating I that the plaintiff had been a resident in the Spanish provinces of East and West Florida for nearly thirty years as clerk and partner of a mercantile house established under the particular sanction of the Spanish government for the purpose of trade with the southern nations of Indians, which they were allowed to continue by special permission from His Britannic Majesty, pending the two Spanish wars that occurred during that period. The mercantile house had acquired considerable property in those provinces, and, particularly, the plaintiff possessed in East Florida a cotton plantation on the river St. John's, of which he was sole proprietor, and held the same with upwards of 100 negroes at the period of the invasion of the

State of Georgia by the British forces under the command of Sir George Cockburn, in the preceding January. The plaintiff said that on the night of Feb. 23, sixty-two of his negroes deserted from his plantation (together with four others belonging to Lindsay Tod his manager), of whom he had found thirty-four, namely, eighteen men, eight women, and twelve young children of both sexes, together with the four negroes belonging to Mr. Tod on board H.M.S. *Terror Bomb*. The slaves refused to return to their duty under pretence that they were then free, in consequence of having come to the island which was in possession of the British. The plaintiff, therefore, prayed

> "that the defendant, Sir George Cockburn, would order the said thirty-eight slaves to be forthwith delivered to him their lawful proprietor, together with the boat which they had piratically stolen from his plantation."

After the memorial the plaintiff had an interview with the defendant, Sir George Cockburn, and claimed of him the slaves in question, then on board the *Terror Bomb*, as his property. Sir George Cockburn told him he might see his slaves, and use any arguments and persuasions he chose to induce them to return. The plaintiff, accordingly, endeavoured to persuade them to go back to his plantation, but they refused to go. The plaintiff then urged his claim very strongly to Sir George and said he must get redress if he did not succeed in prevailing upon Sir George to order them back again, which Sir George said he could not do, because they were free agents and might do as they pleased, and that he could not force them back. They were victualled and subsisted with Sir George Cockburn's knowledge while on board the *Terror Bomb*, and on Mar. 6 were removed from that ship by Sir George Cockburn's orders into his ship, the *Albion*. On Mar. 9, 1815, Sir Alexander Cochrane addressed to Sir George Cockburn the following letter:

> "Sir, Having received and considered your letter, No. 25, of the 28th February, 1815, and the correspondence it encloses respecting some individuals of colour, who have arrived at Cumberland Island, and there placed themselves under the protection of His Majesty, and who have been since represented as having escaped from His Catholic Majesty's possessions in East Florida, where it is said they were slaves, and in consequence have been formally demanded by the governor and other claimants of East Florida. I have the honour to inform you, that under the circumstances attending these people, I do not consider myself authorised (without reference to His Majesty's government) to decide upon the claims set forth by the governor and other persons in East Florida, and, as without such reference, it will be impossible for me to attend to any solicitation of their being given up, you will be pleased to cause the refugees in question to be put on board one of His Majesty's ships going to Bermuda, to be reported to me on their arrival there, and I will take care to have them so guarded as to prevent their desertion, and to be forthcoming, should it be decided that they are to be returned to East Florida."

In the same month of March Sir George Cockburn sailed in the *Albion* with the slaves on board for Bermuda, at which time he had received intelligence of peace between England and America, and such slaves as belonged to American subjects and were in the possession of the defendants, were not taken away in consequence of the wording of the treaty of peace. Bermuda was a British colony, 500 miles from East Florida, or any other land where slavery was acknowledged. The slaves in question were, on March 29, 1815, transferred by Sir George Cockburn's orders, from H.M.S. *Albion* into H.M.S. *Ruby* at Bermuda. After being on board that ship for about twelve months, they were landed in that island, and many of them were employed in the king's dock-yard there. The slaves which were taken on board the *Albion*, and belonging to the plaintiff, were worth to him £3,800.

Comyn, for the plaintiff.—The plaintiff had a property in his slaves, and having been deprived of that property by the act of the defendant, is entitled to maintain this action. Although, by the Abolition of the Slave Trade Act, 1807, the traffic in slaves has been declared unlawful in a British subject, the courts of this country still have respect to the trade itself when carried on by the subjects of a state which continues to tolerate it: *The Fortuna* (1); *The Donna Marianna* (2). The trade is now considered prima facie illegal, and the burden of proof that it is not so is thrown upon those who carry it on: *The Amedie* (3). It is true that in this country slavery does not exist, but an action is maintainable for the price of slaves in the courts of this country. In *Butts* v. *Penny* (4), trover was brought for ten negroes. Upon special verdict it appeared by an examination of the record that the action was brought to recover the value of negroes of which the plaintiff had been possessed in India. It is stated in the report that the court held that negroes, being usually bought and sold among merchants in India, and being infidels, there might be a property in them sufficient to maintain the action. It appears that no judgment was ever pronounced. The opinion of the court, however, is an authority to show that the right of property in slaves, in a country where slavery is allowed, will be recognised by the laws of this country. In *Smith* v. *Gould* (5), the action was brought for a negro wrongfully detained in a country where slavery was lawful. This distinction, also was acted upon by the court in *Smith* v. *Brown* (6), and it is recognised in *Sommersett's Case* (7). These authorities fully establish that this plaintiff had a property in these slaves while in Florida. They made their escape and got on board a British ship, of which Sir George Cockburn was the commander. He had notice that they were the property of the plaintiff. *Blake* v. *Lanyon* (8) is an authority to show that an action will lie for harbouring an apprentice, after notice that he is the apprentice of the plaintiff, and, by parity of reasoning, the present action is maintainable. The other defendant, Sir Alexander Cochrane, having concurred in the harbouring of these men, is also liable.

Jervis, for the defendants.—It may be conceded, that the laws of a particular country, one man may have a property in others as his slaves, and that an action may be maintained by him in the courts of this country for an injury done to that property while his property in the slaves continued. Here, all rights of the plaintiff over those persons who in Florida had been his slaves ceased the moment when they got on board the British ship of war. In *Sommersett's Case* (7) it was decided that a person who had been a slave in one of our own settlements, came to this country, and was here detained by the captain of a ship for the purpose of taking him back to such settlement, was entitled to be set at liberty, inasmuch as the law of England did not recognise the state of slavery. Lord Mansfield says:

> "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law."

It is incumbent on the plaintiff in this case, therefore, to show that at the time when he demanded these slaves to be given up to him, they were his slaves by the positive law of the place where they then were. It is clear that the law of England prevailed on board the British ship. *Madrazo* v. *Willes* (9) is an authority on that point, for in that case the Spanish law was recognised by our courts as prevailing on board a Spanish ship, and the slaves were, therefore, considered as property. By parity of reason these persons who had been slaves ceased to be slaves the moment they came on board the British ship, because, by the law of England, slavery is not allowed to exist. *Smith* v. *Brown* (6), too, is an authority to show, that, in order to maintain an action for the price of a slave, it must be shown, on the face of the pleadings that the parties were slaves by the law of the particular place where the sale took place. The right to property in slaves, therefore, is conferred by the municipal law of the place only, and can be enforced

only for an injury to such property while the slave is within that place. If a British subject, resident in such a country, committed a violation of such a right, he might possibly be answerable for it in the courts of this country. The right, however, being created only by the municipal law, must be co-extensive with it. If a master, therefore, brings his slave to a place where slavery is unlawful, an action is not maintainable against another person for detaining or harbouring the slave, because there is no obligation on the latter to return to the service from which he has escaped.

BAYLEY, J.—It is a matter of great satisfaction to me that this case, which is one of considerable importance, and of some novelty, may, at the option of either party, be turned into a special verdict. At present the impression upon my mind is that the action is not maintainable. The cases decided in the Admiralty Courts are not applicable to the present. There certain persons had taken upon themselves to be active and to seize ships having slaves on board, on the ground that they had a right so to do either by the law of nations or the law of this country. The Court of Admiralty refused to assist the captors in condemning that property to which the claimants, by the law of the particular country to which they belonged, had a right. In such cases the Court of Admiralty is called upon to act between the two countries upon a common principle applicable to both. That court, therefore, cannot lend its assistance in the condemnation of a vessel, on the ground that it is engaged in a traffic which, according to the municipal laws of the country to which the claimant belongs, is no wrong. The captain of the *Fortuna* [in *The Fortuna* (1)] had done no act that subjected him to condemnation by the laws of his own country, and this country had no right to say that he had been doing wrong, or that his property was subject to condemnation. In substance, therefore, the decision of that court operates only in the nature of an amoveas manus and no more. In *Madrazo* v. *Willes* (9), the defendant had taken upon himself to be active and to seize the ship and slaves, and the court held that he had no right to make the seizure.

Having thus disposed of the authorities referred to in argument, I now come to consider the question for our decision. My opinion in this case does not at all proceed upon the ground that slavery is not to be tolerated in the place where these slaves came on board, nor that an action, under circumstances, may not be maintained for enticing away or harbouring a slave, nor on the ground that the instant he leaves his master's plantation and gets upon other land where slavery is not tolerated that, ex necessitate, he becomes, to all intents and purposes, a free man. I give no opinion upon any one of these points, but I say that there is a great distinction between making the law of England active and leaving the law of England passive. In the cases cited from the Admiralty Courts, the law of England was passive. Here we are called upon to put that law into activity upon the ground that the defendants have done a wrong.

I am of opinion, however, that we are not warranted in coming to that conclusion with reference to the character which the defendants at that time were filling. The ground of complaint alleged in the first count of the declaration is that the defendant enticed the slaves. There is no evidence to support that count. The second count charges that the defendants harboured the slaves, knowing them to be the slaves of the plaintiff, and the third count that they harboured them after notice. *Blake* v. *Lanyon* (8) is an authority to show that the latter is a good ground for action. It was unnecessary, therefore, to consider whether there was evidence to show that the defendants knew the slaves to belong to the plaintiff. But a very material allegation in all the counts is that the defendants wrongfully did the act with which they are charged, and the question is whether that allegation was made out against either of the defendants? In *Blake* v. *Lanyon* (8) the defendant must have had full opportunity of making inquiry and satisfying himself whether that which was asserted on the part of the plaintiff was true or

not. There could be no difficulty in ascertaining, with respect to a person in this kingdom, whether he was the servant of A. B. or not, but a captain of an English man of war, engaged in foreign service, has not the same means of satisfying himself upon such a fact. It might have been wholly inconsistent with the duties he had to perform in his character of a servant of the public either to leave his ship in order to make such inquiry himself, or to dispatch persons in that public service to enquire whether these slaves belonged to the plaintiff or not. Supposing, during the absence of any of the persons detached on such duty, an occurrence had happened which required the exertions of the whole crew, it would have been no excuse to the government of this country for him to say that he had detached some of his crew to ascertain whether certain persons who had come to his ship and had been claimed as slaves by several persons residing in different places in fact belonged to them. It might happen that every one of the slaves came from different places, and belonged to different owners, and it would have been necessary to make inquiries at each place. In this case the ship was within one mile of the shore, but it might have been fifty miles off.

I am of opinion that the defendants were bound to act bona fide. If it could be made out that they acted mala fide, they would be liable to an action, but in order to support an action against a person who fills a public office like that which the defendants in this case filled it is essential to show that they acted mala fide. The plaintiff claims the slaves as his own, and desires that they should be dismissed from the defendants' ship and put into his possession. Sir George Cockburn said that they might go if the plaintiff could persuade them to go, but they refused to go. It is said that Sir George Cockburn ought have sent them away from his ship, but to what place was he to send them? They would refuse to go to East Florida, and, if he was bound to give them a boat, they would have the option of going where they thought fit, and probably would have gone to Cumberland Island. But the plaintiff desired to have them put in his possession, not to have them set at large. Sir George Cockburn was called upon to consider a nice question of law upon which legal men might entertain a difference of opinion, viz., whether a man who is a slave, in a country where slavery is tolerated, continues a slave when he goes out of the limits of that State, and whether neutrals are warranted in treating him as such.

It appears to me that Sir George Cockburn acted bona fide. If he had said: "These men shall not remain longer in my ship, but I will not put them into your possession. They shall go where they will", it is clear that they would not have gone back into the plaintiff's service. Instead of that, however, Sir George Cockburn writes to Sir Alexander Cochrane for instructions, and the latter considers it a question fit to be decided upon by the government and directs that the slaves should be conveyed to a place of security where they might be forthcoming for the benefit of the plaintiff if the government should decide that they should be restored to him. It appears to me, therefore, that the character of mala fides does not attach upon either of the defendants in this case, and, that being so, I am of opinion that they did not, in the language of this declaration, wrongfully harbour, detain, and keep the slaves. Their character, as public officers, placed them in a different situation from that in which other individuals would stand, and, upon that ground, I am of opinion, that the plaintiff is not entitled to maintain this action.

HOLROYD, J.—I am also of opinion that the plaintiff is not entitled to maintain the present action. The declaration alleges that the plaintiff was the proprietor and in the possession of a cotton plantation lying contiguous to the river St. John's in East Florida, on which land he employed divers persons, his slaves or servants. The plaintiff, therefore, claims a general property in these persons as his slaves or servants, and he claims this property, as founded, not upon any

municipal law of the country where he resides, but upon a general right. This action is, therefore, founded upon an injury done to that general right.

It appears, from the facts of the case that the plaintiff had no right in these persons except in their character of slaves, for they were not serving him under any contract, and, according to the principles of the English law, such a right cannot be considered as warranted by the general law of nature. I do not mean to say that particular circumstances may not introduce a legal relation to that extent, but, assuming that there may be such a relation, it can only have a local existence where it is tolerated by the particular law of the place to which law all persons there resident are bound to submit. If the plaintiff cannot maintain this action under the general law of nature independently of any positive institution, then his right of action can be founded only upon some right which he has acquired by the law of the country where he is domiciled. If he, being a British subject, could show that the defendant, also a British subject, had entered the country where he, the plaintiff, was domiciled, and had done any act amounting to a violation of that right to the possession of slaves which was allowed by the laws of that country, I am by no means prepared to say that an action might not be maintained against him. The laws of England will protect the rights of British subjects, and give a remedy for a grievance committed by one British subject upon another, in whatever country that may be done. That, however, is a very different case from the present. Here, the plaintiff, a British subject, was resident in a Spanish colony, and perhaps it may be inferred that, by the law of that colony, slavery was tolerated. I am of opinion that, according to the principles of the English law, the right to slaves, even in a country where such rights are recognised by law, must be considered as founded not upon the law of nature, but upon the particular law of that country. And, supposing that the law of England would give a remedy for the violation of such a right by one British subject to another (both being resident in and bound to obey the laws of that country) still, the right to these slaves being founded upon the law of Spain as applicable to the Floridas, must be co-extensive with the territories of that State.

I do not mean to say that if the plaintiff, having the right to possess these persons as his slaves there, had taken them into another place, where, by law, slavery also prevailed, his right would not have continued in such a place, the laws of both countries allowing a property in slaves. The law of slavery is, however, a law in invitum, and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another Power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the particular place only, does not continue, and there is no right of action against a party who merely receives the slave in that country without doing any wrongful act.

This has been decided to be the law with respect to a person who has been a slave in any of our West India colonies, and comes to this country. The moment he puts his foot on the shores of this country, his slavery is at an end. Put the case of an uninhabited island discovered and colonized by the subjects of this country. The inhabitants would be protected and governed by the laws of this country. In the case of a conquered country, indeed, the old laws would prevail, until altered by the King in Council, but in the case of the newly discovered country, freedom would be as much the inheritance of the inhabitants and their children, as if they were treading on the soil of England. Suppose a person who had been a slave in one of our own West India settlements, escaped to such a country, he would thereby become as much a freeman as if he had come into England. He ceases to be a slave in England only because there is no law which sanctions his detention in slavery; for the same reason he would cease to be a slave the moment he landed in the supposed newly discovered island.

In this case, indeed, the fugitives did not escape to any island belonging to

England, but they went on board an English ship (which for this purpose may be considered a floating island), and in that ship they became subject to the English laws alone. They then stood in the same situation in this respect as if they had come to an island colonized by the English. It was not a wrongful act in the defendants to receive them, quite the contrary. The moment they got on board the English ship there was an end of any right which the plaintiff had by the Spanish laws acquired over them as slaves. They had got beyond the control of their master, and beyond the territory where the law recognising them as slaves prevailed. They were under the protection of another Power. The defendants were not subject to the Spanish law, for they had never entered the Spanish territories, either as friends or enemies. The plaintiff was permitted to see the men and to endeavour to persuade them to return, but in that he failed. He never applied to be permitted to use force, and it does not appear that he had the means of doing so. I think that Sir George Cockburn was not bound to do more than he did; whether he was bound to do so much it is unnecessary for me to say. It was not a wrongful act in him, a British officer, to abstain from using force to compel the men to return to slavery. It does not appear that he prevented force being used. I do not say that he might not have refused, but in fact there was no refusal.

I have given my opinion upon this question supposing that there would be a right of action against these defendants if a wrong had actually been done by them, but I am by no means clear that even under such circumstances any action would have been maintainable against them by reason of their particular situation as officers acting in discharge of a public duty in a place flagrante bello. I doubt whether the application ought not to have been made in such a case to the governing powers of this country for redress. The cases from the Admiralty Courts are distinguishable from the present, upon the grounds already stated by BAYLEY, J. In *Madrazo* v. *Willes* (9) the plaintiff was a Spanish subject, and, by the law of Spain slavery and the trade in slaves being tolerated, he had a right, by the laws of his own country, to exercise that trade. The taking away the slaves was an active wrong done in aggression upon rights given by the Spanish law. That is very different from requiring, as in this case, an act to be done against the slaves who had voluntarily left their master. When they got out of the territory where they became slaves to the plaintiff and out of his power and control, they were, by the general law of nature, made free, unless they were slaves by the particular law of the place where the defendant received them. They were not slaves by the law which prevailed on board the British ship of war. I am, therefore, of opinion, that the defendants are entitled to the judgment of the court.

BEST, J.—The feelings which are naturally excited by a discussion of the subject of slavery may, perhaps, betray me into some warmth of expression. I beg, however, that nothing which I say may be considered as trenching upon the local rights of the proprietors of lands in our West India islands to the services of their slaves in that country. They have acquired those rights under the encouragement of the legislature of this country, and they ought not to be put in jeopardy by any power in this country unless a complete compensation be given to them by the public for the capital which they have been encouraged to embark in such property. The crime of slavery is the crime of the nation, and every individual in the nation should contribute to put an end to it as soon as possible. It is a relation which ought not to be continued one moment longer than is necessary to fit the slave for a state of freedom. For our convenience or our gain it ought not to be allowed to exist.

The plaintiff in this case states his rights in terms so general that possibly the declaration might have been bad upon demurrer, although it is sufficiently certain after verdict. It is incumbent upon us, however, to see what sort of

servants the plaintiff claims. It is clear that they were not servants in our sense of the word—not servants by contract—but slaves. The first objection that occurs to me is that it does not appear that the right to slaves exists in East Florida. That right is not a general but a local right; it ought, therefore, to have been shown that it existed in Florida and that the defendants knew of its existence. Assuming, however, that those facts did appear, still, under the circumstances of this case, this action could not be maintained. These slaves were not seduced from the service of their employer by any act of the defendants; if they had, the case would have been very different. The plaintiff, therefore, can only be entitled to recover upon the count which charges the defendants with harbouring the slaves.

Then the question is: Were these persons slaves at the time when Sir George Cockburn refused to do the act which he was desired to do? I am decidedly of opinion that they were then no longer slaves. The moment they put their feet on board of a British man of war, not lying within the waters of East Florida (where, undoubtedly, the laws of that country would prevail), those persons who before had been slaves, were free. The defendants were not guilty of any act prejudicial to the rights which the plaintiff alleges to have been infringed. Those rights were at an end before the defendants were called upon to act. Slavery is a local law, and, therefore, if a man wishes to preserve his slaves, let him attach them to him by affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognised by the local law they have broken their chains, they have escaped from their prison, and are free. These men, when on board an English ship, had all the rights belonging to Englishmen, and were subject to all their liabilities. If they had committed any offence they must have been tried according to English laws. If any injury had been done to them they would have had a remedy by applying to the laws of this country for redress. I think that Sir George Cockburn did all that he lawfully could do to assist the plaintiff; he permitted him to endeavour to persuade the slaves to return, but he refused to apply force. I think that he might have gone further, and have said that force should not be used by others, for if any force had been used by the master or any person in his assistance, can it be doubted that the slaves might have brought an action of trespass against the persons using that force? Nay, if the slave, acting upon his newly recovered right of freedom, had determined to vindicate that right, originally the gift of nature, and had resisted the force, and his death had ensued in the course of such resistance, can there be any doubt that every one who had contributed to that death would, according to our laws, be guilty of murder? That is substantially decided by *Sommersett's Case* (7), from which, it is clear, that such would have been the consequence had these slaves been in England, and, so far as this question is concerned, there is no difference between an English ship and the soil of England, for are not those on board an English ship as much protected and governed by the English laws as if they stood upon English land?

If there be no difference in this respect, *Sommersett's Case* (7) has decided the present. He was held to be entitled to his discharge, and, consequently, all persons attempting to force him back into slavery would have been trespassers, and, if death had ensued in using that force, would have been guilty of murder. It has been said that Sir George Cockburn might have sent them back. He certainly was not bound to receive them into his ship in the first instance, but, having done so, he could no more have forced them back into slavery than he could have committed them to the deep. There may possibly be a distinction between the situation of these persons and that of slaves coming from our own islands, for we have unfortunately recognised the existence of slavery there, although we have never recognised it in our own country. The plaintiff does not found his action upon any violation of the English laws, but he relies upon the comity of nations. I am of opinion, however, that he cannot maintain any action in

this country by the comity of nations. Although the English law has recognised slavery, it has done so within certain limits only, and I deny that in any case an action has been held to be maintainable in the municipal courts of this country founded upon a right arising out of slavery.

Let us look to the history of the odious traffic out of which the relation of master and slave in the West Indies has arisen. Queen Elizabeth expressed her hope to Sir John Hawkins that the negroes went voluntarily from Africa to submit to domestic slavery in another country, and declared, that, if any force was used to enslave them, she doubted not it would bring down the vengeance of heaven upon those who were guilty of such wickedness. It is unfortunate, however, for the memory of that queen that in her reign patents were granted to encourage the trade, and those were followed up by Acts of Parliament expressly recognising it. The legislature, interfering from motives of humanity, regulated the mode of transporting slaves, and also the making of insurances upon them. An Act was also passed soon after we had accomplished our own liberty, viz., the Trade with Africa Act, 1697, ss. 7, 8, 9, which certainly speak of these unhappy beings by the degrading appellation of merchandise, and of their being brought to England, not as the termination of the voyage, but as a place at which ships might call. I think, however, that notwithstanding that Act, if they had come here and got within the waters of England, they might have been discharged by means of writs of habeas corpus. There was also a statute passed in the reign of George II [relating to the recovery of debts in American plantations], by which slaves in the West India islands, like other property, were made saleable, and subject to the debts of the persons to whom they belong. Both those statutes, however, were local in their application, being confined to the West India islands only. I do not, therefore, feel myself fettered by anything expressed in either of them in pronouncing the same opinion upon the rights growing out of slavery as if they had never passed. If, indeed, there had been any express law commanding us to recognise those rights, we might then have been called upon to consider the propriety of that which has been said by the great commentator upon the laws of this country, "that if any human law should allow or injoin us to commit an offence against the divine law, we are bound to transgress that human law": 1 BLACKSTONE'S COMMENTARIES, p. 42.

There is no statute recognising slavery which operates in the part of the British empire in which we are now called upon to administer justice. It is a relation which has always in British courts been held inconsistent with the constitution of the country. It is a matter of pride to me to recollect that, while economists and politicians were recommending to the legislature the protection of this traffic, and senators were framing statutes for its promotion and declaring it a benefit to the country, the judges of the land, above the age in which they lived, standing upon the high ground of natural right and disdaining to bend to the lower doctrine of expediency, declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject-matter of property. As a lawyer I speak of that early determination, when a different doctrine was prevailing in the senate, with a considerable degree of professional pride.

I say there is not any decided case in which the power to maintain an action arising out of the relation of master and slave has been recognised in this country. I am aware of *Butts* v. *Penny* (4), but there the question was never decided, and if it had, in *Smith* v. *Gould* (5), the whole court declared that the opinion there expressed is not law. The same had before been said by HOLT, C.J., in *Chamberlain* v. *Harvey* (10). *Smith* v. *Brown* (6) has been misunderstood. It has been supposed to establish the position that an action may be maintained here for the price of a negro, provided the sale took place in a country where negroes were saleable by law. But that point was not decided. The

court only held that the question could not be agitated unless that fact was averred on the face of the declaration.

In this case the slaves belonged to the subject of a foreign State. The plaintiff, therefore, must recover here upon what is called the comitas inter communitates, but it is a maxim that that cannot prevail in any case where it violates the law of our own country, the law of nature, or the law of God. The proceedings in our courts are founded upon the law of England, and that law is again founded upon the law of nature and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the English municipal courts cannot recognise it. I take it, that that principle is acknowledged by the laws of all Europe. It appears to have been recognised by the French courts in the celebrated case alluded to by Mr. Hargrave in his argument in *Sommersett's Case* (7). BLACKSTONE, in his COMMENTARIES, vol. 1, p. 42, says:

"Upon the law of nature and the law of revelation, depend all human laws; that is to say, no human law should be suffered to contradict these."

If it can be shown that slavery is against the law of nature and the law of God, it cannot be recognised in our courts. In vol. 1, p. 424, the same writer says:

"The law of England abhors, and will not endure the existence of slavery within this nation. . . . A slave or negro, the instant he lands in England, becomes a freeman, that is, the law will protect him in the enjoyment of his person and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before."

After some other observations, he says:

"Whatever service the heathen negro owed of right to his master, by general, not by local law, the same (whatever it be) is he bound to render when brought to England and made a Christian."

Whatever service he owed by the local law, is got rid of the moment he got out of the local limits. What service can we owe by the general law? Service to our country, service to our relations for the protection they have afforded us, and service by compact. A state of slavery excludes all possibility of a right to service arising by either of these means. A slave has no country, he is not reared by or for his parents or for his own benefit, but for that of his master, he is incapable of compact.

We have the authority of the civil law for saying that slavery is against the rights of nature: INST., lib. 1, tit, 3, s. 2. The legislature of this country has given judgment upon the question. They have abolished the trade in slaves, they have even bought up at a great price the right of other countries to carry it on. We might, perhaps, have called upon them to abandon the traffic without remuneration. It might have been glorious thus to put down an usurpation against the rights of nature, but we had participated too largely in the iniquitous traffic to be justified in throwing the first stone, and may be considered as having paid this sum as a sin-offering for our transgressions. In *Sommersett's Case* (7) LORD MANSFIELD observes:

"The difficulty of adopting the relation without adopting it in all its consequences, is indeed extreme, and yet many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate."

Sommersett was discharged. He might then have maintained an action against those who had detained him, and, if that be so, how can any action be maintained against these defendants for not assisting in the detention of these men? The place where the transaction took place was, with respect to this question, the same as the soil of England. Had the defendants detained these men on board

their ships near the coast of England a writ of habeas corpus would have set them at liberty. How, then, can an action be maintained against these gallant officers for doing that of their own accord which, by process of law in a British court of justice, they might have been compelled to do?

If slavery be recognised by any law prevailing in East Florida, the operation of that law is local. It is an anti-Christian law, and one which violates the rights of nature, and, therefore, ought not to be recognised here. For these reasons I am of opinion, that our judgment must be for the defendants.

Judgment for defendants.

SCRATTON *v.* BROWN

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Trinity Term, 1825]

[Reported 4 B. & C. 485; 6 Dow. & Ry. K.B. 536; 107 E.R. 1140]

Foreshore—Land between high and low water marks—Prima facie property of Crown—Grant to subject—Rights of subject determined by terms of grant.

The property in land lying between the high and low water marks of the sea is prima facie in the Crown. It may, however, be in a subject by virtue of a grant by the Crown and different rights may be vested in the subject according to the terms of the grant. The Sovereign may have granted the soil, or the privilege of fishing, or of laying, keeping, and taking oysters on that spot. The rights of a grantee must depend on the rights which he derived from the Crown.

Foreshore—Accretion of land between high and low water marks—Passing under lease of sea-grounds between those marks—Grant not limited to land between marks at time of lease.

A release of sea-grounds which were delineated as extending "from the south at low water mark to the north at high water mark" **held** to pass not only the soil which, when the deed was executed, was bounded by the then high and low water marks, but also any other land between high and low water marks imperceptibly added by accretion.

Document—Construction—Extent of grant—Intention to grant something different from that which words in their technical meaning import—Doubt as to intention—Construction against grantor.

Per HOLROYD, J.: If in a deed the grantor does not mean to grant that which the words, used in their technical meaning, import, it is his duty to qualify those words. If there be a reasonable doubt what the intention actually was, such a construction is to be given to the deed as would be rather against the grantor than the grantee.

Notes. Considered: *A.-G.* v. *Hanmer* (1858), 27 L.J.Ch. 837; *A.-G.* v. *Chambers*, [1843–60] All E.R. Rep. 559; *Hindson* v. *Ashby*, [1896] 2 Ch. 1; *Mellor* v. *Walmesley*, [1905] 2 Ch. 164. Referred to: *Re Alton's Estate* (1856), 28 L.T.O.S. 337.

As to the ownership and extent of the foreshore, see 39 HALSBURY'S LAWS (3rd Edn.) 557–561. As to construction of deeds and other instruments, see 11 HALSBURY'S LAWS (3rd Edn.) 381 et seq. For cases see 44 DIGEST 66 et seq., and 17 DIGEST (Repl.) 253 et seq.

Cases referred to:

(1) *Earl of Cardigan* v. *Armitage* (1832), 2 B. & C. 197; 3 Dow. & Ry. K.B. 414; 107 E.R. 356; 17 Digest (Repl.) 300, *1074*.

(2) *Gifford* v. *Lord Yarborough* (1828), 5 Bing. 163; 130 E.R. 1023; sub nom. *R.* v. *Lord Yarborough*, 2 Bli. N.S. 147; 1 Dow & Cl. 178; H.L.; 44 Digest 67, *485*.

Also referred to in argument:

Whisler v. *Paslow* (1618), Cro. Jac. 487.

Wrotesley v. *Adams* (1559), 1 Plowd. 187; 2 Dyer, 177 b; 17 Digest (Repl.) 288, *943*.

Swyft v. *Eyres* (1639), Cro. Car. 546; 79 E.R. 1070; sub nom. *Swift* v. *Heirs*, March 31; sub nom. *Litchfield* (*Vicars Choral*) v. *Ayres*, W.Jo. 435; 17 (Digest (Repl.) 288, *946*.

Rule Nisi obtained by the defendant for a new trial in an action for trespass for breaking and entering three closes of the plaintiff, situate in the parish of Prittlewell, in Essex, being respectively to the southward of the cliff, and part or parcel of the now beach or shore, and with spades, etc., turning up the soil of the closes, and taking and carrying away large quantities of shingle and stones, and converting the same to the defendant's use. The defendant denied liability.

At the trial before GRAHAM, B., at the Spring Assizes for the county of Essex in 1825 it appeared that the plaintiff was tenant for life of an estate at Southend and Prittlewell which was bounded on the south by the sea, and that he was also lord of the manors of Middleton Hall and Prittlewell Priory. The defendant was a manufacturer of Parker's cement, and had, at different times, taken stones, for the purpose of making the cement, from the sea-beach and seashore adjoining the plaintiff's manors. Some of them had been taken between high and low water mark, and some had been taken above high-water mark. The plaintiff, in order to show that the space between high and low water mark belonged to him, proved that from time to time he had exercised acts of ownership there. The defendant took the stones under the authority of one Taylor, in whom was vested an interest in the shore conveyed by the plaintiff by lease and release, bearing date Sept. 27 and 28, 1773, to T. Lee, D. Harridge and W. King.

The release was made between those persons and D. Scratton, the present plaintiff, described as eldest son and heir-at-law of D. Scratton deceased. It recited that by lease and release of January 17 and 18, 1770, and by a recovery suffered in pursuance thereof in 1770, the messuage, tenement, or boat-house, sea-grounds, oyster-layings, shores, fisheries, and hereditaments thereinafter mentioned, among other hereditaments therein comprised, were conveyed and assured, or intended so to be, unto and to the use of D. Scratton (deceased), his heirs and assigns for ever, and that D. Scratton had contracted with T. Lee, D. Harridge, and W. King for the absolute sale to them and their heirs of the said messuage, tenement, boat-house, sea-grounds, oyster-layings, shores, fisheries, and hereditaments, for the sum of £6,000. The indenture then witnessed that in pursuance of the recited contract, and in consideration of the sum of £6,000, D. Scratton had bargained, sold, released, etc., unto the said T. Lee, D. Harridge, and W. King, in their actual possession then being, by virtue of a bargain and sale made to them the day next before the date of the release, for one year, and to their heirs and assigns, all that messuage, tenement, or boat-house, with the gardens, stables, outhouses, and buildings thereunto belonging, situate at Southend, in the parish of Prittlewell, and also all that and those sea-grounds, oyster-layings, shores and fisheries of him the said D. Scratton, commonly called by the name or names of Milton, otherwise Middleton Hall and Prittlewell Priory shores or sea-grounds, with full and free liberty to and for the said T. Lee, D. Harridge, and W. King, and their heirs and assigns for ever, to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same, at their free will and pleasure, which said sea-grounds, oyster-layings, shores, and fisheries did extend from the south at low-water mark to the north at high-water mark, and abutted west upon the lands or sea-grounds of Chalkwell Hall, and towards the east upon the sea or oyster-grounds of one Drew, in Essex, all which said sea-grounds, oyster-layings, shores, and fisheries thereby granted, released, and conveyed and mentioned, or intended so to be, did contain in the whole, by estimation, 800 acres

of land covered with water, or thereabouts, as the same were beaconed, marked, and stubbed out, and were then in the tenure or occupation of the said T. Lee, D. Harridge, and W. King, their under-tenants or assigns, together with all and all manner of ways, etc., with reservations to D. Scratton, his heirs and assigns, of inter alia, all and all manner of fish royal, and all wrecks of the sea, flotsam, jetsam, and ligan, within the said respective manors, or either of them, to hold the said messuage, tenement, or boathouse, sea-grounds, oyster-layings, shores, and fisheries, hereditaments and premises thereby granted or released, or intended so to be, and every part and parcel thereof, with their and every of their rights, members, privileges, hereditaments, and appurtenances, unto the said T. Lee, D. Harridge, and W. King, their heirs and assigns, as to one full undivided third part of all and singular the said hereditaments and premises, to the only proper use and behoof of the said T. Lee, his heirs and assigns for ever, as to one other full undivided third part of all and singular the said hereditaments and premises, to the only proper use and behoof of the said D. Harridge, his heirs and assigns for ever, and as to the remaining one full undivided third part of all and singular the said hereditaments and premises, to the only proper use and behoof of the said W. King, his heirs and assigns for ever, and to or for no other use, intent, or purpose whatsoever.

It was proved that, since the date of the deed, the sea had gradually encroached upon the land, according to the testimony of some of the witnesses twelve or fifteen feet, according to the testimony of others much more, and, consequently, that the present high and low water mark had advanced in the same degree inland since that time. It was contended on the part of the defendant that the deed of 1773 conveyed to the grantees the soil of the shore between high and low water mark, wherever those marks might be. On the part of the plaintiff it was contended (i) that the deed did not convey the soil, but a mere privilege or easement of fishing, and laying oysters there; and, (ii) assuming that the deed did convey the soil, it conveyed only that part of the shore which in 1773 lay between high and low water mark, and, consequently, that the plaintiff was entitled to recover for any stones taken by the defendant higher up on the shore than the high-water mark reached at that time.

The learned judge was of opinion that the deed did not convey the soil of the shore to the grantees, but a mere right of fishing and laying oysters there, and under his direction the jury found a verdict for the plaintiff, subject to a reference as to the amount of the damages. Subsequently, *Serjeant Taddy* obtained a rule nisi for a new trial, upon the ground that the deed did convey to the grantees the soil of the shore.

Murryat, *Gurney*, *Comyn* and *Andrews* for the plaintiff, showed cause against the rule.

Serjeant Taddy, *Preston* and *Knox* for the defendant, supported the rule.

BAYLEY, J.—This action is brought upon the supposition that the deed of 1773 conveys a privilege and an easement only in the waste and leaves in the grantor the general property in the soil, from low to high water mark. If we are satisfied from the language of the deed that the soil passes, then the present verdict, to the extent to which it has been given, cannot be supported.

It appears to me that the deed did pass to the grantee, not a mere privilege or easement, but the soil, so far, at least, as the surface was concerned. The property is of a peculiar description, viz., land lying between high and low water mark. The property in such land, prima facie, is in the Crown. It may, however, be in a subject, and different rights in that description of property may be vested in a subject according to the terms of the grant. The king may have granted to a subject the soil itself, or the general privilege of fishing, or of laying, keeping, and taking oysters on that spot.

The rights, therefore, of the grantor, in this case, must depend upon the rights

which he derived from the Crown. If he intended to part with all that he had and the extent of his rights were doubtful, he would probably use in his conveyance language calculated to pass every description of property which he at that time might possess. The deed purports to pass " all that and those, sea-grounds, oyster-layings, shores, and fisheries." If it had conveyed the sea-grounds only, that, prima facie, would have operated as a grant of the soil itself. For, generally speaking, the soil passes by the word "ground," as, by the word "wood" the soil in which the wood grows passes. If the grantor had intended to pass a limited specific privilege and easement in the soil and not the soil itself, he ought not to have used such comprehensive words, but words limited and restricted in their sense. It seems to me, therefore, that if the grant had contained only the words "sea-grounds," they would have passed the soil. But then, the words "oyster-layings" are introduced, and it is said, that from these words it is to be inferred that, by the words "sea-grounds," it was intended to convey a privilege of laying oysters only. I think, however, that those additional words may have been introduced because the grantor was uncertain as to the nature of the right which he had actually derived from the Crown. Then comes the word "shores" which denotes that specific portion of the soil by which the sea is confined to certain limits. That term is wholly inapplicable to the grant of a privilege or easement; it of necessity comprehends the soil itself. But the word "fishery" immediately follows, and it is said that there could be no reason for introducing the word "fishery," if the soil itself had been previously granted.

I have already observed that the grantee of the Crown might either have had the soil, or the fishery, or the mere privilege of laying and taking oysters, or he might have taken the soil from the Crown by one grant and the fishery by another. In either case, it might have been a matter of doubt whether he had the right to the soil or a mere easement. It certainly would require very clear language to qualify the effect of the words "sea-grounds, oyster-layings, and shores," and if I held that these words were qualified by the word "fishery," I should limit the effect of words which have a certain definite meaning by a word apparently introduced for the purpose, not of limiting the grant, but of including any additional right which the grantee might possess. Then follow the words

> "with full and free liberty for the grantees to fish, dredge, and lay oysters thereon, and from thence to take and convey the same."

It has been said that if the soil had been previously granted, these privileges would have been incident to the grant of the soil, and, therefore, that the grant of these privileges shows that the soil was not previously granted. The liberty, however, is equally useless, whether the previous part of the deed conveyed the soil or an easement only. The deed then excepts all manner of fish royal. Such an exception might be material, for the grantee of the Crown, having previously granted the fishery, would have thereby conveyed any right that he had to fish royal, unless there had been an exception in that respect. The exception of wrecks flotsam, jetsam, and ligan was wholly useless, for those, being prerogative rights, would not pass without express words introduced for that purpose. If those words have any effect, it is in favour of the defendant, for it is quite clear that if the grantor had intended to pass a privilege only, it would have been unnecessary to introduce them. Upon the whole of this deed, I am of opinion, that it must be construed to convey not a mere privilege and easement, but the soil itself.

That being so, the second question is: What soil did it convey? There is no dispute as to the limits on the east and west, but merely as to those on the north and south. It has been contended on the part of the plaintiff, that it does not convey that soil which from time to time is bounded by the high and low water marks, but only that soil which at the time when the deed was executed was bounded by the then high and low water marks. The passage cited from the first INSTITUTE, 48b, shows that there may be a movable freehold. It does not

apply specifically to this case, because the case put there is of a given quantity of land, fixed in situation, of which part from time to time may be vested in A. and the other part vested in B. The question here is whether there may be a certain quantity of land shifting in situation and vesting in the same persons at different times? That must be the case of land fronting the sea or a river, where, from time to time, the sea or river encroaches or retires. If the sea leaves a parcel of land, the piece left belongs to the person to whom the shore there belongs. The land between high and low water marks originally belonged to the Crown, and can only vest in a subject as the grantee of the Crown. The Crown by a grant of the seashore would convey, not that which at the time of the grant is between the high and low water marks, but that which from time to time shall be between these two termini. Where the grantee has a freehold in that which the Crown grants, his freehold shifts as the sea recedes or encroaches. Then what was the object of the parties to the deed of 1773? To grant the land within certain limits. Those to the east and west were ascertained, but those on the north and south were to be ascertained by the high and low water marks. I think that those words must be construed with reference to the rule of the common law upon the subject of accretion, and that as the high and low water marks shift, the property conveyed by the deed also shifts. For these reasons I am of opinion that the plaintiff was not entitled to recover in respect of any part of the stones which were proved to have been taken between high and low water marks.

HOLROYD, J.—I am clearly of opinion, that the right to the soil passed by the deed. I think that the first part of the grant must be taken to operate as a conveyance of corporeal hereditaments (supposing always that the person assuming to convey had a right to convey corporeal hereditaments), and that the subsequent part of the deed operated as a conveyance of incorporeal hereditaments. Whether the grantor had or had not these corporeal rights, which he assumed to have, I think that the words, "with liberty to fish, etc." may have been introduced to remove all doubts as to the nature and extent of the rights granted. It is possible that at some former period the right in the soil of the shore and the right of fishing on the shore may have existed in different persons, before they both vested in the grantor, and, therefore, that it may have been a matter of doubt whether one was merged in the other. I think that the additional words were intended as words of amplification, and that they ought not to operate as words of restriction.

In a deed, if the grantor does not mean to grant that which the words, used in their technical meaning, import, it is his duty to qualify those words, and, if there be a reasonable doubt what the intention actually was, then such a construction is to be given to the deed as would be rather against the grantor than the grantee. Previous to the granting part of the deed there is a recital that a recovery had been suffered of, among other things, the tenement, messuage, and boat-house, the sea-grounds, oyster-layings, shores, fisheries and hereditaments thereinafter mentioned, and that they were comprised in a settlement there referred to. It then recites that the grantees had consented and agreed for the absolute sale of the messuage or tenement, etc., and the sea-grounds, oyster-layings, shores, and fisheries, and hereditaments thereinafter more particularly mentioned. Those are the sea-grounds, oyster-layings, shores, etc., which had been comprised in the recovery before. If they were corporeal tenements, the recovery would operate upon them, and they might have been demanded in a præcipe, but if they were not corporeal tenements they could not be demanded in a præcipe. They might pass as appurtenances, but would not themselves be the principal subject on which the recovery would operate, and it would only affect them because it operated on other subjects to which they bore relation. Then by the granting part, "all that messuage, tenement, or boat-house . . . and also . . . those sea-grounds, oyster-layings, shores, and fisheries," known by the particular names thereinafter mentioned were conveyed. These terms import that corporeal tenements were conveyed and they

are not to be narrowed and restrained, unless there is something to show that such was the intention of the parties.

Then the deed grants "full and free liberty for the grantee to fish, dredge," etc. That part of the grant was wholly unnecessary, for that privilege would pass under the words "sea-grounds and shores." If, however, the right of fishing continued to exist as a distinct privilege, and was not merged in the general right of the soil, these words would be useful to pass it, or, if it were at all doubtful, whether it existed or not as a distinct privilege, they remove all doubt as to the intention to pass that privilege. Supposing the grantor's title to the sea-grounds was invalid and he had the right of fishery, but not the soil, these words might be useful as granting the incorporeal right, although the grant would be void as to the corporeal right. They do not, therefore, show any intention on the part of the grantor that the corporeal right should not pass pursuant to the technical language of the former part of the grant. In a grant it is not very material which of the parts stands first and which last. Suppose that there had been a grant, "of full and free liberty to fish, dredge, and lay oysters, together with the sea-grounds," it could not be contended that the latter words would have no effect. They would operate as a grant of a corporeal tenement. The deed then proceeds: "with all the rents, issues, and profits of all and singular the said premises." All the issues and profits of what was before granted were to be taken, and not merely a particular profit arising from the right of getting fish. The grantor, therefore, uses extensive and sweeping words to show that he meant to convey all that he could, with reference to the subject-matter of the grant, and I am clearly of opinion, that the instrument was sufficient to pass the soil.

With respect to the other question, I am of opinion, that, supposing the soil to be granted, it follows as a consequence that the grantee, with respect to the shore, will stand in the same situation as the grantor would have stood if he had not executed the deed. The grantor conveyed the whole of his shore between particular boundaries; he had, therefore, no part of it remaining in him, and the grantee stood in his situation. Then the accretion follows as an accessory to the principal. The change being gradual it becomes part of the shore, and belongs to the person who has the shore at the time when the accretion takes place. I think, therefore, that there should have been no new trial in this case, if it had appeared that all the stones had been taken from the shore, but, as some of them were taken from the cliff above the high-water mark, a new trial must be granted, unless the parties can come to some arrangement upon the subject.

LITTLEDALE, J.—It seems to me that by this deed the soil is passed, not only in the 800 acres which were described in the deed, but also in any other land between high and low water mark, imperceptibly added by accretion. Upon the construction of the deed, it is clear that if the words "sea-grounds" had stood alone, the soil would have passed under them. "Sea-ground" is either ground bordering on the sea or covered with the sea. The word "ground" itself is sufficient to pass the soil, and the word "sea" annexed to it only shows where it is situate. The next words "oyster-layings" would not of themselves pass the soil, but the word "shores," unconnected with other words, would pass the soil. It is said, however, that that word is to be coupled with the word "oyster," and, therefore, that the deed only imported to convey oyster-shores. I see no reason why they should be coupled together, but, supposing it to be so, that would not make it less a shore, and that would be sufficient to pass the soil. It would only denote the purpose to which the land was applied, viz., that it was a shore where oysters were got, just as the words "arable land," "pasture land," "woodland," denote the purposes to which the land is applied. Then, as to the word "fisheries," it is said that with that word oyster must be coupled, but I do not know why they are to be connected together. It may, indeed, be said that the word "fishery" is unnecessary, for, if the soil passed, the fishery passed also, but that is not so. A fishery in a river

would pass by the conveyance of the adjoining land because of common right it might be incident to the soil, but in this case it was absolutely necessary to grant the fishery, for the grant of the soil would not be sufficient to convey a peculiar privilege to fish between high and low water mark, because all the king's subjects would have a right to fish there, unless a particular person was entitled to it by specific grant or prescription. The fishery, therefore, would not pass by the word "soil" and, supposing that the soil passed by the deed, the word "fishery" might, nevertheless, be properly introduced to give the privilege of fishing. Perhaps even the words "oyster-layings" would not pass the privilege of getting oysters, because those words only import a privilege of laying oysters there, and it might be doubtful whether it would give a right to take them. But then the words are "all those sea-grounds called by the name of Middleton Hall shores and sea-grounds," so that the grant applies to some shores called by a particular name. It is evident, therefore, that they were the grounds and shores which had been granted before. Then come the words "full and free liberty to fish," etc. Supposing that liberty to have been accessory to the grant of the soil, it is clear that the unnecessary addition of those words does not restrict the grant, but only explains the intention of the parties: *Earl of Cardigan* v. *Armitage* (1). By the grant of the soil the party has no peculiar right to fish, but he might have a right to fish, dredge, and lay oysters by a grant of the fishery. Then, in the exception, there are no words which have any bearing on the present case, but there are these which are insisted upon: "except fish royal." It was necessary to except them, for otherwise they would be conveyed, for the exception implies that, but for that exception, the thing was before granted.

Then, supposing the soil passes, the other question is whether it is to be confined to the 800 acres mentioned in a subsequent part of the deed? The grant is of those sea-grounds which went by the name of Middleton Hall shores and sea-grounds. Therefore, the only subject of inquiry is whether the place in question, whence the stones have been taken, is called by either of those names, for the subject-matter of the grant cannot be affected by the subsequent part of the deed which has nothing to do with the grant, but is merely matter of description. The distinction is well established that where there are words sufficient to pass property in the first instance, and there are in a subsequent part of the deed words of affirmation, these latter words, though they may be wrong in point of description, do not affect the previous part of the grant. The words are:

> "which said sea-grounds," etc. [after description of their boundaries on the north and south by high and low water mark, and on the east and west by the grounds of particular persons] "do contain, on the whole, 800 acres of land covered with water."

These words of suggestion or affirmation may be true or false. Instead of 800 acres there might have been 5,000 acres, and it is quite immaterial whether they were bounded on the east and west by the lands of the persons mentioned in the deed, because, in the operative part of the grant, the sea-grounds are the thing granted, and the latter words will not vitiate that grant which extends to all the shores going by the name of Middleton Hall shores and sea-grounds.

The only remaining question is whether the accretion which has taken place passes by that grant. I think it quite clear, from *R.* v. *Lord Yarborough* (2), and LORD HALE'S treatise DE JURE MARIS, that the increase, being imperceptible, continued to pass as incident to that which belonged to the grantee. On that principle, I am of opinion that the land between high and low water mark constitutes a part of Middleton Hall shores, or sea-grounds, and that the deed is sufficient to pass the accretion which has taken place.

Rule absolute for new trial.

A

HARPER *v.* CHARLESWORTH

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Trinity Term, 1825]

[Reported 4 B. & C. 574; 6 Dow. & Ry. K.B. 572; 3 L.J.O.S.K.B. 265; 4 L.J.O.S.K.B. 22; 107 E.R. 1174]

B

Trespass—Trespass to land—Action—Plaintiff—Person in actual possession of land—Enjoyment of profits—No legal right to possession as against freeholder.

Although a person in the actual possession of land and enjoyment of the profits had no legal right to retain possession as against the freeholder, **held** his possession was sufficient to enable him to maintain an action against a trespasser on the land.

C

Notes. Considered: *Humphrey* v. *Nowland* (1862), 15 Moo. P.C.C. 343. Referred to: *Heartley* v. *Banks* (1859), K. & G. 219; *A.-G.* v. *Dakin* (1868), L.R. 3 Exch. 288.

As to who may sue for trespass to land, see 38 HALSBURY'S LAWS (3rd Edn.) 744–746; and for cases see 46 DIGEST (Repl.) 359 et seq.

D

Cases referred to:

(1) *Chambers* v. *Donaldson* (1809), 11 East, 65; 103 E.R. 929; 46 Digest (Repl.) 389, *314*.

(2) *Anon.* (1586), 4 Leon. 184; Godbolt, 133; 46 Digest (Repl.) 359, *66*.

(3) *Johnson* v. *Barret* (1647), Aleyn, 10; 82 E.R. 887; 46 Digest (Repl.) 362, *90*.

E

(4) *Wood* v. *Veal* (1822), 5 B. & Ald. 454; 1 Dow. & Ry. M.C. 11; 1 Dow. & Ry. K.B. 20; 106 E.R. 1257; 26 Digest (Repl.) 297, *191*.

(5) *Graham* v. *Peat* (1801), 1 East, 244; 102 E.R. 95; 19 Digest (Repl.) 542, *3794*.

(6) *Frogmorton* v. *Scott* (1802), 2 East, 467; 102 E.R. 447; 19 Digest (Repl.) 542, *3795*.

Also referred to in argument:

F

Dyson v. *Collick* (1822), 5 B. & Ald. 600; 1 Dow. & Ry. K.B. 225; 1 Dow & Ry. M.C. 70; 106 E.R. 1310; 46 Digest (Repl.) 368, *137*.

Finch v. *Risley* (1594), Poph. 53; 79 E.R. 1169; sub nom. *Finch* v. *Throckmorton*, Cro. Eliz. 221; sub nom. *Finch's Case*, 2 Leon. 134; sub nom. *Anon.*, And. 303; 31 Digest (Repl.) 527, *6498*.

G

Geary v. *Bearcroft* (1667), 1 Sid. 346; Cart. 57; O. Bridg. 484; 1 Lev. 202; 82 E.R. 1148; sub nom. *Geery* v. *Bearcroft*, 2 Keb. 148; sub nom. *Bearcroft* v. *Geery*, 2 Keb. 250, 285; 46 Digest (Repl.) 372, *161*.

Rule Nisi obtained by the defendant to enter a nonsuit or for a new trial in an action for trespass for breaking and entering the plaintiff's close called The Banks and a certain other close called Allotment No. 15 situate in the parish of Hanbury in the county of Stafford, treading down the grass and herbage of the plaintiff, and breaking down part of the hedges and fences of the said closes. The defendant denied liability and pleaded a right of footway.

H

At the trial before GARROW, B., at the Spring Assizes for the county of Stafford, it appeared that the close where the trespass was committed was part of an allotment made to His Majesty by the award of commissioners under an Act of Parliament, passed in 1801, for dividing, allotting, and enclosing the forest or chase of Needwood, in the county of Stafford. The Act recited that the king was seised to himself, his heirs, and successors, of the forest or chase of Needwood, containing about 9,400 acres, lying within the honour or lordship of Tutbury, parcel of the estates and possessions of the duchy of Lancaster, in the county of Stafford, subject to common of pasturage, and other rights therein mentioned, and the commissioners were empowered to set out such public bridle-roads and footways, and private roads and ways, in, over, and upon the forest or chase as they should think requisite. It then enacted that after the several public or private roads

I

should have been set out and made it should not be lawful for any person, either on foot or with horses, cattle, or carriages, to use any other roads or ways, either public or private, over or upon the ancient or new enclosures or the forest or chase than such as should have been made and set out by the commissioners in their award. His Majesty, his heirs, and successors were enabled to make and grant leases, under the seal of the duchy of Lancaster, for any term or number of years, not exceeding 99 years, and so as such leases be in all other respects made and granted agreeable and conformable to the terms and conditions prescribed and directed by the statute 1 Ann., stat. 1, c. 7.

It was proved that the plaintiff had, since the year 1817, paid to His Majesty for the woodlands of his allotment of Needwood (the timber being reserved to the king), a nominal rent of £1 per annum, which was not one third of the annual value. These woodlands comprised about 1,000 acres, and included the close where the trespass was committed. It appeared that the gamekeeper, the deputy axe-bearer, and the woodward, who had the care of the woods and timber, were paid by the Crown, and the fences were repaired at the expense of the Crown. The plaintiff, who resided principally in London, usually came to Needwood about August and remained there until November, and during that interval he and his friends went over the whole of the allotment, including the close in question, for the purpose of shooting game. One Wallace, the woodward, took the grass in the glades by the plaintiff's permission.

The award of the commissioners was executed in 1805, and no footpath across the close in question was set out in that award. Before the Enclosure Act there were paths in all directions, and, among others, one over the close where the trespass was committed. In 1806 the whole allotment was fenced all round, and no road or path was left over the close in question, and in or about 1807 a notice was affixed at the end of the path stating that there was no road, and that all persons trespassing would be prosecuted according to law.

The defendant admitted the trespass, but he said that the plaintiff had not proved that he had any lawful possession of the land where the trespass was committed because he had not any grant under the seal of the duchy of Lancaster, or, assuming that there might be a parol demise of land by the Crown, yet the statute 1 Ann., stat. 1, c. 7, s. 5, had not been complied with the rent reserved not being one third of the annual value of the land.

The learned judge was of opinion that the plaintiff had sufficient possession to maintain trespass against a wrongdoer, but he reserved leave to the defendant's counsel to move to enter a nonsuit. The defendant then gave evidence to show that since the time of making the award the footway had been generally used by the public, and it was contended that this proved a dedication of the way to the public. The learned judge told the jury to find for the defendant if they were of opinion that the user of the way, since the making of the award, had been with the assent of His Majesty who was the owner of the soil, but otherwise for the plaintiff. The jury having found for the plaintiff, a rule nisi for a nonsuit or a new trial was obtained upon two grounds (i) that the plaintiff had not a rightful possession of the land where the trespass was committed, but was a mere intruder on the possession of the Crown, and, therefore, could not maintain trespass; and (ii) that there was sufficient evidence to show a dedication of the way to the public, and, therefore, that the jury ought to have found for the defendant.

Jervis, *Walton* and *Campbell* for the plaintiff, showed cause against the rule.

W. E. Taunton, *Brougham* and *Russell* for the defendant, supported the rule.

BAYLEY, J.—The first question in this case is whether the plaintiff had any actual possession of the land where the trespass was committed. That does not appear to have been a matter of dispute at the trial, and certainly was not the ground upon which the motion for a new trial was obtained. It appears to me that there was strong evidence to show that there was actual possession in the

plaintiff. The property belonged and the timber was reserved to the king, but every description of enjoyment was not exercised by the king or by any person claiming under him. The plaintiff paid a nominal rent of twenty shillings a year. That rent must have been paid for something, and it must have been accepted upon the principle that, even if there was not a proper species of conveyance so as to give the plaintiff a right as against the Crown, he was entitled to have something. What was the land capable of yielding? It was woodland, with rides on it, and there was a considerable quantity of game on it, and, therefore, it afforded to any person going there an opportunity of killing game. The plaintiff himself did not appear to have any other enjoyment of the land than that of shooting the game. He usually came about August and remained till November. Wallace had the grass, and he took it by licence, not from the Crown, but from the plaintiff, and that licence did not vest the possession in Wallace, but was only a privilege which the plaintiff had conferred upon him. When, therefore, Wallace took the grass, he took it as the representative of the plaintiff, and that was a pernancy [receipt] of the profits by the plaintiff. If the learned judge had been desired to put to the jury the question whether there was or was not an actual possession in the plaintiff, he could not with propriety have directed them to come to the conclusion that there was not an actual possession.

It is insisted, however, that, although the plaintiff may have had the actual possession, yet the land being Crown land, and there not being any grant by matter of record, and the rent paid being less than one third of the annual value, as required by the statute of 1 Ann., stat. 1, c. 7, s. 5 [1702, repealed by Statute Law Revision Act, 1867], the possession was not such as to enable him to maintain trespass against a wrongdoer. I think that, as there was no such grant, as the statute 1 Ann., stat. 1, c. 7, s. 5, and the Needwood Forest Act require, the plaintiff had no legal title against the Crown, and the Crown might at any time, without notice, have removed him from that possession and occupation.

Then it becomes a question whether a person having the actual possession of Crown land can maintain trespass against a mere wrongdoer? Generally speaking, actual possession is sufficient to entitle a party to maintain trespass against a wrongdoer. That is established by a great variety of cases. *Chambers* v. *Donaldson* (1) is a very strong authority upon this point. That was trespass for breaking and entering the plaintiff's dwelling-house, and the defendants pleaded that the dwelling-house was the soil and freehold of A. B., and that they, as his servants, and by his command, broke and entered the same. The plaintiff, in his replication, said that they did not do it by the command of A. B., and there was a demurrer to that replication on the ground that the plaintiff, having by his replication, admitted the soil and freehold to be in another, had thereby admitted that he had no cause of action and that the fact whether the defendants entered by the command of the other or not was immaterial and not traversable. The court decided that, although upon the pleadings it must be taken that the plaintiff had a wrongful possession as against the person in whom the freehold was, yet that such a possession was rightful and sufficient to enable the plaintiff to maintain trespass against a wrongdoer, and that, unless the defendants acted under the authority of the person in whom the soil and freehold was alleged to be, they could not justify committing a trespass against any person in the actual possession of the land.

But a distinction has been taken between land belonging to a common person and land belonging to the Crown, and, if that distinction be valid in point of law, the defendant must have the benefit of it in this action. That distinction is founded on the authority of a case (*Anon.* (2)) very loosely reported, in 4 LEONARD, 184, and GODBOLT, 133. ANDERSON, C.J., there said:

"If one intrude upon the possession of the king, and another man entereth

upon him, he shall not have any action of trespass for that entry; for that he who is to have and maintain trespass, ought to have a possession. But in such case he hath not a possession, for every intruder shall answer to the king for his whole time, and every intrusion supposeth the possession to be in the king."

The words "another man entereth upon him," I apprehend to mean that another intruded and ousted the person originally in possession. In that case the right of possession would remain in the Crown. Suppose, for instance, A. being an intruder enters, and B. afterwards intrudes, and excludes A. A. brings trespass against B. A. cannot maintain this action because during the whole of the time the possession was not legally and properly in A. or B., but the right of possession, during the whole time, was in the Crown. The Crown would have a right to call upon A. for the profits for that time during which he had been in possession, and on B. for the same, during the time he had been in possession, and, therefore, A. cannot call upon B. for any part of those profits. The report goes on to say that PERIAM, J., doubted, and RODES, J., said and vouched, Y.B. 19 Edw. 4, fo. 2, pl. 5, to be, that he cannot in such case say, in an action of trespass, quare clausum suum fregit.

The case from Y.B. 19 Edw. 4, referred to by RODES, J., when examined, explains the meaning of the language in *Anon.* (2) that "every intruder shall answer to the king for his whole time." It was trespass for breaking and entering the plaintiff's close, taking his grass, and cutting his trees. It was, therefore, an action brought against the defendant for taking the profits of the land. The defendant pleaded that before the day of the trespass a commission issued from the exchequer directed to the escheator of the county of Suffolk to inquire of all manner of lands and tenements, etc.; and before the escheator in the same county it was found that one John B. held the same land of the king, etc., and died without heir, wherefore the king entered, etc. Judgment, etc. VAVISOR:

"This is no plea, for notwithstanding that the king has cause to have all manner of issues and profits issuing out of, etc., yet this shall not excuse him who did the trespass; as, in like case, if a stranger take certain goods (which I have) out of my possession, and he whose property they are release to the stranger, still I shall have an action of trespass against him for the taking, etc., and yet he shall have the goods."

TOWNSEND said:

"The contrary appears to me, for I apprehend when the king is entitled to have any land, he shall be answered for the issues and profits from the first day of his title to the day of office found, and that every man shall answer for his time, namely, each of those who occupied for the time of his occupation. Then, if he who shall have the administration and occupation of such lands shall have no action, in this case it shall be that he account for the issues (arising during his occupation), and yet the defendant have them, which would be unreasonable."

CHOKE, J., said:

"For such things as arise from the land, the action by this office found is clearly gone; but for such things as do not arise from the land, as for entering the land and breaking the hedges, or for the taking of any chattel, in this case the action is not gone by the office and seizure for the king; but where the action is brought for things which arise from the land, as for cutting grass and the like, there, when the office is found for the king, all actions are gone for ever, for he shall not answer for those matters; but this person shall answer for the time; wherefore, etc."

The decision, then, in that case was that trespass was not maintainable by one intruder against the other to recover the profits of the land, because each of

them was liable to account to the Crown for all profits arising during the period of his occupation, but that the action was maintainable by the first intruder against the second to recover a compensation for an injury to the possession not in any way affecting the profits of the land. That case, therefore, does not warrant the proposition for which it was stated by RODES, J. It had been found by office that the lands belonged to the king, and all the profits belonged to the king from the death of his tenant. The plaintiff, therefore, not only had a wrongful possession, but the king, by entering, showed that he meant to treat the possession as wrongful. The plaintiff could have no right to recover the profits of the land, but the king would be entitled to them. Still it was held that, notwithstanding he had a wrongful possession as against the king, he might maintain trespass against a wrongdoer.

There is a subsequent case of *Johnson* v. *Barret* (3), which is at variance with the doctrine laid down in *Anon.* (2). It was an action of trespass for carrying away soil and timber. The question arose upon a quay that was erected at Yarmouth, and destroyed by the bailiffs and burgesses of the town. There was a difference of opinion on the Bench whether, if it were erected between the high-water mark and low-water mark, it belonged to him who had the adjoining land or to the king. It was, however, agreed that an intruder upon the king's possession might have an action of trespass against a stranger, but that he could not make a lease whereupon the lessee might maintain an ejectione firmæ. That is an authority to show that an intruder may have a possession sufficient to enable him to maintain an action against a person who does an injury to that possession, but that he cannot maintain any action in which it would be necessary to prove title. Apply that doctrine to this case. The plaintiff had no title to enable him to maintain an ejectment because he had not a legal conveyance from the Crown, but still, according to the authority of *Johnson* v. *Barret* (3) he would be entitled, by reason of his actual possession, to maintain trespass against a wrongdoer.

These are certainly conflicting authorities, but *Johnson* v. *Barret* (3) is later in point of time than *Anon.* (2), and I think that the rule laid down in *Johnson* v. *Barret* (3) is more reasonable because it is better calculated to prevent wrongful trespasses than that of the former case. It is useful that the party whom the king allows to have the actual possession should be at liberty to call to account individuals who commit trespasses on the land, rather than that the Crown should be driven to its prerogative process to punish minute trespasses.

But, assuming that the doctrine in *Anon.* (2) is correct in point of law as applied to intruders, then the question arises, whether the plaintiff comes within the character of an intruder. It seems to me that he does not. I consider an intruder to be not merely a person who comes in without any legal sanction from the Crown, but one who comes in, if not against the will, at least without the knowledge of the Crown. Here the plaintiff was in the actual possession with the consent and concurrence of the Crown. It seems to me that if an information had been filed against him as an intruder, it would have been a good answer in point of law for him to show that by licence from the Crown he was in possession and in the actual occupation of the land. There is a material distinction between what is essential to be done to convey a title from the Crown so as to take away its right, and what is necessary to be done to confer a privilege so as to prevent a party exercising that privilege from being a wrongdoer. A title to Crown land can only be acquired by matter of record, but the Crown may by parol confer privileges so as to take away from itself the power of treating the party exercising the privilege as a wrongdoer. A corporation can only grant by deed, yet there are many things which a corporation has power to do otherwise than by deed. It may appoint a bailiff and do other acts of the like nature. It appears to me, then, that the plaintiff was in the actual possession of the land, and notwithstanding the authorities cited from LEONARD and GODBOLT, I am of opinion, that actual possession of Crown land, with the consent of the Crown, is sufficient to entitle the

A party possessing it to maintain trespass against persons who have no title at all, and who are mere wrongdoers.

The only remaining question is whether there was sufficient evidence to show that this was a public footway at the time when the action was commenced. By the Enclosure Act, which passed in 1805, all roads which had previously existed were to be discontinued, unless the commissioners otherwise directed B by their award. There was no such provision in the award as to this footpath, but it appeared that since 1805 it had been used by the public, and it was argued that such user was sufficient to warrant a court of law in holding it to be a public road. But the right of soil is in the Crown, and this cannot be a public way by dedication unless there be some evidence to show that the owner has consented to such user. *Wood* v. *Veal* (4), is an express authority to show that the consent C of the lessee is not sufficient for that purpose, because it cannot bind the owner of the inheritance. [But see now s. 1 (1) of the Right of Way Act, 1932 (11 HALSBURY'S STATUTES (2nd Edn.) 217) as amended by s. 58 of the National Parks and Access to the Countryside Act, 1949 (28 STATUTES 566).] It was there held that the owner of the fee when the lease expired had a right to prevent the public D from going along the road, notwithstanding it had been used by the public during the term. Besides, I think also that there was not sufficient evidence to warrant a conclusion that this road was used with the consent of any person in the occupation of the land. Upon the whole, therefore, I am of opinion, that the rule for a new trial ought to be discharged.

E **HOLROYD, J.**—After the very clear exposition of the law applicable to this subject by BAYLEY, J., and the comments which he has made on the different cases it will not be necessary for me to give my opinion at any length. I agree that the plaintiff took no legal estate from the Crown because the provisions of the statute 1 Ann., stat. 1, c. 7, s. 5, have not been complied with, and he could not, therefore, maintain an action of ejectment because he could not make any lease to vest an interest in the nominal plaintiff. The action of ejectment and F the action of trespass are very different in their nature. It is clearly established with respect to private property that trespass may be brought by a person in the actual possession against a wrongdoer or a person who has no right to enter upon the land or to do any act which is an injury to the actual possession. Although there appears to be some difference between the circumstances of *Johnson* v. *Barret* (3) and *Anon.* (2), inasmuch as in the former there may be ground for G saying that the Crown was not entitled to possession of the land until office found, I think that the latter case, explained as it is by the case in the YEAR BOOK, 19 Edw. 4, shows that the same rule of law applies to an intruder upon the possession of the Crown as to a person wrongfully in the possession of private property. If the Crown had treated the plaintiff as an intruder and had proceeded against him as a person in the wrongful occupation of the land, that might have made it a H very different case, but so far from anything of that kind having taken place, the occupation by the plaintiff appears to have been by the permission of the Crown. That permission was not sufficient to vest in him the legal interest in the land. As between the Crown and the plaintiff, the right of possession was not taken away from the Crown as it would have been if the owner of the land had been I a private person. The parol demise then would have created a tenancy from year to year or a tenancy at will. But, although that is not so as to land belonging to the Crown, yet, I think, the actual occupation of Crown land and enjoyment of the profits do, as between the person in such enjoyment and possession and a mere stranger, constitute a right which entitles the former to maintain trespass against any person coming to deprive him of any of the fruits of that possession. The doctrine laid down in *Anon.* (2) is consistent with the principles which prevailed in earlier times. According to the old rule it was an answer to an action of trespass brought against a wrongdoer for the defendant to show that the right

of soil was in a third person. For, although it was necessary for a defendant to allege in his plea that he entered by the command of the owner of the soil, the plaintiff was not at liberty to traverse the command. But that doctrine has been overruled by later cases. The law now is that an entry on the possession of another cannot be justified unless it be made by the authority of a person in whom the right of soil is vested. So, in this case, the question was not whether the plaintiff had a legal title to the land, but, assuming that he could not retain the actual possession against the Crown, the question was whether he was entitled to that possession against a third person as the Crown did not treat him as a wrongdoer. Although he could not retain the possession against the king, I think he may maintain trespass against a wrongdoer, but even against him he cannot maintain ejectment.

It appears to me that the payment of the rent, the exercise of the privilege of shooting over the land, and the actual cutting of the grass by the plaintiff's permission, was sufficient evidence to go to the jury, and for them to find that the plaintiff was in the actual possession of all but the trees. The actual taking of the grass by Wallace did not divest the plaintiff of his possession, because the former took it, not in his own right, but by permission of the plaintiff, and retained it only by his permission. I think there is no pretence for saying that there was any dedication of the way to the public.

LITTLEDALE, J.—I am of the same opinion. Generally speaking, trespass may be maintained by a person in the actual possession of land against a wrongdoer, even where that possession may be wrongful as against a third person. If a tenant hold over after the expiration of his lease or incur a forfeiture by committing waste or otherwise, the landlord would have a right to enter and as against him the tenant would have no right of possession, yet, if the landlord permitted him to continue in the actual possession, he might maintain trespass against any person entering upon him not having a better title than himself. A party, therefore, may be in such a situation, that he may be turned out himself, by a person having a better title, but not by a stranger. *Graham* v. *Peat* (5) is a very strong case upon this subject. There the plaintiff was in possession of glebe land under a lease which had become void by the non-residence of the rector, and it was held that after the lease had become void the lessee had a sufficient possession to enable him to maintain trespass against a wrongdoer, and the rector who had rendered this lease void by his own non-residence afterwards recovered possession of the land in ejectment: *Frogmorton* v. *Scott* (6). That is a direct authority to show that a party having no title as against his landlord, may still maintain trespass against a wrongdoer. *Anon.* (2), which is very loosely reported, is the only authority for the proposition that an intruder on the possession of the Crown cannot maintain trespass, but that probably was considered to be new law for one of the judges did not agree to the decision and it was subsequently overruled by *Johnson* v. *Barret* (3), although, perhaps, that case may more properly apply where office is necessary to entitle the Crown to possession. I, however, cannot consider that a person who is in possession of land by permission of the Crown, although without title, is an intruder. The plaintiff here does not claim under the Crown any interest for life, or for years; he merely claims the actual possession. Perhaps the Crown might call upon him to account for the whole profits which he has received from the land, but it does not, therefore, follow that he may not have as much right to maintain an action against a wrongdoer as the plaintiff in *Graham* v. *Peat* (5), for there the rector afterwards recovered the premises in ejectment, and was, of course, entitled to the profits of the land. I am, therefore, of opinion, that so long as the plaintiff had the land by licence from the Crown he had a sufficient possession to enable him to maintain trespass against a wrongdoer. I also think that there was sufficient evidence for the jury to find that he was in the actual occupation of the land, and that there

was no proof of a dedication of the way to the public. The rule for a new trial must, therefore, be discharged.

Rule discharged.

MASON *v.* HILL AND OTHERS

[COURT OF KING'S BENCH (Lord Denman, C.J., Littledale and Parke, JJ.), May 23, June 11, 1833]

[Reported 5 B. & Ad. 1; 2 Nev. & M.K.B. 747; 2 L.J.K.B. 118; 110 E.R. 692]

Water—Riparian rights—Right of lower riparian owner to restrain abstraction or injury to quality of water by upper riparian owner—Right of upper riparian owner where water dammed up or thrown back by lower riparian owner—Right of action as soon as water applied to purpose of utility—Rights of first occupant of running water.

The possessor of land through which runs a natural stream has a right to the advantage of that stream flowing in its natural course, and to use it as he pleases for any purposes of his own not inconsistent with a similar right in the proprietors of the land on the stream above and below him. No proprietor may diminish, to the prejudice of a lower riparian occupier, the quantity or injure the quality of water which would otherwise descend to the lower riparian occupier in a certain condition, nor can any proprietor dam up or throw back the water to the detriment of a proprietor higher up the stream. Whether the loss by diversion of general benefit of the stream be or be not such an injury in law as to sustain an action without proof of special damage, yet, as soon as the proprietor of the land has applied the water to some purpose of utility and is prevented from so doing by a diversion he has a right of action against the person diverting.

The first occupant of running water for a beneficial purpose cannot take away from the owner of land below him water which is one of the natural advantages of that land, is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied, and deprive him of it altogether by anticipating him in its application to a useful purpose.

Water—Ownership—Running water—Ownership only in water taken from stream and retained in possession.

Running water is not a bonum vacans in which anyone can acquire a property so that the first occupier of riparian land or the first person who appropriates a natural stream to a useful purpose has a title against the owner of land below him and may deprive that owner of the benefit of the natural flow of water. Flowing water is only publici juris in the sense that it is public or common to all who have a right of access to it in the sense that all may drink it or apply it to the necessary purposes of supporting life. No one has any property in the water itself except in that particular portion which he has abstracted from the stream and of which he has possession, and that during the time of such possession only.

Notes. Distinguished: *Arkwright* v. *Gell* (1839), 5 M. & W. 203. Considered: *Acton* v. *Blundell* (1843), 12 M. & W. 324; *Wood* v. *Waud*, [1843–60] All E.R. Rep. 894; *Embrey* v. *Owen* (1851), 6 Exch. 353; *Dickinson* v. *Grand Junction Canal Co.* (1852), 7 Exch. 282; *Chasemore* v. *Richards*, [1843–60] All E.R. Rep. 77. Applied: *Holker* v. *Porritt* (1875), L.R. 10 Exch. 59. Approved: *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839. Considered: *Ormerod* v. *Todmorden Mill Co.* (1883), 11 Q.B.D. 155. Referred to: *Cocker* v. *Cowper* (1834), 5 Tyr. 103;

Bower v. *Hill* (1835), 1 Scott, 526; *Sampson* v. *Hoddinott* (1857), 1 C.B.N.S. 590; *Gaved* v. *Lovering* (1865), 19 C.B.N.S. 732; *Wilts and Berks Canal Navigation Co.* v. *Swindon Water Works Co.* (1873), 9 Ch. App. 453, n. A

As to the ownership of water and riparian rights, see 39 HALSBURY'S LAWS (3rd Edn.) 506–508, 514 et seq.; and for cases see 44 DIGEST 5–9, 11 et seq.

Cases referred to: B

(1) *Bealey* v. *Shaw* (1805), 6 East, 208; 2 Smith, K.B. 321; 102 E.R. 1266; 44 Digest 23, *145*.

(2) *Liggins* v. *Inge* (1831), 7 Bing. 682; 5 Moo. & P. 712; 9 L.J.O.S.C.P. 202; 131 E.R. 263; 44 Digest 5, *4*.

(3) *Earl of Rutland* v. *Bowler* (1622), Palm. 290; 81 E.R. 1087; 44 Digest 14, *58*.

(4) *Saunders* v. *Newman* (1818), 1 B. & Ald. 258; 106 E.R. 95; 44 Digest 31, *227*. C

(5) *Williams* v. *Morland* (1824), 2 B. & C. 910; 4 Dow. & Ry. K.B. 583; 2 L.J.O.S.K.B. 191; 107 E.R. 620; 44 Digest 5, *3*.

(6) *Cox* v. *Matthews* (1673), 1 Vent. 237.

(7) *Prescott* v. *Phillips* (1798), cited in 6 East, at p. 213; 102 E.R. 1268; 44 Digest 21, *127*.

(8) *Wright* v. *Howard*, *Howard* v. *Wright* (1823), 1 Sim. & St. 190; 1 L.J.O.S. Ch. 94; 57 E.R. 76; 19 Digest (Repl.) 161, *1057*. D

(9) *Hebblethwaite* v. *Palmes* (1688), 3 Mod. Rep. 48; 87 E.R. 30; sub nom. *Heblethwaite* v. *Palms*, Carth. 84; Holt, K.B. 5; sub nom. *Keblethwait* v. *Palmes*, Comb. 9; sub nom. *Nulmes* v. *Hoblethwayte*, 3 Lev. 133; sub nom. *Palmer* v. *Keblethwaite*, 1 Show. 64; sub nom. *Palmis* v. *Heblethwait*, 2 Show. 249; Skin. 65; 44 Digest 25, *169*. E

(10) *Glyn* v. *Nichols* (1688), Comb. 43; 90 E.R. 333; sub nom. *Glynne* v. *Nichols*, 2 Show. 507; 44 Digest 26, *178*.

Also referred to in argument:

Hewlin v. *Shippam* (1826), 5 B. & C. 221; 7 Dow. & Ry.K.B. 783; 4 L.J.O.S. K.B. 241; 108 E.R. 82; 19 Digest (Repl.) 6, *2*.

Bryan v. *Whistler* (1828), 8 B. & C. 288; 2 Man. & Ry.K.B. 318; 6 L.J.O.S. K.B. 302; 108 E.R. 1050; 19 Digest (Repl.) 26, *118*. F

Winter v. *Brockwell* (1807), 8 East, 308; 103 E.R. 359; 19 Digest (Repl.) 28, *128*.

Canham v. *Fisk* (1831), 2 Cr. & J. 126; 2 Tyr. 155; 1 L.J.Ex. 61; 149 E.R. 153; 44 Digest 8, *18*.

Taylor v. *Waters* (1816), 7 Taunt. 374; 2 Marsh. 551; 129 E.R. 150; 19 Digest (Repl.) 21, *83*. G

Action for damages against the defendants for having wrongfully diverted from a stream water to which the plaintiff was entitled for use in connection with his mill, and for spoiling water which the defendants returned to the stream.

A stream of water, called the Stubbs Brook, until the diversions thereof after-mentioned ran and flowed by the northern end of Newcastle-under-Lyne, in a southerly direction by the corner of a garden called Kinnersley's Garden, into and through a certain croft called Hatrell's Croft, by a tree there called the Sitchwell Tree, thence into a piece of land called the Parson's Flat by a spring there called the Sitchwell Spring, and thence by and through other closes into a croft called Ashley's Croft, part of which belonged to the defendants and part to the plaintiff. In the latter part were situate a mill, factory, and premises of the plaintiff, and the stream flowed only through that part of the croft, and thence through another close into the Newcastle Lower Canal. A considerable quantity of pure water at all times ran and flowed from the Sitchwell Spring, and also from other springs called the Over Canal Springs, into the stream. The last-mentioned springs flowed into the stream below the Sitchwell Spring, and the stream, before the diversions thereof hereinafter mentioned, flowed along its natural and ancient course through and along Ashley's Croft. H I

A For upwards of twenty years before 1818 Thomas Ashley, the father, who was then the occupier and owner of the whole of Ashley's Croft, appropriated and used the water of the stream and springs for watering his cattle and also for irrigating that part of the croft which now belonged to the plaintiff. In 1818 the defendants erected a mill in a certain close adjoining Ashley's Croft, near, but not contiguous to the stream, and at that time Thomas Ashley, the son, who B was then the occupier and owner of the whole of Ashley's Croft, gave to the defendants a parol licence to make a dam at the Sitchwell Tree, higher up the stream than the Sitchwell Spring and the Over Canal Springs, and to take what water of the stream they pleased from that point to their mill, which water, after being used at the mill, was to be returned by pipes into the bed or channel of the stream higher up than that part of Ashley's Croft which now belonged to C the plaintiff. In consequence of this licence, the defendants, in 1818, erected a dam, and thereby took part of the water of the stream above the Sitchwell Spring and the Over Canal Springs for the use of their mill by means of pipes laid down at their own expense. For a considerable time they returned part of such water, by means of other pipes, into the stream between the Sitchwell Spring and that part of Ashley's Croft which now belonged to the plaintiff. Also in 1818 the D defendants collected into a tank part of the water of the Over Canal Springs, and, by means of pipes, carried it over the brook into the reservoir which received the water taken under the licence from the Sitchwell Tree. That licence, however, did not extend to take Sitchwell Spring water from the Over Canal Springs. After the dam was made part of the water of the stream which from time to time flowed over and through the dam, all the water from the Sitchwell Spring, E and, after the making of the tank, the water from the Over Canal Springs which was not collected in the tank flowed at all times in its ancient and natural course through Ashley's Croft until the diversion thereof by the defendants mentioned below.

In 1823 the plaintiff erected a factory on that part of Ashley's Croft which F belonged to him, by the side of the stream, and, by the leave and licence of the defendants, laid down pipes between his mill and that of the defendants, and took the hot water which came from the mill of the defendants into his (the plaintiff's) factory for the purposes thereof, until February, 1829, when the communication by means of the pipes was cut off by the plaintiff. At that time and until the diversion thereof by the defendants as hereinafter mentioned, the G plaintiff used for the purposes of his premises part of the water of the stream which flowed over and through the dam at the Sitchwell Tree, and also the whole of the water which flowed from the Sitchwell Spring, such part of the Over Canal Springs water as was not taken into the tank, and all the water which was returned by the pipes of the defendants into the stream. In October, 1828, the plaintiff erected a steam-engine and mill for the purposes of his factory.

H In January, 1829, the plaintiff destroyed the dam made by the defendants at the Sitchwell Tree. The defendants re-erected it and the plaintiff again destroyed it in order that the water might run along its ancient and natural course. On February 18 the plaintiff gave notice to the defendants not to divert or turn the water of the stream from its ancient and natural channel. In June the defendants erected another dam across the stream, lower down than the place I where the Sitchwell Spring and such part of the Over Canal Springs as were not taken into their tank, flowed into the stream by means of which dam all the water of the stream was diverted from its ancient and natural course, and was prevented from flowing along the same to the premises of the plaintiff. On certain days between the making of the second dam and the commencement of the present action, all the water was taken by the defendants from the stream, and no water was returned by the defendants into the stream, but the water from the stream was on those days diverted by the defendants into a totally different direction. Although on other days since the second dam had been made some water was

returned by the defendants into the stream, yet, from day to day, as much water was not returned by the defendants into the stream as was taken from it by them, and the water which was returned by the defendants came back in a heated state. The second dam diverted more water than the dam made by them at the Sitchwell Tree in 1818. After the dam at the Sitchwell Tree had been demolished by the plaintiff the defendants might have erected it again in the same place. They were not prevented from so doing by the plaintiff.

The jury returned a special verdict stating the facts as above set out and that, by means of the premises the plaintiff was prevented from enjoying his mill and factory and carrying on his business as alleged by him. If it should appear to the court on the whole matter that the defendants were guilty, the jurors in that case assessed the damages of the plaintiff, by reason of the defendants having prevented so much of the water of the stream as was formerly taken by the defendants under the licence of 1818 by means of the dam at the Sitchwell Tree, from running and flowing down its ancient and natural course to the mill, engine, factory, and premises of the plaintiff, at 1s. They further assessed the damages of the plaintiff by reason of the defendants having prevented so much of the water of the stream as after the dam was made at the Sitchwell Tree flowed over and through the same, and also for having hindered and prevented the whole of the water of the Sitchwell Spring, and also so much of the water of the Over Canal Springs as after the making by the defendants of the tank mentioned above was not collected in the same from running and flowing down its ancient and natural course to the mill of the plaintiff, at 1s. They further assessed the damages of the plaintiff by reason of the defendants having diverted and collected in the tank part of the water of the Over Canal Springs and prevented the same from running and flowing down its ancient and natural course to the mill of the plaintiff, at 1s. They further assessed the damages, by reason of the defendants having returned into the stream in a heated state, such part of the water as they did return after having diverted the same, at 1s.

Sir John Campbell for the plaintiff.
Serjeant Peake for the defendants.

Cur. adv. vult.

June 11, 1833. **DENMAN, C.J.,** delivered the following judgment of the court. —The substance of the special verdict is this. The defendants' mill was erected in 1818; the plaintiff's in 1823, on a piece of land, the former owner and occupier of which had, for twenty years prior to 1818, appropriated the water of the stream and springs for watering his cattle and irrigating that land. At the time when the defendants' mill was erected, the then owner and occupier of the plaintiff's land gave a parol licence to the defendants to make a dam at a particular place above where the Sitchwell Tree stood, and to take what water they pleased from that point to their mill, which water was so taken and returned by pipes into the stream, above the spot where the plaintiff's mill was afterwards erected. In 1818 the defendants conducted part of the water of the Over Canal Springs, which had before flowed into the stream, into a reservoir for the use of their mill. After the plaintiff erected his mill, namely, in 1828, he appropriated to its use all the surplus water, viz., that which flowed over and through the dam, that from the Over Canal Springs which was not conducted into the reservoir, all from the Sitchwell Spring (which was another feeder of the brook), and also that which was returned by the defendants into the stream. In January, 1829, the plaintiff demolished the dam at the Sitchwell Spring. The defendants erected a new dam lower down, and by means of it diverted from the plaintiff's mill at some times all the stream, including all the water so appropriated, and at others a part of it, and returned the remainder in a heated state into the stream.

The questions upon this special verdict are whether the plaintiff is entitled to

recover, for the diversion of the whole water of the stream, or of any and what part of it, or for the heating of the part returned?

That the plaintiff has a right to a verdict for the injury sustained by the abstraction of the whole of the surplus water, and by the abstraction of part and the heating of the remainder of that surplus water, does not admit of the least doubt. In any view of the law on this subject—whether the right to the use of flowing water be in the first occupant, as the defendants allege, or in the possessor of the land through which it flows in its natural course, as is contended on the other side—the plaintiff was entitled to this surplus, for he filled both characters. He was the first occupant of it, and the owner and occupier of the land through which it flowed. In this respect the case is exactly like that of *Bealey* v. *Shaw* (1). Counsel for the defendants argued that, inasmuch as the plaintiff pulled down the dam at the Sitchwell Tree, in consequence of which the new dam was erected, he must be considered as the author of the mischief, and has no right to complain of it. It is, however, quite impossible to sustain such a position. If the plaintiff committed a wrongful act in demolishing the dam, the defendants might have restored it or brought an action. They had no right to construct another at a different place, and by means of it abstract more water than the other did.

The remaining questions are whether the plaintiff can recover in respect of the abstracting or the injury by heating of that portion of water which was before diverted by the licence of the then owner and occupier of the plaintiff's field; and, secondly, in respect of that portion of the Over Canal Springs which was conveyed in 1818 to the defendants' reservoir, both of which portions have been at one time entirely, and at another partially, abstracted, and in the latter case returned in a heated state into the brook. We are of opinion that the plaintiff is entitled to recover in respect of both.

As to the first of these portions, the defendants contend that the plaintiff has no right of action because the former owner and occupier of his land gave an irrevocable licence by parol to the defendants to divert so much water by the Sitchwell Tree Dam. To prove that a parol licence to divert water, which had been acted upon by the person to whom it was given and expense occurred in consequence, is irrevocable, *Liggins* v. *Inge* (2) was cited. But, admitting that the licence to abstract the water at that particular point, and by means of that dam, was irrevocable, and, therefore, that the plaintiff was a wrongdoer in pulling the dam down, it by no means follows that the plaintiff is not to recover for an equal portion of water abstracted at a different place. In the first place, the licence is not general, to take away at any point, but at this only; and, in the second place, if the licence had been general, to take away at any place, it would have been clearly revocable except as to such places where it had been acted upon, and expense incurred (for it is on that ground only that such a licence can be irrevocable), and, as it was revoked before the last dam was erected, the defendants could not justify the abstraction of any portion of the water by virtue of the licence at such dam.

The last question is whether the plaintiff ought to recover in respect of that portion of the water which was diverted from the Over Canal Springs, and collected in a tank in 1818. This was taken without licence and appropriated by the defendants to the use of their mills before any other appropriation, but it has not been so appropriated for twenty years. The point to be decided is whether the defendants, by so doing, acquired any right to this against the plaintiff through whose field it would otherwise have flowed in its natural course. We are of opinion that they did not.

This point might, perhaps, be disposed of in favour of the plaintiff even admitting the law to be as contended for by the defendants—that the first occupant acquires a right to flowing water, for, by this special verdict, all the water of the brook is found to have been appropriated by Ashley, the father, and used for twenty

years up to the year 1818 for watering his cattle and irrigating the field, now the plaintiff's. A right to use the water, thus acquired by occupancy, in right of the field, must have passed to the plaintiff, and could not be lost by mere non-user from 1819 to 1829, and the total or partial abstraction of the water may be an injury to such a right in point of law, though no actual damage is found by the jury to have been sustained in that respect. But we do not wish to rest a judgment for the plaintiff on this narrow ground. We think it much better to discuss, and, as far as we are able, to settle the principle upon which rights of this nature depend.

The proposition for which the plaintiff contends is that the possessor of land through which a natural stream runs has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for any purposes of his own not inconsistent with a similar right in the proprietor of the land above and below—that neither can any proprietor above diminish the quantity or injure the quality of water which would otherwise descend, nor can any proprietor below throw back the water without his licence or grant—and that, whether the loss by diversion of the general benefit of such a stream be or be not such an injury in point of law as to sustain an action without some special damage, yet, as soon as the proprietor of the land has applied it to some purpose of utility and is prevented from so doing by the diversion, he has a right of action against the person diverting. The proposition of the defendants is that the right to flowing water is publici juris, and the first person who can get possession of the stream and apply it to a useful purpose has a good title to it against all the world, including the proprietor of the land below who has no right of action against him unless such proprietor has already applied the stream to some useful purpose also with which the diversion interferes, and, in default of his having done so, may altogether deprive him of the benefit of the water. In deciding this question, we might content ourselves by referring to and relying on the judgment of this court in this case, on the motion for a new trial (3 B. & Ad. 304) but, as the point is of importance and the form in which it is now again presented to us leads to a belief that it will be carried to a court of error, we think it right to give the reasons for our judgment more at large.

The position that the first occupant of running water for a beneficial purpose has a good title to it is perfectly true in this sense, that neither the owner of the land below can pen back the water nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrongdoer, and the owner of the land who applies the stream that runs through it to the use of a mill newly erected or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill: *Earl of Rutland* v. *Bowler* (3). But it is a very different question, whether he can take away from the owner of the land below one of its natural advantages which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied, and deprive him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall within its limits, might at any time be taken away, and by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises and converted to the profit of another.

We think, that this proposition has originated in a mistaken view of the principles laid down in *Bealey* v. *Shaw* (1), *Saunders* v. *Newman* (4), and *Williams* v. *Morland* (5). It appears to us also that the doctrine of BLACKSTONE and the dicta of learned judges, in some of those cases and in *Cox* v. *Matthews* (6), have been misconceived. In *Bealey* v. *Shaw* (1) the point decided was that the owner of land through which a natural stream ran (which was diminished in quantity by having been in part appropriated to the use of works above for twenty years

and more without objection) might, after erecting a mill on his own land, maintain an action against the proprietor of those works, for an injury to that mill by a further subsequent diversion of the water. This decision is in exact accordance with the proposition contended for by the plaintiff—that the owner of the land through which the stream flows, may, as soon as he has converted it to a purpose producing benefit to himself, maintain an action against the owner of the land above for a subsequent act by which that benefit is diminished, and it does not in any degree support the position that the first occupant of a stream of water has a right to it against the proprietor of land below. LORD ELLENBOROUGH, C.J. (6 East, at pp. 214, 215) distinctly lays down the rule of law to be that

> "independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration. But an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream, subject to such adverse right."

LAWRENCE, J., confirms the opinion of GRAHAM, B., (ibid. at p. 211), on the trial, that

> " persons possessing lands on the banks of rivers had a right to the flow of the water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use."

LE BLANC, J., in his judgment, says (ibid. at p. 219):

> "The true rule is, that after the erection of works and the appropriation by the owner of land of a certain quantity of the water flowing over it, if a proprietor of other land afterwards takes what remains, the first-mentioned owner, however he might, before such second appropriation have taken to himself so much more, cannot do so afterwards."

This expression, in which, in truth, that learned judge cannot be considered as giving any opinion upon the effect of a prior appropriation, is the only part of the case which has any tendency to support the doctrine contended for by the defendants.

Saunders v. *Newman* (4) is no authority upon this question, and is cited only to show that HOLROYD, J., quotes the opinion of LE BLANC, J., above mentioned, and he confirms it, so far as this, that the plaintiff, by erecting his new mill, appropriated to himself the water in its then state, and had a right of action for any subsequent alteration, to the prejudice of his mill, about which there is no question.

The last and principal authority cited is *Williams* v. *Morland* (5). The case itself decides no more than that the plaintiff, having in his declaration complained that the defendants had, by a floodgate across the stream above, prevented the water from running in its regular course through his (the plaintiff's) land, caused it to flow with increased force and impetuosity, and thereby undermined and damaged the plaintiff's banks, could not recover, the jury having found that no such damage was sustained. The judgments of all the judges proceed upon this ground, though there are some observations made by BAYLEY, J., which would seem at first sight to favour the proposition contended for by the defendants. These observations are (2 B. & C. at p. 913):

> "Flowing water is originally publici juris. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains publici

juris. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such a right, ought to show that he is prevented from having water which he has acquired a right to use for some beneficial purpose."

The dictum of TINDAL, C.J., in *Liggins* v. *Inge* (2) is to this effect (7 Bing. at pp. 692, 693):

"Water flowing in a stream, it is well settled by the law of England, is publici juris. By the Roman law, running water, light, and air, were considered as some of those things which were res communes, and which were defined 'things, the property of which belongs to no person, but the use to all.' And by the law of England, the person who first appropriates any part of this water flowing through his land to his own use, has the right to the use of so much as he then appropriates, against any other."

For that he cites *Bealey* v. *Shaw* (1), which case, however, is no authority for this position so far as relates to the owner of the land below, and probably, therefore, the Lord Chief Justice intended the expression "any other" to apply only to those who diverted or obstructed the stream.

To these dicta may be added the passage from BLACKSTONE'S COMMENTARIES, vol. 2, p. 14:

"There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and, therefore, they still belong to the first occupant during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such also, are the generality of those animals which are said to be feræ naturæ, or of a wild and untameable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards."

Further, in the same volume, p. 18:

"Water is a movable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it."

None of these dicta, when properly understood with reference to the cases in which it was cited and the original authorities in the Roman law from which the position that water is publici juris is deduced, ought to be considered as an authority, that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose has a title against the owner of land below and may deprive him of the benefit of the natural flow of water.

The Roman law is as follows (2 INST. [JUSTINIAN], tit. 1, s. 1):

"Et quidem naturali jure, communia sunt omnium hæc: aer, aqua profluens, et mare, et per hoc littora maris."

It is worthy of remark, that FLETA, enumerating the res communes, omits "aqua profluens:" lib. 3, ch. 1. VINNIUS, in his COMMENTARY ON THE INSTITUTES [of JUSTINIAN], explains the meaning of the text

"communia sunt quæ à natura ad omnium usum prodita, in nullius adhuc ditionem aut dominium pervenerunt: Huc pertinent, præcipue aer et mare, quæ

A cum propter immensitatem, tum propter usum, quem in commune omnibus debent, jure gentium divisa non sunt, sed relicta in suo jure, et esse primævo adeoque nec dividi potuerunt. Item aqua profluens, hoc est aqua jugis, quæ vel ab imbribus collecta, vel e venis terræ scaturiens, perpetuum fluxum agit, flumenque aut rivum perennem facit. Postremò propter mare, etiam littora maris. In hisce rebus duo sunt, quæ jure naturali omnibus competunt. B Primum communis omnium est harum rerum usus, ad quem natura comparatæ sunt, tum siquid earum rerum per naturam occupari potest, id catenus occupantis fit, quatenus ea occupatione usus ille promiscuus non læditur."

The author proceeds to describe the use of water,

"aqua profluens ad lavandum et potandum unicuique jure naturali concessa."

C The law as to rivers is:

"Flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque."

VINNIUS, in his commentary on this passage, says: "Unicuique licet in flumine publico navigare et piscari." He proceeds to distinguish between a river and D its water, the former being, as it were, a perpetual body and under the dominion of those in whose territories it is contained, the latter being continually changing and incapable, while it is there, of becoming the subject of property, like the air and sea. In the DIGEST, bk. 43, tit. 13, in public rivers, whether navigable or not, it appears that every one was forbidden to lower the water or narrow the course of the stream, or in any way to alter it to the prejudice of those who E dwelt near. Title 12 distinguishes between public and private rivers, and in s. 4 it is said that private rivers in no way differ from any other private place.

From these authorities it seems that the Roman law considered running water, not as a bonum vacans in which any one might acquire a property, but as public or common, in this sense only, that all might drink it, or apply it to the necessary purposes of supporting life, and that no one had any property in the water itself F except in that particular portion which he might have abstracted from the stream and of which he had the possession, and during the time of such possession only. We think that no other interpretation ought to be put upon the passage in BLACKSTONE, and that the dicta of the learned judges above referred to, in which water is said to be publici juris, are not to be understood in any other than this sense, and it appears to us that there is no authority in our law, nor, as far as we know, G in the Roman law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein.

It remains to observe upon one case which was cited for the defendants—*Cox* v. *Matthews* (6)—in which LORD HALE said (1 Vent. 237):

H "If a man hath a watercourse running through his ground and erects a mill upon it, he may bring his action for diverting the stream, and not say antiquum molendinum; and upon the evidence, it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that he used to turn the stream as he saw cause; for otherwise he cannot justify I it, though the mill be newly erected."

What is said by LORD HALE is perfectly consistent with the proposition insisted upon by the plaintiff, and the defendants in the supposed case would have no right to divert unless they had gained it by prescription (which is the meaning of LORD HALE), or, according to the modern doctrine, until the presumption of a grant had arisen. This view of the case accords with the law, as laid down by SERJEANT ADAIR, Chief Justice of Chester, in *Prescott* v. *Phillips* (7), by LORD LILLESBOROUGH in *Beale* v. *Shaw* (1), and by SIR JOHN LEACH, V.-C., in his luminous judgment in *Howard* v. *Wright* (8).

We are, therefore, clearly of opinion that the plaintiff is entitled to recover in respect of the abstracting of the water taken from the Over Canal Springs, as well as the other injuries complained of, for which damages have been assessed by the jury.

As to the right to recover for the injury sustained, by the water being returned in a heated state, there can be no question. Whether he could have maintained an action before he had constructed his mill or applied the water of the stream to some profitable purpose, we need not decide. It may be proper, however, to refer to two cases not cited in the argument. In *Palmer* v. *Kebblethwaite* (9) the declaration merely stated that the water used and ought to run to the plaintiff's mill, and LORD HOLT said (1 Show. at p. 64):

> "Suppose a watercourse run to my ground, and I have no use for it, and one upon another ground divert it before it comes to mine, will an action lie? Is not this the same? Must you not lay some use for it? But you will speak to it again."

In the report of the same case in SKINNER, 65, POLLEXFEN in argument said he took it to be a clear case that, the stream being the plaintiff's, the defendant could not divert it, and so held the court, that an action had lain for diverting the stream though no mill had been erected. The final result of that case does not appear in the books, and the roll has been searched for in vain.

In *Glynne* v. *Nichols* (10) a similar question was raised which appears from the report of the same case in COMBERBACH, 43, to have been decided for the plaintiff. It must not, therefore, be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water, without a special use or special damage shown. But be that as it may, the plaintiff in this case, who has sustained actual damage, is entitled to the judgment of the court.

Judgment for plaintiff.

ATTORNEY-GENERAL FOR IRELAND (AT THE RELATION OF M'MULLEN AND OTHERS) *v.* DUBLIN CORPORATION

[HOUSE OF LORDS (Lord Lyndhurst, L.C., Lord Redesdale and the Earl of Eldon), February 23–26, March 8, May 10, 1827]

[Reported 1 Bli. N.S. 312; 4 E.R. 888]

Charity—Public charity—Rate fund of municipal corporation—Order for account—Jurisdiction of Chancery Court.

The Court of Chancery [now the Chancery Division of the High Court] has jurisdiction to call on a municipal corporation to account for money paid to the corporation by ratepayers, the corporation being trustees of the municipal property and the objects for which that property is held being charitable objects in the legal sense.

Charity—Proceedings—Information filed by Attorney-General—Execution of charitable purpose—Misapplication of charitable funds—Need for relator—Liability for costs.

Where proceedings are necessary to enforce the execution of a charitable purpose or to deal with an alleged misapplication of charitable funds they should be by way of information filed by the Attorney-General. The right of the Attorney-General to file an information is a prerogative right. The Sovereign, as parens patriae, has a right by the Attorney-General to call on the courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as, e.g., in the case of a charity. The Attorney-General may appear with or without a relator, but a relator is properly introduced by the Attorney-General so that there may be some person responsible for the costs

of the proceedings should the court dismiss the information, for the court cannot award costs against the Attorney-General.

Notes. Considered: *A.-G.* v. *Liverpool Corpn.*, *A.-G.* v. *Aspinall* (1837), 7 L.J.Ch. 51; *A.-G.* v. *Eastlake* (1853), 11 Hare, 205. Referred to: *Ludlow Corpn.* v. *Greenhouse* (1827), 1 Bli. N.S. at p. 83; *A.-G.* v. *Carlisle Corpn.* (1828), 2 Sim. 437; *A.-G.* v. *East Retford Corpn.* (1838), 3 My. & Cr. 484; *Armitstead* v. *Durham* (1848), 11 Beav. 556; *Nightingale* v. *Goulbourn*, [1843–60] All E.R. Rep. 420; *Re St. Botolph Without Bishopsgate Estates* (1887), 35 Ch.D. 142.

As to public charitable purposes and the parties to proceedings, see 4 HALSBURY'S LAWS (3rd Edn.) 226–232, 394, 414–419, 439 451. For cases see 8 DIGEST (Repl.) 342 et seq., 488, 489, 508–511, 516 et seq.

Cases referred to:

(1) *A.-G.* v. *Brown* (1818), 1 Swan. 265; 1 Wils. Ch. 323; 36 E.R. 384, L.C.; 8 Digest (Repl.) 345, *262*.

(2) *A.-G.* v. *Heelis* (1824), 2 Sim. & St. 67; 2 L.J.O.S. Ch. 189; 57 E.R. 270; 8 Digest (Repl.) 343, *246*.

(3) *Ludlow Corpn.* v. *Greenhouse* (1827), 1 Bli. N.S. 17; 4 E.R. 780, H.L.; 43 Digest 1023, *4630*.

Appeal from an order of the Lord Chancellor of Ireland dismissing an information filed by the Attorney-General for Ireland.

The corporation of Dublin having, before the year 1777, supplied water to the inhabitants of the city from works which they had constructed, but the rents which they received being inadequate to the maintenance of the water-works, by an Irish Act of that year commonly called the Water Pipe Act, the owners or occupiers of houses were compelled to provide branch pipes from the mains of the company to the houses, and the corporation were empowered to charge the owners or occupiers with certain fixed annual rates or rents in order to enable them to construct new mains and extend their works, to borrow money for those purposes, and to mortgage the rates for the repayment of the money so borrowed. Under the authority of that Act, the corporation borrowed, on the credit of the water rates, sums of money which in 1809 amounted to £67,800. In that year the corporation obtained a new Act of Parliament, commonly called the Metal Main Act, by which they were empowered to borrow, at stated annual periods, a further sum amounting to £32,200, and to charge the debt upon the rates granted by that and the former Acts. The Act required that the interest of the money borrowed under the Act should be retained out of the rates thereby granted as well as a further sum of £2,000 to be appropriated as a sinking-fund to pay off the whole debt for money borrowed under that and the former Acts. The Act directed that distinct accounts should be kept of the rates received under the Act and that the surplus, after providing for the interest of the whole debt, should be applied in laying down iron or metal main and service pipes, in the general improvement and extension of the water-works, and to increase the sinking-fund. The Act then provided that the corporation should furnish annually, to be laid before Parliament, an account of the sums received by them under that Act and the former Acts, and of the manner in which the same had been expended and applied. Finally, a provision was made by the Act for the appropriation to the sinking-fund of any further surplus out of the rates. In 1823 an information and bill was filed by the Attorney-General for Ireland, at the relation of certain inhabitants of Dublin paying water rates, against the corporation, which, stating various acts of mismanagement and misappropriation of the funds arising from the rates, submitting that the corporation were trustees under the Act, of rates thereby given for uses which were charitable in their nature, and charging that the conduct of the corporation amounted to a breach of trust, prayed a declaration and execution of the trust, and that accounts might be taken of the rates received by the corporation and the application thereof, and of the sums annually applied

to the sinking-fund and the money borrowed and due on the credit of the rates which had been applied in payment of the principal and interest of the debt. To this information and bill the corporation put in an answer by which, after admitting many of the principal facts and setting forth various accounts, they submitted that they were not trustees, that the purposes specified in the Acts were not charitable uses, that the Act required the accounts to be furnished annually to the Lord Lieutenant to be laid before Parliament, which having been done, it was a bar to the jurisdiction of the court. The cause was heard on July 21 and 22, 1824, when the Lord Chancellor of Ireland decreed that the information should stand dismissed with costs, for want of jurisdiction. The Attorney-General for Ireland appealed.

Shadwell and *Sugden* for the appellant.
Sir Charles Wetherell and *Pepys* for the respondent corporation.

LORD LYNDHURST, L.C., at the conclusion of the argument said: This is a case of very great importance to the parties, and more so as to the general doctrine to be established or overturned.

Only two cases have been mentioned which bear directly upon the main question in the cause. In *A.-G.* v. *Brown* (1) the question was much argued whether the fund was to be applied to a charitable use? After the argument it appeared to me that it was a charitable use. But that was not the ground of the judgment in that case, whether it was well or ill founded, because I was of opinion that the Court of Chancery had jurisdiction in that case whether it was or was not a charitable use. *A.-G.* v. *Heelis* (2) weakens the authority of *A.-G.* v. *Brown* (1); because much of the doctrine of the vice-chancellor in the former case is not reconcilable with the principle of the decision of *A.-G.* v. *Brown* (1).

But in neither of those cases did the court look sufficiently into the old law upon the subject. The research which has been made by Lord Redesdale into the old books as to the writ of account confirms my decision in *A.-G.* v. *Brown* (1) rather than the judgment in *A.-G.* v. *Heelis* (2). But, without looking to the power in the common law to enforce the account, the jurisdiction being established in the courts of equity, it will be necessary, in reviewing the judgment of the court below, to consider (i) the law of the case according to the doctrines of a court of equity if no special facts except the case out of the ordinary rule; (ii) supposing the courts of equity to have jurisdiction in such cases, whether any of the Acts of Parliament passed for the purposes in question destroy the jurisdiction of the courts of equity upon the subject, that is, whether such powers are given by the Act as expressly, or by necessary implication, displace the jurisdiction. The question of jurisdiction is the more material because the Lord Chancellor of Ireland has not shown distinctly what his opinion would have been if he had been accurately acquainted with *A.-G.* v. *Brown* (1) and *A.-G.* v. *Heelis* (2). He takes notice that two judges in England have differed upon the question, and says that if *A.-G.* v. *Brown* (1) is right, it proceeds upon the ground that there is no other jurisdiction. But I do not admit that *A.-G.* v. *Brown* (1) proceeds upon that ground.

Mar. 8, 1827. **LORD REDESDALE.**—This is an information which was filed by His Majesty's Attorney-General in Ireland in consequence of an investigation which had taken place respecting certain duties which were to be levied upon persons who are householders and owners of houses in the city of Dublin and the liberties of that city for the purpose of paying the corporation of Dublin a remuneration for the supply of water which was to be afforded to the citizens of Dublin. It is unnecessary to enter into the whole subject, the question which is now before your Lordships being properly merely a question whether a proper mode of proceeding has been adopted in this case for the purpose of compelling the mayor and corporation of Dublin to account for certain rates which they

A are entitled to receive under the authority of an Act of Parliament and to apply them according to the terms of that Act of Parliament, or whether the persons who have instituted this suit have not mistaken their remedy because another jurisdiction is supplied by the Act which authorised the establishment of those rates and duties, or by a more general Act which directed certain public accounts to be taken in a particular way.

B Looking into a note with which I have been furnished of what was the judgment of the Lord Chancellor of Ireland, I find that he thought fit to dismiss this information as being improperly instituted, and that judgment seems to be founded upon an idea that there was another jurisdiction, and that that jurisdiction was before the Commissioners of Public Accounts. It has been contended at your Lordships' Bar that there is no jurisdiction in consequence of the Act which C creates these duties having directed that the mayor and corporation of Dublin should lay their accounts before the two Houses of Parliament. It seems to me most singular that directing the accounts to be laid before the two Houses of Parliament, who are perfectly incompetent to take the accounts, who never act in the character of a court of justice for any such purpose—the mere laying those accounts before the two houses of Parliament—should defeat every jurisdic- D tion which would have a right to take those accounts if that provision had not been made. I do not find that the Lord Chancellor of Ireland so considered it. He conceived that the accounts might be properly taken under the commissioners for examining and taking the public accounts, as they are called. The Act passed for the purpose of taking and directing the manner of taking the public accounts, E i.e., accounts relating to the public moneys applied for the public purposes of government, which may be for special purposes directed by the government of the country, proceeds, it is true, to give to the Commissioners of Public Accounts a jurisdiction with respect to certain establishments to which either the Parliament of Ireland, while it was a separate Kingdom, or the Parliament of the United Kingdom after the Union, had granted certain sums of public money in assistance F of their funds, but all those are specially enumerated in the Act, and distinguished from what are called public accounts, it being the clear construction of the Act that what are called public accounts are the accounts of the application of public money—that money which belongs to the State, and not the application of money not belonging to the State. If a general jurisdiction of this description had been intended, the Act of Parliament would unnecessarily have mentioned these par- G ticular establishments. There was no occasion to mention them, according to the argument in this case, but by mentioning them specially and particularly it is clear that the Act of Parliament did not intend by the words "public accounts," to include any accounts of this description.

I take it, therefore, to be perfectly clear, that the Act of Parliament for taking the public accounts does not extend to this case. But there is a power given by H the Act of Parliament in certain cases to the Lord Lieutenant to order certain accounts to be taken by the Commissioners of Public Accounts. Those are special cases, and this is not one of those special cases. But suppose it had been one of those special cases, here the Lord Lieutenant did take upon himself to order the corporation of Dublin to account before the Commissioners of Public Accounts, and the Commissioners of Public Accounts proceeded, though imperfectly, to I take the accounts, and, in the course of taking those accounts, they reported a misapplication by the corporation of Dublin to a very considerable amount. What was to be done upon the report, supposing that they were authorised to make the report? Suppose the Lord Lieutenant had authority, and had authorised them to make the report, what could be done upon it but that which has been done, namely, to institute a suit in the name of the Attorney-General for the Crown to compel the proper application of that money which the Commissioners of Public Accounts had stated to be misapplied. Look at the Act of Parliament for taking public accounts of any kind, either the public accounts relating to the public

money, or those particular cases which are specially mentioned in the Act in which a jurisdiction is given to them. If those Commissioners report any balance or misapplication, what is the mode of proceeding? The Act of Parliament says it shall be by information, by proceedings on the part of the Attorney-General, according to the ordinary course of proceeding, to compel those who have money in their hands which ought to have been applied to a particular purpose, to apply it either to that purpose, or to pay it into the Exchequer, in the manner in which, according to the result of this transaction, the money ought to be applied. Does it not show, with respect to accounting for any part of the public revenue, that proceedings must be had to enforce the payment of that money or the execution of that which the Commissioners of Public Accounts should report ought to be done. I, therefore, confess that I cannot conceive what objection there can possibly be to the mode of proceeding which has been adopted in this case, because there never should be a wrong without a remedy. Our law will not allow such a defect of justice. Our law has provided certain modes of proceeding in different cases, and the ancient law generally proceeded by certain regular forms which were writs contained in a collection called the register of writs, which writs were renewed according to certain cases which had occurred, by the persons authorised to frame the minutes.

It was specially enacted by a very ancient statute that, if the forms which had been provided were insufficient for particular purposes, the persons authorised by the Act should devise new writs for the purpose. But circumstances (which we see by referring particularly to them) induced the persons who had that authority to be very sparing in the exercise of it, and, in conséquence of that practice, the particular writs which were actually framed either by the ancient law or under the authority of this particular law were not always adapted to the purposes for which they were designed. But if no new writ was framed for the purpose, the courts of law were content to use the writs such as they found them and apply them, though in some cases not exactly conformable to the exigency of the writs, and the reason given was that no other writ was provided, and the wrong must not be without a remedy.

The law of Ireland is founded upon the law of England by the adoption of the law of England in Ireland, and in the establishment of the courts in Ireland, the same law which remains in England with respect to the Court of Chancery, the Court of King's Bench, and the Court of Exchequer, became the law of Ireland, and, therefore, if in this country a remedy was provided by writ, a remedy by writ might also be had in Ireland. Looking into the register of writs in this country, it seems to me that the remedy which was provided by the ancient law was an imperfect remedy, but a remedy was provided by the ancient law for a case of this kind. In early times, our Kings took upon themselves by prerogative to grant certain duties very much resembling these duties, for the benefit of towns and cities—to wall towns, to pave towns, and for various other purposes. There are in the register writs expressly adapted to that purpose, reciting the grant by some remote ancestor of the King of certain duties which were to be applied to the walling of towns, or paving of towns, or other public purposes, and that those duties so taken had not been so applied, and not having been so applied, the writ authorised certain persons to call before them the persons whose duty it was to account, and to direct whatever should be in their hands to be applied according to the original intention of the grant, until the whole should be applied according to the intention of the grant.

We are referred to the statute of Elizabeth with respect to charitable uses [Charitable Uses Act, 1601,] as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction, it created no new law. It created a new and ancillary jurisdiction, a jurisdiction borrowed from the elements which I have mentioned, a jurisdiction created by a commission to be issued out of the Court of Chancery to inquire whether the funds given for charitable purposes

had or had not been misapplied, and to see to their proper application, but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit for reserving the controlling jurisdiction of the Court of Chancery as it existed before the passing of that statute, and there can be no doubt that, by information by the Attorney-General, the same thing might be done. While proceedings under that statute were in common practice (as appears in that collection which is called DUKE'S CHARITABLE USES), you will find it stated that in certain cases, although a commission might issue under the statute, an information by the Attorney-General was the better remedy. In process of time, indeed, it was found that the commission of charitable uses was not the best remedy, and that it was better to resort again to the proceedings by way of information in the name of the Attorney-General. The right which the Attorney-General has to file an information is a right of prerogative. The King, as parens patriæ, has a right, by his proper officer, to call on the courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases. In the case of lunatics he has also a special prerogative to take care of the property of a lunatic and may grant the custody to a person who, as a committee, may proceed on behalf of the lunatic. Where there is no such grant the Attorney-General may proceed by his information.

I take this case to be one which falls precisely within the description that I have mentioned. I apprehend it is one in which, according to the practice of the ancient law, such a commission as this which is to be found in the register, might have issued because the persons who collect these rates are to account for the application of them and to apply them accordingly. In this case one part of the question arises from a provision in the Act of Parliament that when a certain sum should have been discharged, a part of the duties should cease, that then they should be no longer levied. For the purpose of effectuating this there were different provisions in the Act of Parliament, and among others a direction for the application of a certain sum in the reduction of this debt, a fund constituted for the purpose of more effectually relieving and putting an end to this debt as soon as the collection of rates would admit, and when that debt was perfectly satisfied, then the rates themselves were to cease. It has been objected, that, if these rates had actually ceased by the payment of the debt which they were appropriated to pay, then the persons upon whom the rates had been levied, or against whom they were sought to be levied, might proceed at common law for the purpose of defending themselves against the rates, and, if the rates had been improperly levied, to recover back what was so levied, and they urge that it is not pretended that the debt is actually extinct, but that the funds had not been applied in such manner as they ought to have been for the purpose of the extinction of the debt. Supposing the debt not to be extinct by the collection, have not the persons upon whom the rates are levied, and has not the Crown on behalf of those persons from whom they may be in future levied, a right to see that the funds are properly applied according to the directions of the Act? How were they to be applied in the gradual extinction of the debt? In paying certain portions of it; in creating a fund which should operate by degrees to the extinction of the principal of a portion of the debt, lessening consequently the interest that was to be paid out of the same fund, and then gradually to extinguish the whole.

If persons are entitled to the benefit of a trust of any description—for instance, persons who are interested in a fund which for a certain period is to be applied to the extinction of a debt—are they not to have a right to call from time to time for an account, for the purpose of seeing that every sum as it has been received, should be applied according to the exigency of the particular trust, as in the extinction of so much of the principal of the debt to which it could be applied, and consequently in extinction of so much of the interest, reducing the amount

of the interest by degrees, and thus effecting the earlier reduction of the principal of the debt? Even suppose the Court of Commissioners of the Public Accounts have a right to take the accounts, and they find that moneys to the amount of nearly £40,000 have not been applied according to the terms of the Act of Parliament, is it the same thing merely to call for the account to ascertain the default of that sum of £40,000, and to compel the proper application, even with interest, because, if it had been applied according to the directions of the Act of Parliament, it would have operated so much quicker to the extinction of the debt?

Under these impressions, I confess I am at a loss to conceive upon what ground the account now sought by this information can be resisted. That it is a case in which the corporation of Dublin are accountable persons, in which an Act of Parliament has provided particular directions for the manner in which they should apply what they should receive under the authority of that Act, is not a question. The accounts which they are ordered to render to the two Houses of Parliament are mere accounts upon which nothing can be done but as the two Houses of Parliament might think fit to direct, when one House of Parliament might proceed one way and the other House another way. After all, if one House were to appoint a committee to examine into these accounts, and to inquire of the persons who are about to come before them, as it were, rendering those accounts, and they rendered those accounts, what could the House do when it had taken the accounts? Could it order payment? Is that a part of the jurisdiction of the House of Commons, or of this House, proceeding as a House of Parliament, and not as a court of justice? We should be acting against the constitution of the country, if we assumed any such authority. It would be rather extraordinary doctrine to hold that either House of Parliament, independent of the other House of Parliament and the Crown, can act for any legislative purpose, or for any purpose except so far as this House is constituted a court of judicature, in which capacity it must act as a court of judicature. The House of Commons, for certain purposes, is capable of acting as the public accuser, but the House of Commons might just as well attempt to try and condemn a person whom, according to the usage and practice of Parliament, they thought fit to impeach, as proceed in the manner in which it is suggested in argument they might proceed. Those who constitute the House better understand the constitution of the government of this country than to attempt any such proceeding. There was a time when such proceedings were attempted, but the result was the overthrow of that constitution of which the House of Commons formed a part.

I conceive, therefore, that with reference to this case there can be no doubt but that, in default of any other jurisdiction, the Court of Chancery in Ireland had the jurisdiction by the information of the Attorney-General, with or without a relator, for the Attorney-General might have filed this information without a relator. The relator is introduced properly by the Attorney-General that there may be some person responsible for the costs of the proceedings if finally there should be an opinion in the court that the information has been improperly instituted, or if in the course of the proceedings it should be in any manner improperly conducted. It is for the benefit of the subject that the Attorney-General in all those proceedings provides persons to be responsible as relators in the information so that the court may award against them what the court cannot do against him.

Under these impressions it seems to me that it is your Lordships' duty to reverse the decree which has been pronounced: that the accounts which have been taken before the Commissioners of Public Accounts have been taken by persons who had no authority to take the accounts: that the result of the investigation upon the subject, amounts to nothing, except as it affords information upon the subject. If, in fact, the commissioners had jurisdiction upon the subject, still I conceive that upon this information the Court of Chancery originally might have proceeded to order that that which the Commissioners of Public Accounts report should be

carried into execution, for I know not how any report of the Commissioners of Public Accounts, can be carried into execution but by means of the ordinary courts of justice. In the Act framed for passing the public accounts before the Commissioners of Public Accounts, even with respect to the public revenue, the proceedings to enforce the payment of any thing that may be due in relation to the accounts, must be by the ordinary proceedings in a court of justice.

I, therefore, think your Lordships ought now to proceed to reverse the judgment (dismissing the information, and ordering the relators to pay the costs) which has been given by the Court of Chancery in Ireland, and to direct, on the contrary, an account to be taken of the receipt and application of the duties in question according to the exigencies of the particular case, following nearly the terms of the prayer of the information. I reserve the consideration of costs, until it shall appear what is the true result of that account, and in so doing, your Lordships, I apprehend, must direct, as to the several sums of money which have been received by the corporation for the duties in question that an inquiry shall be made whether they have been applied according to the terms of the Act of Parliament, particularly in creating what is called a sinking fund, and in the application of the money, first to the payment of the interest, and then in the reduction of the principal, in the very words provided for by the Act of Parliament. If the result of that inquiry should be that the corporation of Dublin have not applied the funds according to the Act of Parliament, it will remain to be considered in what manner the Court of Chancery in Ireland should then have jurisdiction upon the subject, and would be able to proceed to do justice.

In what I propose to your Lordships to do, I propose to prevent further injustice, supposing injustice to have been done. How far, upon the report of the accounts to be taken in the Court of Chancery, the corporation of Dublin can be compelled to do now retrospectively what they ought to have done from time to time, as the funds came to their hands may be a question of considerable difficulty, considering the nature of a corporation, and the funds which may belong to a corporation. But if it were the case of an individual, if an individual, being a trustee for the payment of a debt and receiving funds for the payment of that debt with a provision, clear and distinct, in the deed creating the trust that out of the funds so reserved a certain sum should be applied until the extinction of the debt, or carried to a sinking fund, or applied in any particular way, and that person so entrusted, did not think fit to observe the directions of the trust under which he acts, but retained that money in his own hands, or applied it for purposes to which it was not applicable, it would be a consideration, according to the circumstances of the case in what manner justice should be done to the persons who were injured by such a misapplication of the funds? It might be in the shape of an action for damages, or in the court itself charging the trustee with compound interest, according to the nature of the particular case, in such a manner as to do justice to the persons who were injured by his misconduct. That is a subject which can only be properly entered into after the account shall have been taken, and it shall be shown what is the misapplication which is complained of. The proceeding appears imperfect upon the report of the Commissioners of Public Accounts, and, indeed, the Commissioners of Public Accounts seem to have felt they were not competent to the undertaking, although the Lord Lieutenant had thought fit to refer the account to them, and the corporation of Dublin choose to come before them. They seem to have felt themselves not competent, and besides that, the corporation of Dublin did not conceive they were bound by the account, for in their answer to this bill, they object to the account. How, then, can it be said that that account is to bar these proceedings? Yet that is the ground upon which, as I understand it, that information was dismissed.

It will require some little time to frame an order for your Lordships to make upon the subject, but I think that this decree ought to be reversed and that directions ought to be given upon the information filed by the Attorney-General.

I also think that it may be a subject of inquiry and of a good deal of consideration in what manner the order to be pronounced, should be framed. A precedent cannot be obtained, and, therefore, the House must endeavour to act upon that which the justice of the particular case requires, without the assistance that might be derived from other similar cases. In *Ludlow Corpn.* v. *Greenhouse* (3), a case of a proceeding under a special Act of Parliament which your Lordships thought did not give the authority assumed in the case, the Court of Chancery certainly proceeded upon the idea of making a corporation responsible for the acts which had been done, and, although the corporation itself had derived no benefit from those acts at all correspondent with the sum of money which had been reported to be due from them, in consequence of what had been done they were charged with that amount as the consequence of those acts. I cannot but consider this as a proper proceeding, and one within the regular jurisdiction of the Court of Chancery, and that this is a case in which the corporation of Dublin might be charged out of their general funds, to make good the loss to that particular fund by the misapplication complained of. It appears to me, that the subject ought to be reserved for future consideration. The account ought to be simply directed according to the provisions of the Act of Parliament, reserving all further directions, until the result of the account shall be ascertained.

LORD LYNDHURST, L.C.—I propose to postpone the further consideration of this case.

May 10, 1827. **THE EARL OF ELDON.**—The mere question here is whether the Lord Chancellor of Ireland did right in having dismissed this information and having dismissed it with costs. There was no place for much argument on the question whether, regard being had to the nature of the case stated in this information, the Court of Chancery had, or had not, a jurisdiction. The Lord Chancellor of Ireland being of opinion that, if the Court of Chancery had jurisdiction independently of the circumstances which formed the ground of the decision, yet there are peculiar circumstances in the case that would deprive the court of its jurisdiction.

When this case was argued at the Bar, two cases were cited which had been heard in the Court of Chancery in England, one before myself, *A.-G.* v. *Brown* (1), and another, heard, I believe, by the present Master of the Rolls, *A.-G.* v. *Heelis* (2), and it is but fit to state that although I was of opinion, in *A.-G.* v. *Brown* (1), that the purpose for which certain tolls were appropriated was a purpose that made the establishment of those tolls an establishment for a charitable use, I was of opinion it was not necessary that it should be a charitable use, to give the Court of Chancery jurisdiction upon the subject. But my judgment in that case proceeded upon this ground—that the court had a jurisdiction to call upon persons entrusted with the application of those tolls which were granted for the purpose of supporting banks to protect the land from the inroads of the sea. I thought that the Court of Chancery had a right to direct an account of those tolls to be taken. The authority of that case is considerably weakened by the opinion given by the present Master of the Rolls, then vice-chancellor, in *A.-G.* v. *Heelis* (2), inasmuch as the reasons on which he proceeded were considerably different from those on which the judgment was founded which I thought myself bound to give in *A.-G.* v. *Brown* (1).

The Lord Chancellor of Ireland, in the present case, was of opinion that, inasmuch as the Act of Parliament had directed the accounts to be laid before the Lord Lieutenant of Ireland, and before Parliament or before the Commissioners of Public Accounts, such a direction constituted another jurisdiction, and, therefore, the Court of Chancery had no jurisdiction upon the subject. To the industry of Lord Redesdale we are indebted for having established, in what he stated for your Lordships' consideration, that old authorities justified him in saying that a writ of account might be brought, according to the old forms of the law, for the

purpose of calling such parties to account, and he reasoned satisfactorily, at least to my humble judgment, that, if a writ of account could have been maintained, a suit in Chancery would be also capable of being maintained, unless the jurisdiction of the court was expressly or by necessary implication, taken away.

The Lord Chancellor of Ireland, adverting to *A.-G.* v. *Brown* (1), stated that, according to the facts embodied in the report of the case, it appeared that there was no other jurisdiction, and that the Court of Chancery in England probably was induced, by that circumstance, to think there must be a remedy somewhere, and that, therefore, the Court of Chancery was competent to decree the account which, in that case, the court directed to be taken. I am most clearly of opinion that, admitting that the Act of Parliament ordered this account to be laid before the Lord Lieutenant, who is to lay the account before Parliament, and that the Commissioners of Public Accounts, have some authority likewise in taking such accounts, this provision does not oust the jurisdiction of the Court of Chancery, because that jurisdiction cannot, in my judgment, be taken away but by express words, or by words creating a necessary implication to that effect, and in every view which I can take of this case, I cannot imagine why the direction that the Lord Lieutenant should be informed of the state of the accounts, that the Commissioners of Public Accounts should look into these matters, and that Parliament should have the accounts laid before them should have such an effect. It appears to me that those are measures rather ancillary to the jurisdiction of the Court of Chancery than measures to oust the Court of Chancery from its jurisdiction. Upon the whole, I cannot entertain a doubt that in this case the Court of Chancery has a jurisdiction which has not been taken away by any enactment contained in this act of Parliament regulating those institutions to which it refers. My opinion is that in this case the Court of Chancery having jurisdiction, the bill ought not to have been dismissed.

Appeal allowed.

CROWFOOT AND OTHERS *v.* GURNEY

[COURT OF COMMON PLEAS (Tindal, C.J., Gaselee, Bosanquet and Alderson, JJ.), November 21, 1832]

[Reported 9 Bing. 372; 2 Moo. & S. 473; 2 L.J.C.P. 21; 131 E.R. 655]

Chose in Action—Assignment—Equitable assignment—Debts due from A. to B. and from B. to C.—Request by B. to A. to pay debt owing by B. to C.—Amount of latter debt not ascertained at time of request.

S. being indebted to I., and G. being indebted to S., S. requested G. to pay whatever might be due to him from G. to I. G. promised I. to do so as soon as the amount was ascertained. After the amount had been ascertained, but before it was paid S. became bankrupt. The amount was duly paid by G. to I. In an action by S.'s assignees in bankruptcy against G.,

Held: notwithstanding the bankruptcy of S., I. might sue G. for the amount of his debt to I., there having been an equitable assignment of the debt due from G. to S., and the plaintiffs, standing in the same position as the bankrupt, could not recover from G.

Notes. Considered: *Best* v. *Argles* (1834), 2 Cr. & M. 394. Applied: *Hutchinson* v. *Hepworth* (1838), 9 Ad. & El. 375. Considered: *Rodick* v. *Gandell* (1852), 1 De G.M. & G. 763; *Liversidge* v. *Broadbent* (1859), 4 H. & N. 603. Referred to: Re Burris (1851), 18 L.T.O.S. 292.

As to money had and received, see 8 HALSBURY'S LAWS (3rd Edn.) 236 et seq., as to equitable assignments, see ibid., vol. 4, pp. 492 et seq.; and for cases see 12 DIGEST (Repl.) 678 et seq.

Case referred to:

(1) *Hodgson* v. *Anderson* (1825), 3 B. & C. 842; 5 Dow. & Ry. K.B. 735; 107 E.R. 945; 12 Digest (Repl.) 675, *5212*.

Also referred to in argument:

Gibson v. *Minet* (1791), 2 Bro. Parl. Cas. 48; 1 Hy. Bl. 569; 1 E.R. 784, H.L.; 6 Digest (Repl.) 28, *202*.

Smith v. *Everett* (1792), 4 Bro. C.C. 64; 29 E.R. 780; 8 Digest (Repl.) 575, *241*.

Cuxon v. *Chadley* (1824), 3 B. & C. 591; 5 Dow. & Ry. K.B. 417; 3 L.J.O.S.K.B. 63; 107 E.R. 853; 12 Digest (Repl.) 677, *5227*.

Wharton v. *Walker* (1825), 4 B. & C. 163; 6 Dow. & Ry. K.B. 288; 3 L.J.O.S.K.B. 183; 107 E.R. 1020; 12 Digest (Repl.) 677, *5222*.

Fairlie v. *Denton* (1828), 8 B. & C. 395; 2 Man. & Ry. K.B. 353; 6 L.J.O.S.K.B. 351; 108 E.R. 1089; 12 Digest (Repl.) 678, *5231*.

Wilson v. *Coupland* (1821), 5 B. & Ald. 228; 106 E.R. 1176; 12 Digest (Repl.) 680, *5249*.

Rule Nisi obtained by the plaintiffs to set aside an arbitrator's award.

The arbitrator found the following facts: Streather, before his bankruptcy, had been employed by the defendant, who was treasurer of the Baptist College Chapel, to erect the Baptist College Chapel and other buildings. The works were completed in July, 1830, and on Dec. 16, 1830, there was due to Streather from the defendant, as treasurer of the chapel, a considerable balance for work done and materials supplied by Streather in respect of the buildings, but the actual balance due was not ascertained before April 11, 1831. On Dec. 16, 1830, Streather, being indebted to Solly & Sons, gave them the following letter addressed to the defendant:

> "I shall feel obliged by your paying to Messrs. Isaac Solly & Sons the balance due to me for building the Baptist College Chapel and buildings at Stepney, and their receipt shall be a sufficient discharge to you as treasurer of such chapel."

On the same day Solly's sent the letter to the defendant, enclosed in a letter from themselves as follows:

> "We beg to hand you annexed an order from Mr. Streather, to pay to us the balance due to him for building the chapel, etc. at Stepney; and we shall feel obliged by your informing us when such balance will be in course of payment. Requesting your due attention to said order, we are, etc."

To that letter the defendant, on Dec. 20, 1830, sent the following answer to Solly's:

> "I have received your letter, enclosing Mr. Streather's, and shall be happy to make the payment to you instead of to him as requested; but I have not yet received the surveyor's report and am, therefore, ignorant of the amount and the time at which he may direct it to be paid."

Those letters were stamped with an agreement stamp. On April 21, 1831, a commission of bankruptcy was issued against Streather, under which commission the plaintiffs were duly chosen assignees and the bankrupt's effects were assigned to them prior to the time when the notice hereinafter mentioned was given by the plaintiffs to the defendant. At the time of the bankruptcy, the balance of account due from defendant in respect of the buildings was £528 4s. On May 11, 1831, the plaintiffs, as assignees under the commission, applied to the defendant for payment of that balance and gave him notice not to pay the same to Solly's. On May 31, 1831, Solly's claimed from the defendant the payment of the balance, and gave him notice not to pay it to the plaintiffs as assignees. On Aug. 10, 1831, the defendant paid the balance to Solly's under an indemnity from them against the claim of the assignees in respect of the balance. The action was brought by the plaintiffs to recover the sum of £528 4s. The arbitrator was of opinion that the

plaintiffs were not entitled to recover. A rule nisi was obtained for setting aside so much of the award as adjudged that the plaintiffs had no right to recover. The court ordered it to be taken as a Special Case.

Serjeant Spankie for the plaintiffs.
Serjeant Coleridge for the defendant.

TINDAL, C.J.—It appears to me that the plaintiffs, as assignees of Streather, are not entitled to recover from the defendant in the circumstances stated on this award. A sum of money was due from the defendant Gurney to Streather. The precise amount is not stated but it may be collected from the terms employed by Streather that it was larger than a debt due from Streather to Solly & Sons, which Streather desires Gurney to discharge. Gurney gives his assent, an assent which, it may be observed, is wanting in many of the cases referred to. These circumstances amount to an equitable assignment of the debt due from Gurney to Streather, for Solly & Sons might have gone into a court of equity to compel a formal assignment and no answer could have been given to such an application. There was consideration enough for such an assignment, for Solly & Sons, from the time of the order, appear to have abstained from making any application to Streather and to have looked to Gurney alone.

It has been objected that such an assignment could not take place except in respect of a precise and ascertained amount. I cannot concur in that proposition because all that can be required is that the debt assigned should not be larger than the sum due to the party assigning. Here the balance was ascertained before Streather's bankruptcy. If it was ascertained while Streather was master of his own acts, it is the same thing as if it had been ascertained at the time of the order. The transaction must be considered, therefore, as an equitable assignment; and then the rule applies that the assignees must stand in the same situation as the bankrupt and the defendant is entitled to retain his verdict.

GASELEE, J., concurred.

BOSANQUET, J.—If Solly & Sons had acquired any right in law or equity against Streather on the order, the assignees cannot recover. I am of opinion that he had a right in equity to claim a formal assignment and that, therefore, this rule must be discharged.

ALDERSON, J.—I am of the same opinion. In *Hodgson* v. *Anderson* (1), the order given by Hodgson was,

> "as soon as you have funds belonging to James Anderson of Trinidad, I will thank you to pay, on my account, to the Commercial Banking Co. in your city, £291 19s., being the amount of my promissory note in favour of E. Robertson, Esq., or any part of the same, advising me of the amount, and I will credit Mr. J. Anderson, having received his order to this effect, as he is indebted to me more than this order."

This note was delivered to Anderson & Rhind, agents to James Anderson, and they orally promised the banking company to pay to them according to the terms of the order, as soon as they should have funds of the defendant in hand. It appeared that Hodgson afterwards gave an order to another creditor, authorising James Anderson to pay to such creditor the amount of the debt due to him Hodgson; and James Anderson entered into an obligation to pay the same to such creditor but there was a clause annexed to the obligation, stating that it had been alleged that a payment had been made by some person to Hodgson, on account of James Anderson, and it was declared that should such payment be proved to have been made, the amount should be deducted. The creditor to whom that order was given demanded payment of the debt from James Anderson, on his arrival in this country but the latter refused to pay it on the ground that his agents were liable

to pay it to the Commercial Banking Co., and the same was, in fact, afterwards paid to that company. The court held that although a creditor had a right to insist on payment to himself or to his appointee, yet having once given an order for the payment of his debt to a third person, he had no right to revoke that order, provided there was a pledge by the person to whom the authority was given, that he would pay the debt according to the authority. That case is decisive of the present. Gurney promised to pay when the amount should be ascertained; the amount was ascertained before Streather became bankrupt and, therefore, this rule must be discharged.

Rule discharged.

PLANCHÉ *v.* COLBURN AND ANOTHER

[COURT OF COMMON PLEAS (Tindal, C.J., Gaselee, Bosanquet and Alderson, JJ.), November 5, 1831]

[Reported 8 Bing. 14; 1 Moo. & S. 51; 1 L.J.C.P. 7; 131 E.R. 305]

Contract—Breach—Anticipatory breach—Right to damages—Contract to write article for publication—Abandonment of publication before article completed.

The defendants engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the treatise, but before he had completed it, the defendants abandoned the periodical publication,

Held: the plaintiff might sue for compensation without tendering or delivering the treatise.

Contract—Quantum meruit—Contract in existence and open.

Per TINDAL, C.J.: When a special contract is in existence and open one party cannot sue on a quantum meruit.

Notes. Considered: *Goodman* v. *Pocock* (1850), 15 Q.B. 576; *Hochster* v. *De La Tour*, [1843–60] All E.R. Rep. 12. Referred to: *Cort* v. *Ambergate, etc., Rail. Co.* (1851), 17 Q.B. 127; *Prickett* v. *Badger* (1856), 1 C.B.N.S. 296; *Robins* v. *Power* (1858), 4 Jur. N.S. 810; *Inchbald* v. *Western Neilgherry Coffee Co.* (1864), 17 C.B.N.S. 733; *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.* (1875), 10 Ch. App. 515; *Rhymney Rail. Co.* v. *Brecon and Merthyr Tydfil Rail. Co.* (1900), 83 L.T. 111; *Thomas* v. *Hammersmith Borough Council*, [1938] 3 All E.R. 203.

As to prevention of performance of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 200; as to breach of contract by anticipation and remedies therefore, see ibid. 202 et seq.; and for cases see 12 DIGEST (Repl.) 393.

Motion by the defendants for a rule nisi to set aside the verdict and enter a nonsuit or for a new trial, in an action for breach of contract.

The defendants had commenced a periodical publication called "The Juvenile Library," and had engaged the plaintiff to write for it a volume on costume and ancient armour. The declaration stated that the defendants had engaged the plaintiff for £100 to write this work for publication in "The Juvenile Library," and alleged for breach, that although the author wrote a part and was ready and willing to complete and deliver the whole for insertion in that publication, yet the defendants would not publish it there and refused to pay the plaintiff the sum of £100, which they had previously agreed he should receive. There were then the common counts for work and labour.

At the trial before TINDAL, C.J., it appeared that the plaintiff, after entering into the engagement stated in the declaration, commenced and completed a considerable portion of the work, performed a journey to inspect a collection of ancient

armour and made drawings therefrom but never tendered or delivered his performance to the defendants, they having finally abandoned the publication of "The Juvenile Library," on the ill success of the early numbers of the work. An attempt was made to show that the plaintiff had entered into a new contract.

TINDAL, C.J., left it to the jury to say whether the work had been abandoned by the defendants, and whether the plaintiff had entered into any new contract. A verdict was found for the plaintiff with £50 damages.

Serjeant Spankie for the defendants, moved to set aside the verdict.—The plaintiff could not recover on the special contract, for want of having tendered or delivered the work pursuant to the contract; and he could not resort to the common counts for work and labour when he was bound by the special contract to deliver the work. If the plaintiff had delivered the work, or so much of it as he had completed at the time "The Juvenile Library" was abandoned, the defendants might have turned it to account in some other way.

TINDAL, C.J.—In this case a contract had been entered into for the publication of a work on costume and ancient armour in "The Juvenile Library." The considerations by which an author is generally actuated in undertaking to write a work are pecuniary profit and literary reputation. It is clear that the latter may be sacrificed if an author who has engaged to write a volume of a popular nature, to be published in a work intended for a juvenile class of readers, should be subject to have his writings published as a separate and distinct work and, therefore, liable to be judged of by more severe rules than would be applied to a familiar work intended merely for children. The defendants not only suspended, but actually put an end to, "The Juvenile Library." They had broken their contract with the plaintiff and an attempt was made, unsuccessfully, to show that the plaintiff had afterwards entered into a new contract to allow them to publish his book as a separate work. I agree that when a special contract is in existence and open the plaintiff cannot sue on a quantum meruit. Part of the question here, therefore, was whether the contract did exist or not. It distinctly appeared that the work was finally abandoned and the jury found that no new contract had been entered into. In these circumstances the plaintiff ought not to lose the fruit of his labour and there is no ground for the application which has been made.

GASELEE, J., concurred.

BOSANQUET, J.—The plaintiff is entitled to retain his verdict. The jury have found that the contract was abandoned but it is said that the plaintiff ought to have tendered or delivered the work. It was part of the contract, however, that the work should be published in a particular shape and if it had been delivered after the abandonment of the original design, it might have been published in a way not consistent with the plaintiff's reputation, or not at all.

ALDERSON, J., concurred.

Rule refused.

A

JACOBS *v.* LATOUR AND ANOTHER

[Court of Common Pleas (Best, C.J., and other judges), June 2, 1828]

[Reported 5 Bing. 130; 2 Moo. & P. 201; 6 L.J.O.S.C.P. 243; 130 E.R. 1010]

Execution—Property of debtor liable to seizure—Goods held by creditor on which he has lien.

B

A party who, having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby, although the goods are never removed off his premises and are sold to him under the execution.

Notes. Considered: *Judson* v. *Etheridge* (1833), 1 Cr. & M. 743. Distinguished: *Compton* v. *Haigh* (1836), 5 L.J.C.P. 99; *Scarfe* v. *Morgan*, [1835–42] All E.R. Rep. 43; *Forth* v. *Simpson* (1849), 13 Jur. 1024. Referred to: *Jackson* v. *Cummins* (1839), 5 M. & W. 342.

C

As to loss of lien, see 1 Halsbury's Laws (3rd Edn.) 206, ibid., vol. 2, p. 134, ibid., vol. 24, p. 147, ibid. vol. 34, pp. 125–127; and for cases see 32 Digest (Repl.) 274–275, and 39 Digest (Repl.) 747–748.

D

Cases referred to in argument:

Chase v. *Westmore* (1816), 5 M. & S. 180; 105 E.R. 1016; 32 Digest (Repl.) 260, *65.*

Chapman v. *Allen* (1632), Cro. Car. 271; 79 E.R. 836; 32 Digest (Repl.) 261, *71.*

Jones v. *Thurloe* (1723), 8 Mod. Rep. 172; 88 E.R. 126; sub nom. *Jones* v. *Pearle*, 1 Stra. 557; 32 Digest (Repl.) 268, *145.*

E

Rule Nisi obtained by the defendants to set aside the verdict and enter a non-suit in an action in trover for the conversion of certain race-horses.

Horses were placed by one Lawton with the defendant Messer, a trainer, who kept and trained them for running. Lawton became indebted to Messer for his services who obtained judgment against him on May 5, 1827, for £227 on which he issued a fi. fa. on May 16 returnable on May 23. The levy was made on May 16, and under it the horses, which had never been out of his possession, were sold to Messer for £156. On May 22, 1827, a commission of bankruptcy issued against Lawton on an act of bankruptcy committed in February, 1825. The plaintiff, as his assignee, brought an action in trover to recover the value of the horses.

F

At the trial before Burrough, J., the defendants contended that if the execution would not avail against the commission of bankruptcy, at all events Messer had a lien for his services in training the horses, which entitled him to keep them until his account was settled. A verdict was found for the plaintiff, with leave for the defendants to move to set it aside on this ground.

G

Serjeant Andrews for the plaintiff, showed cause against the rule.

Serjeant Wilde for the defendants, supported the rule.

Cur. adv. vult. H

June 25, 1828. **BEST, C.J.**, delivered the following judgment of the court.—This was an action of trover brought by the plaintiff, as assignee of Lawton, a bankrupt, against the defendant Latour, as sheriff of Hertfordshire, and the defendant Messer, a horse keeper and trainer, to recover the value of certain horses left with Messer by the bankrupt, for the purpose of being trained for racing.

I

Two questions have been raised: (i) whether Messer had a lien on the horses for their keep and charges for training, and, (ii) whether, if he had such lien, it was not destroyed by his having levied and taken the horses in execution for a debt due to him from the bankrupt. If the answer to either of these questions be unfavourable to the defendants, they can have no valid defence to this action. We are of opinion, that it is unnecessary to consider the first question; as, if Messer ever had a lien, it was destroyed by his suing out the execution at his own suit. If he had relinquished or given up his right to the possession of the horses, his lien

would have been destroyed. If a third person had sued out execution, Messer might have insisted on his lien, but he himself caused the sheriff to seize the horses and sell them under the writ, and he expressly affirmed the right to sell, by becoming the purchaser himself. He, therefore, not only set up no lien against the sale, but thought his best title was to be acquired under it. The instant the horses were seized under the writ, the right of possession passed to the sheriff, in order to enable him to sell, and such right was entirely gone from Messer. After he had relinquished it, he did not acquire it again by virtue of his lien, but as a purchaser from the sheriff. Although the equitable right of lien which exists between debtor and creditor cannot be too much favoured, yet it does not extend to a case where the rights of third persons intervene, who claim under the estate of an insolvent, or of a party who has become bankrupt; and if a person, having in his hands goods of a third party, does not claim a right of lien, but gives up possession without insisting on his lien, he thereby waives it. On this ground, therefore, we are of opinion that this rule must be discharged.

Rule discharged.

STACEY *v.* ELPH

[ROLLS COURT (Sir John Leach, M.R.), January 25, 1833]

[Reported 1 My. & K. 195; 2 L.J.Ch. 50; 39 E.R. 655]

Trustee—Renunciation of trust—Need for disclaimer by deed.

It is most prudent that a deed of disclaimer should be executed by a person named trustee who refuses to accept the trust, but there may be conduct which amounts to a clear disclaimer.

Notes. As to disclaimer of the office of executor, see 11 HALSBURY'S LAWS (3rd Edn.) 364, ibid., vol. 16, p. 130, ibid., vol. 38, pp. 912–914; and for cases see 17 DIGEST (Repl.) 245, 23 DIGEST (Repl.) 44 et seq., 43 DIGEST 696 et seq.

Case referred to:

(1) *Conyngham* v. *Conyngham* (1750), 1 Ves. Sen. 522; 27 E.R. 1181; 43 Digest 697, *1348*.

Also referred to in argument:

Townson v. *Tickell* (1819), 3 B. & Ald. 31; 106 E.R. 575; 43 Digest 696, *1342*.

Action for the administration of the estate of Joseph Denny.

By his will dated Sept. 24, 1796, Joseph Denny after directing payment of all his debts, devised a copyhold messuage called the Herring Fishery, and a piece of freehold ground with a stable thereon to his wife Susanna for her life, and after her decease to his executors on trust to dispose of them and divide the proceeds among his children in the same manner as his personal estate; he devised and bequeathed the rest of his freehold and copyhold lands, buildings, household furniture, stock in trade, wherries and boats, to his executors on trust to dispose of so much thereof as might be sufficient to discharge all encumbrances upon his real or personal estate, and apply the surplus according to the best of their judgment and skill for the use, maintenance, and education of all his children, which should be living at his decease; after the decease of his wife, he directed all the properties which should remain undisposed of to be sold and the proceeds to be divided equally among his children. He appointed his wife, John Elph, the defendant, and Henry Smallpiece Fox executors of his will.

The testator died in April, 1800, leaving his wife and five children surviving him. The widow proved the will alone, and continued to carry on the testator's business. In 1802, the defendant purchased a wherry from the widow for £190,

and in 1804, being applied to by the widow to assist her in the arrangement of her affairs, which had become embarrassed, he negotiated the sale of the stock in trade and of a portion of the testator's real estate. Upon this occasion an allotment made in respect of a right of common was purchased by Joseph Denny, the eldest son of the testator, for £20 and the stable and piece of ground, devised to the widow for her life, were purchased by the defendant himself, for £80. The proceeds of the sale were applied in paying the debts of the testator, and debts contracted subsequently to the testator's death by the widow. The defendant obtained the conveyance of the stable and piece of ground in 1808 and in 1811 purchased from the widow and devisee of Joseph Denny the younger, the allotment which had been sold for £20 to Joseph Denny the younger, for the sum of £88. The testator's widow died in 1818. The defendant then renounced probate, and administration was granted to the plaintiff Elizabeth Stacey, one of the testator's daughters. Henry Smallpiece Fox died in 1824, without having taken any part in the execution of the trusts of the will.

The bill filed against the defendant and surviving children of the testator and the representatives of deceased children, charged that the defendant had interfered with the testator's property in the character of executor and trustee, and prayed accounts against him; and that he might be declared a trustee for the plaintiff of such portion of the testator's real estate as he had himself purchased. The defendant denied that he had ever acted or interfered in the executorship of the testator's will or that he had accepted the trusts thereof, and he insisted that in assisting the widow to dispose of the property with a view to the arrangement of her affairs, he had acted solely as her agent and under her directions.

Bickersteth and *Garratt* for the plaintiff.
Pemberton and *Sharpe*, for the defendant.

SIR JOHN LEACH, M.R.—The particular facts of *Conyngham* v. *Conyngham* (1) are not stated in the report, but they are spoken of by the Lord Chancellor in his judgment, as having been ambiguous. In this case there is no ambiguity in the conduct of the defendant. He never interfered with the property except as the friend or agent of the widow, and it is plain from the confidence which the testator appears to have placed in him by his will that he was a particular friend of the family. It never became necessary that he should formally renounce the executorship until the death of the widow and then his formal renunciation took place. It is true he never executed a deed disclaiming the trust but his conduct disclaimed the trust; in the purchase of the small real estate made by him, he took by feoffment from the widow and eldest son of the testator, in whom the estates could only vest by the disclaimer of the trustees. It is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust, because such deed is clear evidence of the disclaimer, and admits of no ambiguity, but there may be conduct which amounts to a clear disclaimer, and such appears to be the case here. It seems plain here, that, in consequence of the defendant and his companion refusing to accept the trust, all parties considered that the will failed as to the real estate, and that the real estate descended to the heir at law. The bill must be dismissed as against the defendant with costs.

Bill dismissed.

WALLACE *v.* WOODGATE

[COURT OF COMMON PLEAS (Best, C.J.), December 2, 1824]

[Reported 1 C. & P. 575; Ry. & M. 193]

Lien—Extinguishment—Possession fraudulently obtained by debtor Right of person having lien to re-possess goods.

Where a livery-stable keeper, by special agreement, is given a lien on horses for their keep by their owner and the owner fraudulently removes them in order to destroy the lien, the livery-stable keeper has a right to re-possess himself of them.

Notes. Referred to: *Bevan* v. *Waters* (1828), 3 C. & P. 520; *Judson* v. *Etheridge* (1833), 3 Tyr. 954; *Sanderson* v. *Bell* (1834), 2 Cr. & M. 304; *Castellain* v. *Thompson*, *Thompson* v. *Castellain* (1862), 13 C.B.N.S. 105; *Re Southern Livestock Producers, Ltd.*, [1963] 3 All E.R. 801.

As to extinguishment of lien, see 24 HALSBURY'S LAWS (3rd Edn.) 169 et seq.; and for cases see 32 DIGEST (Repl.) 268 et seq.

Action of trover for two horses.

The defendant, a livery-stable keeper, sold two horses to the plaintiff, an army officer, who gave him bills of exchange for the price. Before the bills were due, the defendant, having a suspicion that they were not likely to be honoured, went to the plaintiff and asked him to take them back and give up his property in the horses, which were then at livery in the defendant's stables and a bill of charges had been made out for their keep. The plaintiff objected to the defendant's proposition. The defendant afterwards saw the plaintiff again, who, in the course of conversation, said that the horses should not be taken away "till they were paid for." He later sent his servant to the stables to fetch them on the pretence that he wanted to take a ride and would send them back at night. He did not return them and the defendant, finding that they were gone, went after them and having discovered them, told the person at whose stables they were that he had been swindled out of them, and he was allowed to take them away.

Serjeant Taddy for the defendant.

Serjeant Vaughan and *Steer* for the plaintiff.

BEST, C.J., left it to the jury to say whether the plaintiff, by his statement, meant to give the defendant a lien on the horses for their keep and whether, if he did so, he fraudulently took them away in order to destroy that lien, stating it to be his opinion that, under those circumstances, the defendant had a right to re-possess himself of them, and would be entitled to their verdict in his favour.

Verdict for defendant.

DUKE OF SOMERSET *v.* FOGWELL

[Court of King's Bench (Bayley, J., and other judges), Trinity Term, 1826]

[Reported 5 B. & C. 875; 8 Dow. & Ry. K.B. 747; 5 L.J.O.S.K.B. 49; 108 E.R. 325]

Fishery—Several fishery—Tidal river—Lease—Need to be by deed.

Fishery—Several fishery—Terms of grant unknown—Presumption that owner of fishery owner of soil.

Where a subject is owner of a several fishery in a navigable river where the tide flows and re-flows, granted to him (as must be presumed) before Magna Carta by description of "separalem piscariam," a term of years in it cannot be created without deed.

Semble, that the owner of a several fishery, in ordinary cases and where the terms of the grant are unknown, may be presumed to be owner of the soil.

Notes. Considered: *Whitstable, Free Fishers* v. *Gann, Gann* v. *Johnson* (1861), 11 C.B.N.S. 387; *Marshall* v. *Ulleswater Steam Navigation Co.* (1863), 3 B. & S. 732. Approved: *A.-G.* v. *Emerson*, [1891] A.C. 649. Considered: *Hindson* v. *Ashby*, [1896] 2 Ch. 1. Referred to: *Holford* v. *Bailey* (1846), 8 Q.B. 1000; (1849), 13 Jur. 278; *Bridgwater Trustees* v. *Bootle* (1866), 7 B. & S. 348; *Ecroyd* v. *Coulthard* (1897), 77 L.T. 357; *Beaufort* v. *Aird* (1904), 20 T.L.R. 602.

As to classification of fisheries, see 17 Halsbury's Laws (3rd Edn.) 297 et seq., as to private fisheries generally, see ibid., pp. 303 et seq.; and for cases see 25 Digest (Repl.) 3 et seq., 11 et seq.

Cases referred to:

(1) *Sanders* v. *Owen* (1699), Carth. 426; 5 Mod. Rep. 386; 87 E.R. 721; sub nom. *Owen* v. *Saunders*, Colles, 70; 1 Ld. Raym. 158; sub nom. *Saunders* v. *Owen*, 12 Mod. 199; 2 Salk. 467; 3 Salk. 250, H.L.; 33 Digest (Repl.) 272, *992*.

(2) *Royal Fishery of Banne Case* (1610), Dav. Ir. 55; 11 Digest (Repl.) 651, **453*.

Also referred to in argument:

Seymour v. *Courtenay* (1771), 5 Burr. 2814; 98 E.R. 478; 25 Digest (Repl.) 11, *81*.

Smith v. *Milles* (1786), 1 Term Rep. 475; 99 E.R. 1205; 5 Digest (Repl.) 894, *7437*.

Smith v. *Kemp* (1693), Carth. 285; Holt, K.B. 322; 2 Salk. 637; 4 Mod. Rep. 186; Skin. 342; 90 E.R. 769; 25 Digest (Repl.) 32, *322*.

Child v. *Greenhill* (1639), Cro. Car. 553; March, 48; 79 E.R. 1077; sub nom. *Greenhill's Case*, W. Jo. 440; 25 Digest (Repl.) 30, *292*.

Sutton v. *Moody* (1697), Comb. 458; 1 Com. 34; Holt, K.B. 608; 1 Ld. Raym. 250; 5 Mod. Rep. 375; 12 Mod. 144; 2 Salk. 556; 3 Salk. 290; 90 E.R. 590; 25 Digest (Repl.) 371, *25*.

R. v. *Ellis* (1813), 1 M. & S. 652; 105 E.R. 243; 44 Digest 74, *548*.

Rule Nisi obtained by the defendant to enter a nonsuit in an action for trespass.

The first count of the declaration stated that the defendant broke and entered the plaintiff's close called the River Dart, in the parish of Berry Pomeroy, in the county of Devon, between Hem's Mouth and Penny's Quay, and took the plaintiff's fish therein; second count for breaking and entering the several fishery of the plaintiff in the river Dart; third count for breaking and entering plaintiff's free fishery; fourth count de piscibus asportatis. Plea, general issue.

At the trial before Burrough, J., at the Devon Assizes, 1826, the plaintiff gave in evidence letters patent of the 44th year of Elizabeth [1601], by which she granted to Edward Seymour, his heirs and assigns,

"all those domain lands and manors of Berry Pomeroy and Bridgetown Pomeroy and the castle of Berry Pomeroy with all their rights, members, liberties, and appurtenances in the county of Devon, then lately parcels of the lands and possessions of Edward late Duke of Somerset, and once parcels of the lands, possessions, and hereditaments of Thomas Pomeroy, knight;"

and, after making use of general words to pass the lands, etc., and tithes of Berry, Her Majesty granted

"all waters, fisheries, etc., to the aforesaid manors, castle, and premises, and to each and every of them belonging or appendant, known, accepted, held, used, or reputed or deemed as part or parcel of the same premises."

The letters patent then granted to Edward Seymour, his heirs and assigns,

"the aforesaid manor, castle, messuages, lands, etc., and all and singular the premises aforesaid with their appurtenances, as fully, freely and perfectly, and in as ample a manner and form as the same premises or any part thereof, could or ought to have come to the hands of the then queen or to the hands of Henry VIII and Edward VI, late Kings of England, or to the hands of either of them, or to the hands of Mary, late Queen of England."

The plaintiff produced two chirographs of fines, the first levied in Michaelmas Term, in the second year of Edward VI [1548], in which Edward Duke of Somerset was plaintiff and Thomas Pomeroy and Joannah his wife, were deforciants of the manors of Berry Pomeroy, Hurberton and Herberton with the appurtenances, and of 200 messuages, etc., "Ac de separali piscaria in aqua de Dert." The other fine was levied in the second and third years of Philip and Mary [1554 and 1555] in which Edward Duke of Somerset was plaintiff and Thomas Pomeroy and Joannah, his wife, were deforciants of the manor of Berry Pomeroy, Bridgetown Pomeroy, Hurberton and Herberton, with the appurtenances and of 200 messuages, 40 cottages, 2,000 acres of land, etc., with the appurtenances in Berry Pomeroy, Bridgetown Pomeroy, "Ac de separali piscaria in aqua de Dert." It was also proved that the duke and his ancestors had, from 1765, regularly received an annual rent for the fishery from different tenants for fishing in the river Dart between Hemsworth and Penny's quay, and that no other persons during that period had claimed a right to fish within those limits; and that the defendant, in September, 1825, committed the trespass complained of by taking fish within those limits.

It was contended for the defendant that the duke had granted a lease of the fishery to one Mills, and that Mills was in possession of the fishery under such lease at the time of the trespass complained of and that the action ought to have been brought in his name and not in that of the duke. An agreement in writing, not under seal, was given in evidence. It was dated May 7, 1824, and the duke thereby agreed to let and one N. Mills agreed to take all the duke's fishery, of whatsoever nature, kind or description the same might be and to which the duke at law or in equity, was entitled,

"upon and out of the river Dart and the adjacent shores and banks of the same river . . . with all rights, privileges and appurtenances whatsoever attached to or appurtenant to the said fishery, as fully and amply as the said duke was entitled to the same; and also all that sand bank situate and lying in the parish and manor of Berry Pomeroy . . . habendum to N. Mills, his executors, etc., from May 25 then last past, for three years, yielding and paying, therefore, unto the duke, his heirs and assigns, the yearly rent of £40 on the days therein mentioned; and also yielding and paying to the duke, his heirs and assigns, the yearly rent of 5s. on the days and in the manner aforesaid, for and in respect of the said bank."

The judge was of opinion that there was evidence for the jury to presume that there had been before the reign of Henry III, a grant of the exclusive right of

fishing in the river Dart, which was then vested in the plaintiff and that as it was a right in a navigable river where the tide flowed and re-flowed, it was an incorporeal hereditament which lay in grant and not in livery, and that a term for years could not be created in it without deed. He directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A verdict having been entered for the plaintiff on the second and fourth counts, counsel for the defendant obtained a rule nisi for entering a nonsuit.

Erskine, for the plaintiff, showed cause against the rule.
Selwyn, for the defendant, supported the rule.

Cur. adv. vult.

Trinity Term, 1826. **BAYLEY, J.,** delivered the judgment of the court, in which, after stating the pleadings, he proceeded: The material question in this case was whether the plaintiff had, by his agreement entered into with Mills, put it out of his power to maintain the action. He had entered into an agreement to let to Mills all his fishery in the river Dart, with all rights and privileges appurtenant to the said fishery for a period extending beyond the time when the alleged trespass was committed. If, by that instrument, he legally dispossessed himself of the right for the term therein mentioned, the defendant is entitled to have a nonsuit entered.

For the plaintiff it was contended that the fishery lay in grant and that a term, even for years, could only be created by deed. On the other side it was admitted that such would be the consequence if the fishery lay in grant and not in livery, and, looking at the authorities, we find many which establish that a term for years in a thing lying in grant cannot be created without deed. Several such cases are collected in 14 VINER'S ABRIDGMENT, tit. Grant(Ga), and most of them are also in 2 ROLLE'S ABRIDGMENT 63, tit. Grant(G). I will mention a few of them as the point is of importance.

In COKE ON LITTLETON, 85a, which is a commentary on the words "per fait on sans fait," in LITTLETON, s. 116, it is said:

> "Here LITTLETON affirmeth that the wardship of the body may be granted over without deed, and herein note a diversity between an original chattel of a thing that properly lyeth in grant, and a chattel derived out of a freehold of anything that lyeth in grant. As for example, if a man make a lease for years of a villeine, this cannot be done without deed, neither can the lessee assign it over without deed, because it is derived out of a freehold that lyeth in grant. But the wardship of the body is an original chattel during the minority, derived out of no freehold, and therefore as the law createth it without deed, so it may be assigned over without deed."

It is singular that both in 2 ROLLE'S ABRIDGMENT 62, and in 14 VINER'S ABRIDGMENT, tit. Grant(Ga) this passage is cited, with the word vill instead of villeine, but that is clearly a mistake. In 2 ROLLE'S ABRIDGMENT 63, pl. 14, it is said that a parson cannot grant his tithes to a stranger for life or for years without deed because it is entirely in grant; and pl. 16 shows that it makes no difference whether the grant be for one year or for several. In pl. 17 a distinction is taken between a grant of tithes to a stranger and to the owner of the land. In the latter case it may be without deed because it is in the nature of a composition for the tithes retained and not a grant of tithes. In 14 VINER'S ABRIDGMENT, tit. Grant(Ga) pl. 29, GODBOLT 374 is cited, where it is said arguendo that a warren may be demised without deed and reference is made to the Year Book 9 Edw. 4, 47, pl. 35. There may be a difference according to the sort of warren leased, viz., where a warren with the land is leased (in which case by the warren the land would be intended) and where the franchise only is demised. In the former case the lease might be good without deed and if that was the nature of the lease spoken of in GODBOLT the position is correct, otherwise not. In Year Book 9 Hen. 4, 47, pl. 35, it is said that

warren cannot be leased without deed and the same is laid down in BROOKE'S ABRIDGMENT, tit. Lease, pl. 12; and this doctrine is adopted in *Saunders v. Owen* (1) (2 Salk. 467).

The question, then, is whether the subject-matter of the agreement between the plaintiff and Mills lay in grant as an incorporeal or, in livery, as a corporeal thing. No conveyance of the right of fishery or of the soil was produced at the trial but it appeared not to be an ordinary fishery resulting to the owner of the adjoining land in respect of the land, but a fishery in a navigable river, where the tide flows and re-flows and, therefore, in the nature of a royal franchise which SIR WILLIAM BLACKSTONE calls a free fishery (2 BLACKSTONE'S COMMENTARIES, 39). Such a franchise could not be created after Magna Carta but there was evidence in this case from which its existence from time beyond legal memory might be presumed. Two chirographs of fines, one in the reign of Edward VI, the other in the reign of Philip and Mary were given in evidence in which it was called a several fishery in the River Dart. Much discussion has taken place at different times as to whether a several fishery necessarily imports an ownership of the soil; but considering the nature of the franchise and the law as to rights of fishery in other rivers, I have no difficulty in saying that, in my judgment, this was not a territorial but an incorporeal franchise. In COKE ON LITTLETON, 4 b, it is said:

> "If a man be seised of a river, and by deed do grant separalem piscariam in the same, and maketh livery of seisin secundum formam chartae, the soil doth not pass, nor the water, for the grantor may take water there; and if the river become dry he may take the benefit of the soil, for there passed to the grantee but a particular right, and the livery being made secundum formam chartæ, cannot enlarge the grant. For the same reason, if a man grant aquam suam, the soil shall not pass, but the piscary within the water passeth therewith."

In the case here put, the grant was made by the owner of the soil, capable of granting it, and yet a grant separalis piscariae followed up by livery which properly applies to a thing corporeal, did not convey the soil, livery being made secundum formam chartæ. If then, a fishery only is granted, nothing passes but a right to take the fish, and to use such means as are necessary for that purpose, which is in truth nothing more than a liberty to fish: the grantee has no property in the water, none in the soil. And this is the case where the grant is made between subject and subject and consequently, is to be construed against the grantor, a principle inapplicable to grants made by the Crown, whereby nothing passes, unless the intention that it should pass is manifest. In the great case of the fishery of the Banne (*Royal Fishery of Banne Case* (2)), it appeared that the king had the fishery of the Banne, a navigable river, as parcel of the ancient inheritance of the Crown; and James I, by letters patent, granted to Sir R. M'Donnell in fee the territory of Rout, parcel of the county of Antrim and adjoining to the river Banne, in that part where the fishery was. By the letters patent the king granted "omnia castra messuagia, etc., piscarias, piscationes, aquas, aquarum cursus, etc." It was held that the fishery of the Banne did not pass by the grant of the land adjoining and by the general grant of all piscaries, for that it was a royal fishery not appurtenant to the land, but a fishery in gross, and was by itself part of the inheritance of the Crown; and that general words in a grant by the king would not pass such a special royalty which belonged to the Crown by prerogative. It was further agreed that the grant of the king passes nothing by implication.

In the present case it appeared by the fines given in evidence (which were probably in the language of the original grant) that the Duke of Somerset had nothing more than a fishery without the property of the soil or the water: for that would have been the case even had the grant been made by a subject and, therefore, à fortiori he could take nothing more by grant from the Crown. It was contended in argument that the owner of a several fishery must be presumed

to be the owner of the soil. That may be true where the terms of the grant under which he claims are unknown but when they appear, and are such as convey an incorporeal hereditament only, the presumption is destroyed. If then, the grant to the Duke of Somerset gave nothing more than an incorporeal hereditament of course that alone could be granted by him. He does not, indeed, profess to grant more, the agreement purports to grant the fishery only and that agreement not being under seal could not operate as a demise for years of that which lies in grant. That being so, Mills took nothing under the agreement; the right of the Duke of Somerset remained in him at the time of the trespass and the action is consequently maintainable.

Rule discharged.

SKYRING *v.* GREENWOOD AND ANOTHER

[Court of King's Bench (Abbott, C.J., Bayley and Holroyd, JJ.), June 6, 1825]

[Reported 4 B. & C. 281; 6 Dow. & Ry. K.B. 401; 107 E.R. 1064]

Mistake—Mistake of fact—Money paid under mistake—Increased pay in error credited to army officer—Failure to inform officer—Right of recovery.

A sum allowed in a running account under a mistaken view as to the payee's rights cannot be recovered from the payee or set off in an action by him or his personal representative.

Paymasters of a regiment gave credit in a running account with an officer for increased pay from 1817 to 1820 to which they erroneously supposed him to be entitled, and a statement of account including those amounts was sent to the officer in 1821. In 1816 the paymasters had been informed by the Board of Ordnance that the increase of pay would not be allowed to persons in the situation of the officer in question, but that information was not communicated to the officer until 1821. The running account between the officer and the paymasters continued until he died in 1822, but the Board of Ordnance refused to allow the paymasters any payments of the increased pay after 1816. In an action by the officer's administratrix to recover the increased pay from the paymasters,

Held: the paymasters could not, by way of set-off, recover any money on account of the sums which they had credited to the officer by way of the increased pay.

Notes. Applied: *Bate* v. *Lawrence* (1844), 7 Man. & G. 405; *Parrott* v. *Anderson* (1851), 7 Exch. 93; *R.* v. *Treasury Lords, Re Queen Dowager's Annuity* (1851), 20 L.J.Q.B. 305. Explained: *Cave* v. *Mills* (1862), 7 H. & N. 913. Considered: *Swan* v. *North British Australasian Co.* (1862), 7 H. & N. 603. Distinguished: *R.* v. *Blenkinsop*, [1892] 1 Q.B. 43. Applied: *Deutsche Bank (London Agency)* v. *Beriro & Co.*, [1895–9] All E.R. Rep. 1164. Considered: *Baker* v. *Courage & Co.*, [1908-10] All E.R. Rep. 65. Applied: *Holt* v. *Markham*, [1922] All E.R. Rep. 134. Distinguished: *R. E. Jones, Ltd.* v. *Waring and Gillow, Ltd.*, [1926] All E.R. Rep. 36. Considered: *Weld Blundell* v. *Synott*, [1940] 2 All E.R. 580. Referred to: *Higgs* v. *Scott* (1849), 7 C.B. 63; *Townsend* v. *Crowdy* (1860), 8 C.B.N.S. 477; *De Cordova* v. *De Cordova* (1879), 4 App. Cas. 692; *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181; *Miles* v. *Scotting* (1885), Cab. & El. 491; *British and North European Bank, Ltd.* v. *Zalzstein*, [1927] All E.R. Rep. 556; *Anglo-Scottish Beet Sugar Corpn., Ltd.* v. *Spalding U.D.C.*, [1937] 3 All E.R. 335; *Larner* v. *L.C.C.*, [1949] 1 All E.R. 964; *Spiers and Pond, Ltd.* v. *Finsbury Borough Council* (1957), 55 L.G.R. 361.

As to set-off, see 34 Halsbury's Laws (3rd Edn.) 398 et seq.; and for cases see 40 Digest (Repl.) 422, 423. As to recovery of money paid by mistake, see 26 Halsbury's Laws (3rd Edn.) 921 et seq.; and for cases see 35 Digest (Repl.) 158 et seq.

Cases referred to in argument:

Bilbie v. *Lumley* (1802), 2 East, 469; 102 E.R. 448; 35 Digest (Repl.) 172, *570*.

Lowry v. *Bourdieu* (1780), 2 Doug. K.B. 468; 99 E.R. 299; 12 Digest (Repl.) 318, *2446*.

Brisbane v. *Dacres* (1813), 5 Taunt. 143; 128 E.R. 641; 35 Digest (Repl.) 172, *571*.

Jeffs v. *Wood* (1723), 2 P. Wms. 128; 2 Eq. Cas. Abr. 10, pl. 9; 24 E.R. 668; 40 Digest (Repl.) 408, *31*.

Rule Nisi obtained by the defendants for a new trial in an action of assumpsit for money had and received by the defendants to the use of G. Skyring in his life-time, and to the use of the plaintiff as administratrix since his death.

At the trial before ABBOTT, C.J., it appeared that the plaintiff was administratrix of the late G. Skyring, an officer in the Royal Artillery, and that the defendants were paymasters of the Royal Artillery, and held their office by commission. The pay of the whole army was fixed by regulations established in 1806. Those regulations were made known to the different branches of the army by general orders issued from the respective proper departments. By the general order for the ordnance or artillery issued on Aug. 27, 1806, an increase of pay of 1s. 1d. per day was granted to captains and one of 2s. per day to brevet majors, but subject to a restriction set out in a general order dated July 28, 1797, that the increase was not to be paid to an officer holding another commission. G. Skyring was a captain in the Royal Regiment of Artillery, having also the brevet rank of major before Jan. 1, 1817, and from thence to Nov. 5, 1820, when he obtained the regimental rank of major, and during the same time had the appointment of brigade-major of the garrison of Gibraltar. There was a running account between Major Skyring and the defendants from Jan. 1, 1817, to Dec. 31, 1820, in which credit was allowed to him for his pay to Nov. 5, 1820, including therein 1s. 1d. per day increase of captain's pay granted by the order of Aug. 27, 1806, from Jan. 1 to Dec. 31, 1817, amounting to £19 15s. 5d., and 2s. a day increase granted by the same order to captains having the brevet rank of major, from Jan. 1, 1817, to Nov. 5, 1820, amounting to £140 10s., which two sums made together £160 5s. 5d. A statement of that account was delivered to Major Skyring early in 1821, and there appeared due to him on the balance thereof £116 9s. 7d. Major Skyring was allowed credit for these sums of 1s. 1d. and 2s. a day in the account, in conformity with the usage which prevailed in paying other officers of the regiment having the same rank and appointment during the same period, and which had prevailed from the date of the general order of Aug. 27, 1806, and according to which all such payments have been allowed by the Board of Ordnance in the account of the defendants with them to Dec. 31, 1816.

In December, 1816, the Board of Ordnance intimated to the defendants that they would not allow any payments of the 1s. 1d. and 2s. a day to officers having the rank and appointment which Major Skyring had, and that the same were not warranted by the order of 1806; but this intimation was not communicated to Major Skyring otherwise than by the defendants ceasing to allow him credit for the 1s. 1d. a day after the end of 1817, and writing to him the following letter, dated May 8, 1821:

"Sir,—We beg to acquaint you that a deduction has been made by the Honourable Surveyor General from your regimental pay, and which has been confirmed by the board, of £391 14s. 5d., being the increase of 1s. 1d. and 2s. brevet per diem, granted by the regulations of 1806, but to which it appears you were not entitled, having held the appointment of brigade-major at Gibraltar from July 1, 1806, to Nov. 5, 1820, in addition to your commission as an officer of artillery. We have, therefore, to request you will make a remittance for the above sum. Memorandum. Increase pay 1s. 1d. July 1, 1806, to Dec. 31, 1816, and brevet pay 2s. per day, June 4, 1813, to Nov. 5, 1820."

The sum of £391 14s. 5d. mentioned in that letter, included the £160 5s. 5d. hereinbefore mentioned. The Board of Ordnance refused to allow the defendants any payments of the 1s. 1d. and 2s. a day subsequent to Dec. 31, 1816. The running account between Major Skyring and the defendants was continued to Dec. 6, 1822, the day of his death, during which time his pay and various sums on other accounts received and paid by the defendants by his order were placed to his account, but no statement of the account was delivered to him by the defendants. After the death of Major Skyring the defendants delivered to the plaintiff a statement of their account with him to the day of his death, in which they brought forward and among other items allowed him credit for the £116 9s. 7d. balance due on the former statement of the account and charged him with the £391 14s. 5d., which included the £160 5s. 5d. as aforesaid. The charge of £391 14s. 5d. had been since reduced by the defendants to the £160 5s. 5d., which latter sum the defendants claimed a right to retain on the ground of their having by mistake allowed to Major Skyring 1s. 1d. a day from Jan. 1 to Dec. 31, 1817, and 2s. per day from Jan. 1, 1817 to Nov. 5, 1820, making the amount of £160 5s. 5d., as ordnance pay beyond the amount of which the ordnance regulations entitled him to.

On those facts ABBOTT, C.J., was of opinion that the account rendered by the defendants in 1821 was an admission by them that they had received the allowances in question on account of the plaintiff, and that they were not entitled afterwards to rescind the admission because they had received a communication in 1816 from the Board of Ordnance that those additional allowances would not be allowed and never communicated that intimation to Major Skyring. Under these circumstances a verdict was found for the plaintiff. The defendants obtained a rule nisi for a new trial.

Scarlett and *Bingham* for the plaintiff, showed cause against the rule.
Gurney and *Tindal* for the defendants, supported the rule.

ABBOTT, C.J.—It is not necessary to decide in this case whether the defendants, by reason of their character of paymasters, are estopped by the account which they have rendered from saying that there was a mistake in it. The opinion which I entertained at the trial was founded on a particular fact in this case, and that opinion remains unaltered. The defendants, as paymasters, received sums from the government generally on account of the corps and, an order having been issued for an increase of pay, they rendered an account to Major Skyring in 1821 in which they gave him credit for the increased pay to which they supposed him to be then entitled. On that account there appeared to be due to Major Skyring a balance of £116 9s. 7d. If he had drawn a bill on them for that amount, it probably would have been paid and, if they had paid the money, it is quite clear that they could not afterwards have recovered it back on the ground that according to the true construction of the order, it was not due to Major Skyring. And, if the defendants could not have recovered it back, they ought not now to be allowed to set it off. The defendants afterwards continued to receive further sums on account of Major Skyring, and the money so subsequently received by them must be considered as paid off if they are entitled to bring back into the account the sums which they had given him credit for in respect of the increased pay.

The particular fact in this case on which my judgment proceeds is that the defendants were informed in 1816 that the Board of Ordnance would not allow these payments to persons in the situation of Major Skyring, but they never communicated to him that fact until 1821, having in the meantime given him credit for these allowances. I think that it was their duty to communicate to the deceased the information which they had received from the Board of Ordnance, but they forbore to do so, and they suffered him to suppose during all the intervening time that he was entitled to the increased allowances. It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is.

Every prudent man accommodates his mode of living to what he supposes to be his income; it, therefore, works a great prejudice to any man if, after having had credit given him in account for certain sums and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called on to pay them back. Here the defendants have not merely made an error in account, but they have been guilty of a breach of duty by not communicating to Major Skyring the instruction they received from the Board of Ordnance in 1816; and I think, therefore, that justice requires that they shall not be permitted either to recover back or retain by way of set-off the money which they had once allowed him in account.

BAYLEY, J.—This may be a case of hardship on the defendants, but they have brought it on themselves. This is an action for money had and received. If the defendants are entitled to set-off the sum they claim, the action is not maintainable. From 1816 to 1821 the defendants had given credit for certain sums, as if Major Skyring was entitled to them. I think that they were guilty of a neglect of duty in not communicating to him the information they had received from the Board of Ordnance in 1816. Suppose that the balance of the account delivered in 1821 had been paid to Major Skyring and that no subsequent pay had been received for his use by the defendants and that they had brought an action to recover back the money paid. It would have been a good defence to that action to say that the defendants had voluntarily advanced money to the deceased when he asked no credit and that they had told him that they had received the money for his use, and that, on the faith of their representation, he had drawn it out of their hands as his own money and had been induced to spend it as such, and if they could not recover the money back, neither ought they now to be allowed to retain other moneys belonging to the deceased on the ground that they have paid or allowed him in account money which they had not in fact received to his use, but which they suffered him to consider his own for a long period of time. I think that they cannot now be permitted to say that the money which they allowed him in account as money received by them to his use was not money received to his use. The rule for a new trial must, therefore, be discharged.

HOLROYD, J.—The present action is brought for money had and received by the defendants to the plaintiff's use subsequently to the communication made by the Board of Ordnance to the defendants, and of which the deceased was not informed till 1821. The plaintiff has a right to recover unless the defendants have a debt to set-off. Major Skyring had a right to expect that money belonging to him would be received by defendants for him, and that all payments made by them were on account of moneys so received by them. Suppose that the defendants had paid Major Skyring the balance of the account in 1821 and that no money belonging to him had come subsequently to their hands, they could not have recovered that money back on the ground that they had paid it to him under a mistaken notion that he was entitled to it. A payment, therefore, made under such circumstances, would not create a debt between the defendants and Major Skyring. Here, it is true, the defendants did not pay the balance; but they now say that some of the money which they paid to Major Skyring was not paid to him on account of moneys received for him by them, but was paid by them under the mistaken notion that he was entitled to it and, therefore, that such payment constituted a debt from Major Skyring to them which they are now entitled to set-off. I think that, for the reasons already given, it did not constitute a debt and, that being so, the plaintiff is entitled to recover.

Rule discharged.

BLEADEN AND ANOTHER *v.* HANCOCK

[COURT OF COMMON PLEAS (Tindal, C.J.), December 10, 1829]

[Reported 4 C. & P. 152; Mood. & M. 465; 172 E.R. 648]

Lien—Printer's lien—Trade usage.

The defendant claimed lien on plates for his bill for printing from them.

Held: this was not a mere maker's or repairer's lien, but a larger lien, and to establish it the defendant must show a course of dealing so general and uniform that persons must be supposed to have formed their contracts with him tacitly on the understanding that there was such a usage.

Notes. Applied: *Steadman* v. *Hockley* (1846), 15 M. & W. 553.

As to separate actions by co-owners, see 38 HALSBURY'S LAWS (3rd Edn.) 790; and for cases see 46 DIGEST (Repl.) 495 et seq. As to printer's lien, see 30 HALSBURY'S LAWS (3rd Edn.) 549; and for cases see 17 DIGEST (Repl.) 28; 32 DIGEST (Repl.) 278.

Action in trover for stereotype and other plates. The defendant denied liability.

The plaintiffs Bleaden and Curtis were the assignees of a bankrupt, one Bumpus, who carried on the business of a bookseller and publisher, and the defendant Hancock was a printer who had been employed to print a number of popular works from stereotype plates. Some of the plates were the sole property of Bumpus, others the joint property of Bumpus and another bankrupt named Taylor. On Nov. 23, 1827, a demand in writing for the return of the plates was sent to the defendant. It was expressed to be made by the plaintiffs and by Taylor's assignees jointly in respect of those plates in joint ownership, and by the plaintiffs alone in respect of those owned solely by Bumpus. The defendant gave notice to the plaintiffs and Taylor's assignees of his intention to auction the plates to defray the balance due to him for printing. The auction took place on Dec. 20, despite objections by the plaintiffs' accountant. The plaintiffs sued in trover for conversion of the plates.

The defence was a claim of lien upon the plates, for the amount of the bill for printing from them. To establish this, several witnesses were called on the part of the defendant. Some of them were copper-plate and others stereotype printers. They proved various instances in both trades in which the claim had been made and acquiesced in. For the plaintiffs in reply other persons in those trades were called who stated other cases in which it had been successfully resisted.

Serjeant Wilde, *Serjeant Jones* and *Chitty* for the plaintiffs.

Serjeant Taddy and *Payne* for the defendant.

TINDAL, C.J.—It appears to me to be the ordinary case. Two persons interested in a chattel bring separate actions for a tort. The damages may be severed. They are not so tied together by the joint demand that they may not sever even when they come into court.

TINDAL, C.J., summing-up on the subject of the lien.—This is not the case of a lien claimed by a person who has bestowed labour or expended money upon an article and who may detain it till he is paid. Everybody knows that by the common law a man may detain the commodity on which he has bestowed labour or money. But this is a claim of a larger lien, and those who seek to establish such a lien must show a course of dealing so general and uniform that persons must be supposed to form their contracts tacitly on the understanding that there is such an usage. It is for you to say whether, in this case, any such uniform usage has been proved to your satisfaction. You ought to be satisfied that it is established affirmatively before you find in favour of it.

Verdict for plaintiffs.

GARRARD *v.* LORD LAUDERDALE AND ANOTHER

[Vice-Chancellor's Court (Shadwell, V.-C.), December 6, 9, 1830]

[Reported 3 Sim. 1; 57 E.R. 901]

[Lord Chancellor's Court (Lord Brougham, L.C.), January 27, 29, February 11, 1831]

[Reported 2 Russ. & M. 451; 39 E.R. 465]

Bankruptcy—Assignment for benefit of creditors—Enforcement by creditors—Creditors not party to deed.

A conveyance by a debtor to trustees for the payment of scheduled creditors who do not execute the deed or conform to its terms cannot be enforced by the creditors.

Wallwyn v. *Coutts* (1) (1815), 3 Mer. 707, explained.

Notes. Considered: *Acton* v. *Woodgate* (1833), post p. 115. Explained: *Bill* v. *Cureton* (1835), 2 My. & K. 503. Followed: *La Touche* v. *Lucan* (1840), 7 Cl. & Fin. 772; *Gibbs* v. *Gibbon* (1841), 5 Jur. 378. Distinguished: *Gibbs* v. *Glamis* (1841), 11 Sim. 584. Followed: *Steel* v. *Murphy* (1841), 3 Moo. P.C.C. 445. Considered: *Law* v. *Bagwell* (1843), 1 L.T.O.S. 319. Followed: *Wilding* v. *Richards* (1845), 1 Coll. 655. Considered: *Kirwan* v. *Daniel* (1847), 5 Hare, 493; *Mackinnon* v. *Stewart* (1850), 1 Sim. N.S. 76. Distinguished: *Harland* v. *Binks* (1850), 15 Q.B. 713. Considered: *Rodick* v. *Gandell* (1852), 1 De G.M. & G. 763. Distinguished: *Hunt* v. *Jessel* (1854), 18 Beav. 100. Approved: *Synnott* v. *Simpson* (1854), 5 H.L. Cas. 121. Considered: *Siggers* v. *Evans* (1855), 5 E. & B. 367; *Cosser* v. *Radford* (1863), 1 De G. J. & Sm. 585; *Glegg* v. *Rees* (1871), 7 Ch. App. 71. Followed: *Johns* v. *James* (1878) 8 Ch.D. 744; *Re Sanders' Trusts* (1878), 47 L.J.Ch. 667. Considered: *Henderson* v. *Rothschild* (1886), 33 Ch.D. 459. Distinguished: *Re Fitzgerald's Settled Estates*, *Fitzgerald* v. *White* (1887), 57 L.J.Ch. 594; *Godfrey* v. *Poole* (1888), 13 App. Cas. 497; *New*, *Prance and Garrard's Trustee* v. *Hunting*, [1897] 1 Q.B. 607; *Priestley* v. *Ellis*, [1897] 1 Ch. 489. Followed: *Ellis* v. *Cross*, [1915] 2 K.B. 654. Referred to: *Alexander* v. *Wellington* (1831), 2 Russ. & M. 35; *Malcolm* v. *Scott* (1843), 3 Hare, 39; *Dale* v. *Hamilton* (1846), 5 Hare, 369; *O'Brien* v. *Osborn* (1853), 20 L.T.O.S. 201; *Paterson* v. *Murphy* (1853), 11 Hare, 88; *Stone* v. *Van Heythuysen* (1854), Kay, 721; *Montefiore* v. *Browne* (1858), 7 H.L. Cas. 241; *Lees* v. *Whiteley* (1866), L.R. 2 Eq. 143; *Re Agra and Masterman's Bank*, *Ex parte Asiatic Banking Corpn.* (1867), 16 L.T. 162; *Henriques* v. *Bensusan*, *Bank of England Claim* (1872), 20 W.R. 350.

As to assignment for benefit of creditors, see 2 Halsbury's Laws (3rd Edn.) 618, ibid., vol. 38, pp. 840–841; and for cases see 5 Digest (Repl.) 1258 et seq.

Cases referred to:

(1) *Wallwyn* v. *Coutts* (1815), 3 Mer. 707; 36 E.R. 272; sub nom. *Walwyn* v. *Coutts*, 3 Sim. 14; 5 Digest (Repl.) 1258, *10097*.

(2) *Ellison* v. *Ellison* (1802), 6 Ves. 656; 31 E.R. 1243, L.C.; 8 Digest (Repl.) 628, *655*.

(3) *Pulvertoft* v. *Pulvertoft* (1811), 18 Ves. 84; 34 E.R. 249, L.C.; 25 Digest (Repl.) 268, *760*.

(4) *Leech* v. *Leech* (1675), 1 Cas. in Ch. 249; 22 E.R. 785.

(5) *Colman* v. *Sarel*, *Sarel* v. *Colman* (1789), 3 Bro. C.C. 12; 1 Ves. 50; 29 E.R. 379, L.C.; 44 Digest (Repl.) 11, *41*.

(6) *Hill* v. *Secretan* (1798), 1 Bos. & P. 315; 126 E.R. 924; 29 Digest (Repl.) 137, *776*.

(7) *Williams* v. *Everett* (1811), 14 East, 582; 104 E.R. 725; 1 Digest (Repl.) 775, *3055*.

(8) *Scott* v. *Porcher* (1817), 3 Mer. 652; 36 E.R. 250; 5 Digest (Repl.) 1174, *9471*.

Also referred to in argument:

Page v. *Broom* (1827), 4 Russ. 6, 224; 38 E.R. 707, 789; affirmed (1830), 2 Russ. & M. 214, L.C.; 5 Digest (Repl.) 1259, *10098*.

Barfield v. *Kelly* (1828), 4 Russ. 355; 38 E.R. 839; 1 Digest (Repl.) 22, *164*.

Stephenson v. *Hayward* (1710), Prec. Ch. 310; 24 E.R. 147; 5 Digest (Repl.) 1230, *9885*.

Sloane v. *Cadogan* (1808), cited in 12 Sim. at p. 291; 8 Digest (Repl.) 630, *667*.

Ex parte Pye, Ex parte Dubost (1811), 18 Ves. 140; 34 E.R. 271, L.C.; 25 Digest (Repl) 585, *251*.

Holland and Humble's Assignees v. — (1815), 1 Stark. 143; 171 E.R. 427; sub nom. *Heywood* v. *Waring*, 4 Camp. 291; sub nom. *Re Holmes, Ex parte Heywood*, 2 Rose, 355, N.P.; 8 Digest (Repl.) 580, *281*.

Appeal by the plaintiff from an order of SHADWELL, V.-C., infra, refusing the plaintiff's application that the defendants, trustees of a certain deed, might be ordered to pay into court the balance of money admitted to be in their hands under the trusts of the deed.

By an indenture dated June 22, 1822, and expressed to be made between the Duke of York, the defendants, Lord Lauderdale and B. C. Stephenson, and creditors of the duke named in the schedule the duke assigned to the defendants, his furniture, plate, stock, growing crops, and other effects at Oatlands, on trust to sell them and to pay certain tithes, rates and taxes, a debt of £1,138, the costs of getting in the crops and carrying on the farm until Nov. 1, 1822, servants' wages and certain other debts, not exceeding £50 each, and to divide the residue rateably among the creditors. The creditors did not execute the deed. The defendants sold the property assigned to them and received the proceeds.

The plaintiff, one of the creditors, not having been paid his debt, filed a bill on behalf of himself and the other unsatisfied creditors against the defendants, charging that he and the other creditors, in consideration of the deed having been executed in their favour and on the faith of the provisions thereby made for their debts, had forborne to sue the duke, so that the deed was founded on a good and valuable consideration, and was binding on the duke and the defendants; that on June 24 and 28, 1822, the plaintiff's solicitor called upon one Humphries, the solicitor of the defendants and of the duke, when the deed was shown to the plaintiff's solicitor, and that the plaintiff afterwards received a letter from Humphries stating that the duke had assigned the properties to the trustees for the payment of the scheduled creditors, that the plaintiff's name was in the schedule to a debt of £191 3s., and that the deed directed that the plaintiff should receive some part of that sum. The bill prayed that the necessary accounts might be taken and that the trusts of the deed might be carried into execution.

The defendant Stephenson by his answer said that neither the plaintiff, nor any of the other creditors, executed the deed, but that it was executed by the duke without their knowledge, privity or concurrence, and was altogether voluntary and without consideration, on his part, that the trustees had paid the tithes, taxes and rates, the debt of £1,138, and also the debts which did not exceed £50 and that they had by express direction of the duke paid five sums amounting to £1,653 to or for the use of the duke, and that, though he did not repay them those sums he had out of his own money paid several of the creditors the whole or part of their debts, amounting altogether to £1,653, and, therefore, that if the deed was irrevocable (which the defendant submitted it was not), the duke's personal representatives were entitled to stand in the place of those creditors to the extent of that sum; that the duke by directing payment of the five sums had revoked the deed to the extent of those sums, and that the defendants had been advised that it was doubtful whether they ought not to hold the balance in their hands, in trust for the duke's personal representatives, and that they had for that reason abstained from making any distribution of it among the creditors: that the plaintiff previously to the

execution of the deed, had made some very urgent applications to the duke through Stephenson, who was then acting as the duke's agent, for the payment of his debt, and that the plaintiff's solicitor wrote a letter to the defendant peremptorily demanding payment, and threatening proceedings in case of refusal. The defendant denied that Humphreys ever was his solicitor and stated that he was unable to say whether Humphries wrote the letter to the plaintiff, but that on the execution of the indenture, he and his co-trustee authorised Humphries to write to the scheduled creditors circular letters informing them of the execution of the indenture. The defendant denied that the indenture was an inducement and consideration to the plaintiff and the other creditors, to forbear to sue the duke, and said that though the plaintiff and some of the creditors did not, yet others of them did sue the duke for their debts.

A motion was now made for the plaintiff that the defendants might be ordered to pay into court, the balance admitted to be in their hands.

Rogers for the plaintiff.

Pepys and *Wigram* for the defendants.

SHADWELL, V.-C. The question in this case is similar to that which arose in *Wallwyn* v. *Coutts* (1), and I have obtained the bill that was filed in that cause and also procured from the registrar's book a copy of the order made in that case.

The first deed in that cause was dated Feb. 22, 1812, and it is obvious from its contents that the object of the Duke of Marlborough in executing it was to make a provision for the Marquis of Blandford, and there is no reference in it to anything which was to move from the marquis to his creditors. It was a deed made by the father to the son for the purpose of redeeming annuities granted by the son and paying off the arrears of those annuities, and then, if the trustees thought proper, they were empowered to raise a sum for the payment of the son's specialty and simple contract debts. It is observable, however, that by the ultimate trust in that deed the Marquis of Blandford took a direct interest in the estates, for he was made tenant in fee of them in remainder after the death of the duke. The marquis having thus become tenant in fee in remainder of these estates, became party to another indenture, of August 13, 1812, which was made between the Duke of Marlborough of the first part, the Marquis of Blandford of the second part, and Blackstone & Coutts of the third part. That deed recited that £15,000 had been raised by the parties, that the trustees had not been able to liquidate the demands, and that the duke and the marquis had agreed that the trusts of the former deed should be extended so as to enable the trustees to raise by way of annuity the sums by the release authorised to be raised by sale or mortgage.

In that deed there was a direct dealing by the Marquis of Blandford, by means of his reversion in fee, and by that deed he took upon himself to vary the order of payment prescribed by the former deed. Then the character of the parties changed; for we have no longer the father making a provision for the son but here is a son, who had attained a vested remainder, varying the order in which the trusts had been declared for the benefit of his annuity creditors and afterwards for his general creditors. Then there was a third deed of Oct. 20, 1813, made between the Duke of Marlborough of the first part, the Marquis of Blandford of the second part, and Blackstone & Coutts of the third part. In that deed they take notice that the duke and the marquis had agreed that the trustees should stand seised of the hereditaments, etc. [HIS HONOUR here read part of the deed.] That certainly is not a very plain manner of stating what the parties were to do, but those are the terms of the deed. The deed then proceeds thus: "That is to say, upon trust to raise," etc., and the ultimate trust was then declared, as before. Here again there was a direct interference both by the Duke of Marlborough and by the Marquis of Blandford, with respect to the disposition which had been previously pointed out for the payment of the annuity creditors, and also, of the other creditors of the marquis.

Then the bill alleged that the trustees had raised several sums of money, divers parts of which had been paid over by them to the duke and marquis; that the plaintiff's annuity and several of the other annuities were still unpaid; that the trustees pretended that they were allowed to apply the moneys raised as they should deem most beneficial to the several trusts; but the plaintiff charged that they were bound by the indenture of Feb. 22, 1812, to re-purchase the annuities and pay off the arrears; and that the annuities and arrears were a lien upon the estates, and that the trustees could not apply the moneys to any other purpose, before they should have re-purchased the annuities and paid off the arrears; that the duke and marquis pretended that they were entitled to have the £3,000 raised and paid to the marquis, and that the trusts of the indentures were solely for the benefit and accommodation of the marquis; and that the duke and marquis had called upon the trustees to re-convey the trust premises to them. The bill then prayed that the plaintiff's annuity and the other annuities mentioned in the schedule to the deed of February, 1812, might be declared to be a lien on the estates and on the moneys raised and to be raised; that the trusts of the indentures might be performed; that the defendants might account for what they had received; and for an injunction to restrain the trustees from re-conveying the estates to the duke or to the marquis and from paying over to them or either of them any of the moneys raised under the trusts.

To that bill the Duke of Marlborough and the Marquis of Blandford were made defendants, as well as Blackstone & Coutts. Coutts in his answer admitted the deeds, and submitted all the questions of law to the court. On May 11, the plaintiff applied to the Lord Chancellor for an injunction, and that application was made in terms which raised the question that has been raised by the passages in the bill which I have referred to. That application was opposed by counsel on behalf of the marquis and the trustees, and the result of it was that the court did not think fit to make any order upon it, but directed the plaintiff to pay to the defendants the costs of the application. So that a more decisive opinion upon it could not have been given by that judge.

The question is: What is fairly to be inferred from that order. Having had an opportunity of considering this since the motion was mentioned to me, it appears to me that the principle on which Lord Eldon acted when he pronounced that order, must be taken to be consistent with that which he has repeatedly declared to be the established law of this court, namely, that where there is an actual settlement made for vesting an estate in trustees, or for vesting stock in trustees for volunteers, there, the legal character being complete, the persons who have the legal character are trustees for the volunteers, who may claim as cestuis que trust against the trustees under the deed. I apprehend that the principle of the two decisions in *Ellison* v. *Ellison* (2) and *Pulvertoft* v. *Pulvertoft* (3), and of that in *Wallwyn* v. *Coutts* (1) are reconcilable with each other; because I apprehend that Lord Eldon must have considered that where a person does, without the privity of anyone, without receiving consideration, and without notice to any creditor, himself make a disposition, as between himself and trustees, for the payment of his debts, he is merely directing the mode in which his own property shall be applied for his own benefit, and that the general creditors or the creditors named in the schedule, are merely persons named there for the purpose of showing how the trust property under the voluntary deed shall be applied for the benefit of the volunteers. It is manifest that Lord Eldon must have proceeded on this principle, for he must have considered that the first deed was a voluntary deed for the benefit of the Marquis of Blandford; and he must also have considered that as under that deed the marquis had become tenant in fee in remainder of the estates he was, when he executed the two subsequent deeds, dealing with his own property, for his own personal benefit and accommodation, in paying his creditors as he thought proper. It appears to me that that is a broad intelligible ground of decision, the principle of which reconciles the

decision in *Wallwyn* v. *Coutts* (1), with the decisions in *Pulvertoft* v. *Pulvertoft* (3) and *Ellison* v. *Ellison* (2).

It was said, however, by the plaintiff's counsel, that in this particular case the creditors must be entitled to the benefit given by the deeds, on account of the letter that was written by Mr. Humphries. In the first place, it is not admitted by the answer that that letter was received, and even if it had been received it does not appear that the creditors ever submitted to take the benefit of the deed, or conformed to its terms, or abstained from suing the duke. But it has been stated that, so far from this creditor thinking that he was bound to take the benefit of the deed, he actually came in under the decree made in the suit that was instituted for the administration of the Duke of York's estate, and proved his debt before the Master after the receipt of the letter.

My opinion, therefore, is that according to the principle of the decision in *Wallwyn* v. *Coutts* (1) the creditors would not have had any right to enforce the deed, even if it had appeared that the letter before alluded to had been received by them, inasmuch as they did not by signing and sealing that deed, make themselves parties to it. But supposing that the plaintiff had a right to enforce the deed from receiving that letter, my opinion is that what has passed would have destroyed his right. On the whole, therefore, I think that this motion ought to be refused; and as *Wallwyn* v. *Coutts* (1) is in my opinion rightly reported, that it ought to be refused with costs.

Jan. 27, 1831. The plaintiff's application was before the LORD CHANCELLOR.

Knight and *Rogers* for the plaintiff.

Sir Edward Sugden, *Pepys*, *Lynch*, and *Wigram* for the defendants.

Cur. adv. vult.

Feb. 11, 1831. **LORD BROUGHAM, L.C.**—This case was argued before me at considerable length; and as it was one which seemed likely to be of general importance from the frequency of such trust deeds for the payment of debts, and as it was strongly urged that the decision of the vice-chancellor was at variance with the current authorities, I took time to consider my judgment, and I also procured a copy of the papers in *Wallwyn* v. *Coutts* (1), on which case his Honour was said to have relied; but I see no reason for departing from the decision which was pronounced in the court below.

[HIS LORDSHIP stated the effect of the trust deed, and continued:] This deed, though for a very meritorious purpose, must be considered as to all intents a voluntary conveyance, even assuming it to be in the strictest sense of the term a trust deed. It has been held, ever since *Leech* v. *Leech* (4) in the time of LORD NOTTINGHAM, that a voluntary conveyance, though void as against a purchaser, is, nevertheless, good as against the representatives of the person who executes it; and I cannot, therefore, but doubt the accuracy of that part of the report of *Wallwyn* v. *Coutts* (1) where LORD ELDON is represented to have said he refused the motion on the ground of the trust being voluntary, and, consequently, a trust which could not be enforced against the Duke of Marlborough and his son the marquis. LORD ELDON, who, in deciding *Ellison* v. *Ellison* (2), had stated the principle so distinctly, and who, again and more recently, had deliberately recognised it in *Pulvertoft* v. *Pulvertoft* (3), could hardly, I think, have so expressed himself. In the first of those cases his Lordship laid down what has ever since been the rule, taking the distinction between a trust executed, where a right vested, and a trust which rests in fieri, not executed; and he said (in conformity with his own subsequent decision in *Pulvertoft* v. *Pulvertoft* (3)) that when the deed was so executed, he would allow the cestuis que trust to appear in court, and would take notice of their existence, and enforce their rights both against the trustees and against the maker of the instrument; but that it was otherwise where the relation had never been fully established, the matter only resting in covenant; and that in such a case he would not interfere.

The ground of this distinction between cases where the matter rests in fieri, and those where the instrument is executed and the relationship of trustee and cestui que trust created, is somewhat obscure; and perhaps a simpler course in the first instance would have been not to give effect to any voluntary conveyance (whether executed or not), either against purchasers as to whom it would, of course, be void by statute, or against the grantor himself. But I am here to deal with the principles as I find them settled by the uniform tenor of decisions; and the rule, as laid down in *Colman* v. *Sarel* (5), and afterwards adopted in *Ellison* v. *Ellison* (2), and *Pulvertoft* v. *Pulvertoft* (3), is not now to be controverted, that the relationship will not be established against the author of a voluntary conveyance, but that wherever the court finds it already constituted, the relationship will be followed out and enforced.

Is, then, *Wallwyn* v. *Coutts* (1) inconsistent with those cases? For it was strongly pressed upon me that that case could only be supported by overruling all the former authorities; and it was further argued, that *Wallwyn* v. *Coutts* (1) would be found to differ from them in this subject, that there the second deed was for consideration. If that had been the fact, the case, as I observed at the time, would have been utterly valueless not worth the paper on which it was printed; for it would only have affirmed a proposition which never was disputed, namely, that, as against a purchaser, a voluntary conveyance could not be enforced. It is satisfactory to find that there is not a shadow of foundation for that suggestion. There were there three deeds, and Wallwyn claimed under the first; but neither was any creditor a party to it, nor was there any consideration moving from a creditor. The case is on all fours with the present, with perhaps this single exception, that there are expressions favouring very much the idea that the deed was not to be considered as vesting an authority in the trustees; for the creditors were to be paid on the request of the Marquis of Blandford, who rather stood in the shoes of the creditors than of the author of the deed. I recur, then, to the question: Is *Wallwyn* v. *Coutts* (1) inconsistent with the former cases? The same judge decided that case who had decided *Ellison* v. *Ellison* (2) and *Pulvertoft* v. *Pulvertoft* (3); and LORD ELDON was not likely rashly to make a decree inconsistent with another which he had pronounced but a short time before. Upon the principle laid down in *Ellison* v. *Ellison* (2) it is clear that no particular form of words is necessary to constitute a trust; but I take the real nature of this deed to be, like that in *Wallwyn* v. *Coutts* (1), not so much a conveyance vesting a trust in *A.* for the benefit of the creditors of the grantor; but rather that it may be likened to an arrangement made by a debtor for his own personal convenience and accommodation for the payment of his own debts in an order prescribed by himself over which he retains power and control, and with respect to which the creditors can have no right to complain, inasmuch as they are not injured by it, they waive no right of action, and are not executing parties to it.

Hill v. *Secretan* (6), *Williams* v. *Everett* (7) and *Scott* v. *Porcher* (8) depend rather upon the principles which are applicable to this species of arrangement. The first of those cases, indeed, in which it was ruled that if *A.* consigns goods to *B.*, to be held for the benefit of *C.*, the latter has such an interest therein that he may effect an insurance upon the goods, has always been considered as going to the very verge of the law. But in the later and much greater authority of *Williams* v. *Everett* (7), it was decided, that where there was no privity between the parties, the proceeds of bills received by *A.*, to whom they were remitted by *C.*, is money had and received not to the use of *B.*, the creditor for whom the bills were to be held, but to the use of *C.*, the party remitting them; the court there holding, consistently, that this is in the nature of a voluntary arrangement by the person who owes the money. *Scott* v. *Porcher* (8) was precisely the same case, occurring in a court of equity; for that is the case of a mere mandate, revocable by the party who consigned the goods.

Two things, if not more, were done in the lifetime, and by the authority of,

the Duke of York, which were inconsistent with the continuance of the arrangement in the present case. His Royal Highness himself paid off several of the scheduled creditors, and to a large amount in the whole, out of moneys of his own; and further, the trustees, by his direction and at his request, paid back to him a considerable portion of the fund which the trust deed had placed in their hands; circumstances tending strongly to show the intent and understanding of the parties themselves with respect to the nature and effect of the transaction. It is unnecessary, therefore, to inquire what might have been the case if the party executing the instrument had never thought fit to do any act inconsistent with its provisions; but the question might then be liable to a very different consideration. The motion to discharge the vice-chancellor's order must be refused.

Appeal dismissed.

ACTON *v.* WOODGATE

[ROLLS COURT (Sir John Leach, M.R.), December 16, 1833]

[Reported 2 My. & K. 492; 3 L.J.Ch. 83; 39 E.R. 1032]

Bankruptcy—Assignment for benefit of creditors—Creditors not parties or privy to deed—Revocability of deed by debtor.

If property is conveyed by a debtor on trust for the benefit of creditors who are neither parties nor privy to the deed, the deed merely operates as a power to the trustees to apply the property in payment of debts, and the power is revocable by the debtor.

Notes. Considered: *Siggers* v. *Evans* (1855), 5 E. & B. 367; *Johns* v. *James* (1878), 8 Ch.D. 744; *Re Sanders' Trusts* (1878), 47 L.J.Ch. 667. Referred to: *Steele* v. *Murphy* (1841), 3 Moo. P.C.C. 445; *Hughes* v. *Stubbs* (1842), 1 Hare, 476; *Wilding* v. *Richards* (1845), 1 Coll. 655; *Kirwan* v. *Daniel* (1847), 5 Hare, 493; *Smith* v. *Keating* (1848), 6 C.B. 136; *Mackinnon* v. *Stewart* (1850), 1 Sim. N.S. 76; *Montefiore* v. *Browne* (1858), 7 H.L. Cas. 241; *Henriques* v. *Bensusan*, *Bank of England Claim* (1872), 20 W.R. 350; *Priestley* v. *Ellis*, [1897] 1 Ch. 489.

As to assignment for benefit of creditors, see 2 HALSBURY'S LAWS (3rd Edn.) 610–612, and ibid., vol. 38, pp. 840, 841; and for cases see 5 DIGEST (Repl.) 1258 et seq.

Case referred to:

(1) *Garrard* v. *Lord Lauderdale* (1830), ante p. 109; 3 Sim. 1; affirmed (1831), 2 Russ. & M. 451; 39 E.R. 465, L.C.; 5 Digest (Repl.) 1259, *10099*.

Also referred to in argument:

Colman v. *Sarel*, *Sarel* v. *Colman* (1789), 3 Bro. C.C. 12; 1 Ves. 50; 29 E.R. 379, L.C.; 44 Digest (Repl.) 11, *41*.

Ellison v. *Ellison* (1802), 6 Ves. 656; 31 E.R. 1243, L.C.; 8 Digest (Repl.) 628, *655*.

Pulvertoft v. *Pulvertoft* (1811), 18 Ves. 84; 34 E.R. 249, L.C.; 25 Digest (Repl.) 268, *760*.

Walwyn v. *Coutts* (1815), 3 Mer. 707; 36 E.R. 272; sub nom. *Walwyn* v. Coutts, 3 Sim. 14; 5 Digest (Repl.) 1258, *10097*.

Page v. *Broom* (1827), 4 Russ. 6, 224; 38 E.R. 707, 789; affirmed (1830), 2 Russ. & M. 214, L.C.; 5 Digest (Repl.) 1259, *10098*.

Bill filed by a general creditor, on behalf of himself and all other creditors, against the trustees of several deeds and against the debtor, Henry Woodgate, praying that the trusts of the deeds might be carried into effect.

By indentures of lease and release, dated Oct. 28 and 29, 1831, Henry Woodgate conveyed certain real estates to the defendants, William Woodgate and James Currie their heirs and assigns, on trust to sell the same, and out of the proceeds

to pay the debts due to them by him and all other debts then due from him. At the time of the execution of the conveyance, Henry Woodgate was indebted to several persons on post obit bonds and annuity deeds. A doubt later arose whether the description in the trust deed of debts then due from him might not extend, contrary to his intention, to the post obit bonds and to future arrears of the annuities, and therefore by further indentures of lease and release, dated Aug. 29 and 30, 1833, made with the former trustees and certain creditors, after reciting the former deed and the doubt that had arisen he directed the trustees to apply the proceeds of the trust estates in payment of their own and all other debts due at the time of the execution of the first conveyance, with the exception of the post obit bonds and subsequent arrears of annuities.

A general creditor sued the trustees and Henry Woodgate to have carried into execution the trusts of the second conveyance, or of the first conveyance if the court should be of opinion that the trusts of the first conveyance could not be varied by the grantor. The defendants, by their answer, stated that Henry Woodgate was then, and at the time of executing the first conveyance, indebted to certain named persons on post obit bonds, and to certain other named persons on annuity deeds, and submitted to the court whether such persons ought to be made parties to the suit in order to assert their claims under the first conveyance. The first conveyance was not communicated to any creditor except the trustees, nor was any other creditor party or privy to it. The second conveyance was executed by several creditors who were not privy to the first.

Pemberton and *Sidebottom* for the plaintiff.
Tinney and *Wigram* for the defendants.

SIR JOHN LEACH, M.R.—It is established by the authorities which have been referred to that if a debtor conveys property in trust for the benefit of his creditors to whom the conveyance is not communicated, and the creditors are not in any manner privy to the conveyance, the deed merely operates as a power to the trustees, which is revocable by the debtor, and has the same effect as if the debtor had delivered money to an agent to pay his creditors, and, before any payment made by the agent or communication by him to the creditors, had recalled the money so delivered. In *Garrard* v. *Lord Lauderdale* (1) it seems to have been considered that a communication by the trustees to creditors of the fact of such a trust would not defeat the power of revocation by the debtors. It appears to me, however, that this doctrine is questionable, because the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised. In the present case, no such communication was made; and the creditors by post obit bond and the annuitants who were named in the answer of the trustees are not, therefore, necessary parties to the suit.

Trusts of the second conveyance to be carried into execution.

LINDENAU *v.* DESBOROUGH

[Court of King's Bench (Lord Tenterden, C.J., Bayley and Littledale, JJ.), November 12, 1828]

[Reported 8 B. & C. 586; 3 C. & P. 353; 3 Man. & Ry. K.B. 45; 7 L.J.O.S.K.B. 42; 108 E.R. 1160]

Insurance—Proposal—Misstatement—Avoidance of policy—Non-disclosure of material fact—Materiality a question for jury.

It is the duty of a party effecting an insurance on life or property to communicate to the underwriter all material facts within his knowledge touching the subject-matter of the insurance. It is a question for the jury whether any particular fact was or was not material.

Notes. Applied: *Wainwright* v. *Bland* (1836), 1 M. & W. 32. Considered: *Wheelton* v. *Hardisty* (1857), 8 E. & B. 232; *London Assurance* v. *Mansel* (1879), 11 Ch.D. 363; *Joel* v. *Law Union and Crown Insurance Co.*, [1908] 2 K.B. 431. Referred to: *Everett* v. *Desborough* (1829), 5 Bing. 503; *Jones* v. *Provincial Insurance Co.*, [1843-60] All E.R. Rep. 443; *Yorke* v. *Yorkshire Insurance Co.*, [1918–19] All E.R. Rep. 877.

As to non-disclosure in insurance contracts, see 22 Halsbury's Laws (3rd Edn.) 185 et seq.; and for cases see 29 Digest (Repl.) 63–65; 379–381.

Cases referred to:

(1) *Morrison* v. *Muspratt* (1827), 4 Bing. 60; 12 Moore, C.P. 231; 5 L.J.O.S.C.P. 63; 130 E.R. 690; 29 Digest (Repl.) 385, *2917*.

(2) *Bufe* v. *Turner* (1815), 6 Taunt. 338; 2 Marsh. 46; 128 E.R. 1065; 29 Digest (Repl.) 471, *3398*.

Also referred to in argument:

Magne v. *Walter* (1782), 3 Doug. K.B. 79; 99 E.R. 548; 29 Digest (Repl.) 211, *1519*.

Huguenin v. *Rayley* (1815), 6 Taunt. 186; 128 E.R. 1005; 29 Digest (Repl.) 379, *2877*.

Carter v. *Boehm* (1766), 3 Burr. 1905; 1 Wm. Bl. 593; 97 E.R. 1162; 29 Digest (Repl.) 42, *2*.

Haywood v. *Rodgers* (1804), 4 East, 590; 102 E.R. 957; sub nom. *Heywood* v. *Rodgers*, 1 Smith, K.B. 289; 29 Digest (Repl.) 197, *1370*.

Ross v. *Bradshaw* (1761), 1 Wm. Bl. 312; 96 E.R. 175; 29 Digest (Repl.) 384, *2908*.

Motion by the plaintiff for a rule nisi for a new trial in an action of assumpsit against the secretary of the Atlas Insurance Co. on a policy of insurance on the life of the Duke of Saxe Gotha.

At the trial before Lord Tenterden, C.J., it appeared that in 1824 an insurance was effected on the life of the duke with the Union Assurance Co. That company had an agent in Germany, who, on behalf of his principals, submitted certain questions to the physicians of the duke, many of them as to specific diseases, and his habits of life, and the last was: "Is there any other circumstance within your knowledge which the directors ought to be acquainted with?" This was answered in the negative. There was also a private certificate sent by the agent to the directors in answer to their inquiries as to certain points. In this also there was a general question: "Do you know any other circumstance which ought to be communicated to the directors?" This was answered as follows:

"Agreeably to our informations, the duke has led a dissolute life in former days, by which he has lost the use of his speech, and, according to some informations, also that of his mental faculties, which, however, is contradicted by the medical men; and as little as we believe that this has any influence on his natural life, we find it our duty to mention it."

The physicians in one of their answers said the duke was hindered in his speech, but did not mention the state of his mental faculties.

An application was made to the Union to insure a further sum on the duke's life, but, that being contrary to their general rules, their agent handed over the proposal to the Atlas, and at the same time gave the latter company the private answers received from their agent in Germany. The plaintiff signed the usual declaration, and declarations by the duke's physicians were made to the Atlas similar to those made to the Union. Upon receiving these documents the Atlas entered into the policy. In 1825 the Duke died, and it was then discovered that there had existed in his head for many years a large tumour pressing on the brain, to which the loss of speech and mental faculties might be attributed, but all the medical testimony went to establish that the symptoms during the duke's life were not such as were likely to excite the suspicion that such a tumour existed, or that he was afflicted with any particular disorder tending to shorten life. One foreign physician, however, said that, had he been consulted, he would have thought it right to state that he attributed the loss of speech to a paralysis of the organs of speech. An English surgeon, called for the plaintiff, on cross-examination said he should, in answer to the general question: "Whether he knew any other circumstances that ought to be communicated to the directors?" have thought it right to mention the state of the duke's mental faculties.

Upon hearing this evidence LORD TENTERDEN told the plaintiff's counsel he thought it made an end of his case, and he should leave it to the jury to say whether there were any facts material to be known which were not mentioned to the assurers, and that if there were, the policy was void. The plaintiff's counsel thereupon elected to be nonsuited, leave being given to him to move for a new trial, on the ground of misdirection.

Brougham, for the plaintiff, moved accordingly.

LORD TENTERDEN, C.J.—At the trial before me among other depositions that of a foreign physician named Stark was read, wherein he stated that he would have certified that the duke was in bodily health, but that he would not have failed to observe that he laboured under an inability to speak, which he attributed to a paralytic state of the nerves of the organs of speech. In addition to this, Mr. Green, a surgeon, stated that if consulted he should have thought it right to mention the state of the duke's mental faculties; whereupon I expressed an opinion that the cause was at an end, and said that I should direct the jury to find for the defendant if they thought the plaintiff had failed to communicate to the insurers any material circumstance within his knowledge. The only question now is whether that direction would have been correct or not.

At the time of the trial I had in my recollection, although not very accurately, *Morrison* v. *Muspratt* (1), which was tried before me at Lincoln. By the printed report it appears that in April, 1823, an insurance was effected upon the life of a lady, who at the end of 1822 had suffered from a pulmonary attack, and was attended by a surgeon. In March, 1823, a medical practitioner who had known her for some years, but did not attend her during that illness, was sent for to examine her with a view to effecting the insurance in question; and he certified that she was in good health. In 1824 she died of a pulmonary disease. I left it to the jury generally to say whether any misrepresentation had been made; and the jury having found a verdict for the plaintiff, the Court of Common Pleas granted a new trial, on the ground that the jury ought to have been called upon to say whether it was material for the defendants to have been made acquainted with the illness of the lady in 1822.

In the present case, the insurance was upon the life of a foreigner. It appeared that a previous insurance had been effected with an office that had an agent abroad. That office was requested to make a further insurance, and being unwilling to do so, the secretary handed over to the defendant the certificate received from their

A foreign agent. If that had distinctly disclosed the fact now in question, I am not prepared to say that the defendant would have had any ground for complaint; but the state of the duke's faculties is not distinctly stated in that certificate. Then it is said that the party is not bound to do more than answer the questions proposed, unless he can be charged with some fraudulent concealment. Admitting this not to fall within any of the specific questions, which is not by any means clear, B still the general question put by the office requires information of every fact which any reasonable man would think material. It certainly seems to me that the circumstances proved as to the state of the Duke of Saxe Gotha's mental faculties were material; and, upon the authority of *Morrison* v. *Muspratt* (1) and *Bufe* v. *Turner* (2), I think I should not have done wrong in leaving the case to the jury in the manner proposed at the trial.

C

BAYLEY, J. I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and D it would often be extremely difficult to show that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach. Besides the cases already mentioned, there are others establishing that the concealment of a material fact, although not fraudulent, is sufficient to vitiate a policy on a ship. On these E grounds and authorities, I am of opinion that the proper question for the jury was not whether the party believed the information withheld to be material, but whether it was in fact material.

LITTLEDALE, J.—I am of the same opinion. It is the duty of the assured in all cases to disclose all material facts within their knowledge. In cases of life F insurance certain specific questions are proposed as to points affecting in general all mankind. But there may be also circumstances affecting particular individuals which are not likely to be known to the assurers, and which had they been known would no doubt have been made the subject of specific enquiries. The general question appears to have been proposed in order to meet such cases, and I think the question on such a policy is not whether a certain individual thought a particular G fact material, but whether it was in truth material, and of that the jury are by law constituted the judges. I, therefore, think the proposed direction would have been right, and that the nonsuit ought not to be disturbed.

Rule refused.

A

ADAMSON *v.* JARVIS

[COURT OF COMMON PLEAS (Best, C.J., and other judges), February 5, 1827]

[Reported 4 Bing. 66; 12 Moore, C.P. 241; 5 L.J.O.S.C.P. 68; 130 E.R. 693]

B

Agent—Principal—Liability of principal to agent—Agent's right to indemnity—Property sold for principal having no right to sell—Agent sued by true owner—Right to indemnity from principal.

C

The defendant, who had certain property in his possession, represented to the plaintiff, an auctioneer, that he had authority to dispose of it, and requested the plaintiff to auction it for him. This the plaintiff did, and paid to the defendant the net proceeds of the sale. Unknown to the plaintiff, the defendant in fact had no authority to dispose of the property. The true owner having recovered damages from the plaintiff, the plaintiff claimed to be indemnified by the defendant.

D

Held: every man who employs another to do an act which the employer appears to have a right to authorise him to do undertakes to indemnify him in respect of all such acts as would be lawful if the employer had the authority he pretends to have; and the plaintiff was, accordingly, entitled to be indemnified by the defendant.

E

Notes. As to contribution between tortfeasors, see the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, replacing the rule that wrongdoers cannot have contribution against each other.

Applied: *Betts* v. *Gibbins* (1834), 2 Ad. & El. 57. Explained: *Collins* v. *Evans* (1844), 5 Q.B. 820. Explained and Distinguished: *Ormrod* v. *Huth* (1845), 5 L.T.O.S. 268; *Morley* v. *Attenborough* (1849), 18 L.J.Ex. 148. Distinguished: *Elliot* v. *Von Glehn* (1845), 13 Q.B. 632; *Robson* v. *Devon* (1857), 5 W.R. 724. Applied: *Dugdale* v. *Lovering*, [1874–80] All E.R. Rep. 545. Explained: *Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (1886), 34 Ch.D. 261. Approved: *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, [1894] A.C. 318. Explained: *The Englishman and The Australia*, [1895] P. 212. Distinguished: *Halbronn* v. *International Horse Agency and Exchange*, [1903] 1 K.B. 270. Applied: *R. Leslie, Ltd.* v. *Reliable Advertising and Addressing Agency, Ltd.*, [1914–15] All E.R. Rep. 1068; *London Association for Protection of Trade* v. *Greenlands*, [1916] 2 A.C. 15. Considered: *Hillen* v. *I.C.I. (Alkali), Ltd.*, [1934] 1 K.B. 455. Applied: *Romford Ice and Cold Storage Co.* v. *Lister*, [1955] 3 All E.R. 460. Referred to: *Barker* v. *Furlong*, [1891] 2 Ch. 172; *Burrows* v. *Rhodes*, [1895–9] All E.R. Rep. 117; *Weld-Blundell* v. *Stephens*, [1920] All E.R. Rep. 32; *Lister* v. *Romford Ice and Cold Storage Co.*, [1957] 1 All E.R. 125.

F

G

As to agent's right of indemnity, see 1 HALSBURY'S LAWS (3rd Edn.) 203–205; as to auctioneer's liability to a purchaser, see 2 HALSBURY'S LAWS (3rd Edn.) 86–89; as to representation subsequently discovered to be false, see 26 HALSBURY'S LAWS (3rd Edn.) 846–847; as to contribution and indemnity among tortfeasors, see 37 HALSBURY'S LAWS (3rd Edn.) 136–141; and for cases see 1 DIGEST (Repl.) 621–624. For the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, see 25 HALSBURY'S STATUTES (2nd Edn.) 359.

H

I

Cases referred to:

(1) *Merryweather* v. *Nixan* (1799), 8 Term Rep. 186; 101 E.R. 1337; 1 Digest (Repl.) 786, *3141*.

(2) *Walton* v. *Hanbury* (1707), 2 Vern. 592; 23 E.R. 985; 1 Digest (Repl.) 621, *2052*.

(3) *Philips* v. *Biggs* (1659), Hard. 164.

(4) *Medina* v. *Stoughton* (1700), 1 Ld. Raym. 593; Holt, K.B. 208; 1 Salk. 210; 91 E.R. 1297; 35 Digest (Repl.) 30, *207*.

A (5) *Sanders* v. *Powell* (1664), 1 Lev. 129; 83 E.R. 332; sub nom. *Saunders* v. *Powell*, 1 Sid. 183; 1 Keb. 693; 21 Digest (Repl.) 645, *1323*.
(6) *Crosse* v. *Gardner* (1688), Carth. 90; Comb. 142; Holt, K.B. 5; 3 Mod. Rep. 261; 1 Show. 68; 90 E.R. 656; 39 Digest (Repl.) 512, *544*.
(7) *Haycraft* v. *Creasy* (1801), 2 East, 92; 102 E.R. 303; 35 Digest (Repl.) 8, *26*.
(8) *Weston* v. *Mason*, *Weston* v. *Chapman* (1765), 3 Burr. 1725; 97 E.R. 1067;
B 41 Digest (Repl.) 80, *54*.
(9) *Bull* v. *Steward* (1749), 1 Wils. 255.
(10) *Max* v. *Roberts* (1810), 12 East, 89; 41 Digest 208, *475*.

Also referred to in argument:
Pasley v. *Freeman* (1789), 3 Term Rep. 51; 2 Smith, L.C., 12th. ed., 71; 100
C E.R. 450; 1 Digest (Repl.) 27, *205*.

Motion in arrest of judgment in an action in which the plaintiff, an auctioneer, had obtained a verdict on a count under which he claimed to be indemnified by the defendant, under whose order the plaintiff had sold goods, the defendant having no authority to sell the same.

The count stated that the defendant, being possessed of cattle and other chattels
D of the value of £1,100, represented to the plaintiff that he was entitled to sell them, and requested the plaintiff to put them up for sale by public auction for him, the defendant. It was further pleaded that the plaintiff, confiding in this representation of the defendant and believing the same to be true, did put up and sell the property by auction for the sum of £601 2s. 9d., and, after deducting his expenses of £187 18s. 11d., paid over the residue thereof, to wit, the sum of £413 3s. 10d.
E to the defendant. The count then alleged that judgment was later obtained against the plaintiff by the true owner in an action to recover the value of the property sold for the sum of £1,100 and £95 costs, which the plaintiff paid, and that the plaintiff had been obliged to spend some £500 in defending in that action. He now sought to be indemnified by the defendant.

At the trial before BEST, C.J., at Guildhall, a verdict was found for the plaintiff,
F damages £1,195. *Serjeant Taddy* for the defendant, in the last term obtained a rule nisi to arrest the judgment, on the ground that the count was ill conceived.

Serjeant Wilde for the plaintiff, showed cause against the rule.
Serjeant Taddy for the defendant, supported the rule.

G Feb. 5, 1827. **BEST, C.J.,** delivered the following judgment of the court.—A motion has been made in arrest of judgment after verdict. The plaintiff relies on the second count, on which only his verdict and judgment are to be entered. Stripped of the technical language with which it is encumbered, the Case Stated on the second count is that the defendant having property of great value in his possession, represented to the plaintiff that he had authority to dispose of such
H property; and followed this representation by a request, that the plaintiff would sell the property for him, the defendant. The plaintiff, believing the representation of the defendant as to his right to the property, and not knowing, either at the time the representation was made, or at any time after, that it was not his, as the agent of the defendant, sold the property; and, after paying such sums out of the proceeds as he was bound to pay, and making such deductions as he had a right
I to make, and which the defendant appears to have allowed, paid the residue to the defendant. The defendant, who had induced the plaintiff to make this sale by his false representation and request to sell, and who, after the sale, continued to assert his right to sell, and confirmed the agency of the plaintiff by accepting from him the residue of the proceeds of the sale, had no right to dispose of this property. The consequence has been, that the plaintiff, supposing, from the defendant's false representations, that he had an authority which he had not, and, acting as the defendant's agent, has rendered himself liable to an action at the suit of the true owner of the goods, and has been obliged to pay damages and costs, while the

defendant, the sole cause of the sale, quietly keeps the fruits of it in his pocket.

It has been stated at the Bar that this case is to be governed by the principles that regulate all laws of principal and agent. Agreed. Every man who employs another to do an act which the employer appears to have a right to authorise him to do undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have. A contrary doctrine would create great alarm. Auctioneers, brokers, factors, and agents, do not take regular indemnities. These would be indeed surprised, if, having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrongdoers, and could not recover compensation from him who had induced them to do the wrong.

It was certainly decided in *Merryweather* v. *Nixan* (1), that one wrongdoer could not sue another for contribution. LORD KENYON, however, said:

> "that the decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right."

This is the only decided case on the subject that is intelligible. There is *Walton* v. *Hanbury* (2), but it is so imperfectly stated that it is impossible to get at the principle of the judgment. *Philips* v. *Biggs* (3) was never decided; but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors. From the inclination of the court on this last case, and from the concluding part of LORD KENYON's judgment in *Merryweather* v. *Nixan* (1), and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

If a man buys the goods of another from a person who has no authority to sell them, he is a wrongdoer to the person whose goods he takes; yet he may recover compensation against the person who sold the goods to him, although the person who sold them did not undertake that he had a right to sell, and did not know that he had no right to sell. That is proved by *Medina* v. *Stoughton* (4), *Sanders* v. *Powell* (5), *Crosse* v. *Gardner* (6), and many other cases. These cases rest on this principle, that if a man, having the possession of property which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when in point of fact the affirmant is not the owner, he is liable to an action. It has been said, that is because there is a breach of contract to rest the action on, and that there is no contract in this case. This is not the true principle; it is this: he who affirms either what he does not know to be true, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages. But here is a contract: the plaintiff is hired by the defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale.

The above cited cases show that a scienter is not necessary in this case, although it was necessary in *Haycraft* v. *Creasy* (7), and the cases of that class. In these cases, a party who had no interest was applied to for his opinion; if he gave an honest, although mistaken one, it was all that could be expected.

But it has been said, you have not shown that the affirmation was false at the time it was made; for the breach is not, that the plaintiff had not authority to sell at the time he said he had, but at the time of the sale, which was subsequent. But the complaint is that the defendant affirmed he had power to sell, and followed that affirmation by a request to sell; which affirmation and request induced the plaintiff to sell when the defendant had no right to give him authority to make such sale. This affirmation and request caused the plaintiff to do an act which has been injurious to him and beneficial to the defendant. For this injury the plaintiff

is entitled to compensation, whether the affirmation was false or true at the time it was made. If the defendant had authority to sell at the time he employed the plaintiff, but ceased to have that authority at the time of the sale, he should have informed the plaintiff of this change in his situation, and prevented him from doing what he ought not to have done; at all events, he should not have taken the proceeds of the sale.

If after verdict we can collect a cause of action, or infer that proof must have been given at the trial, that will support the action, and the judgment may be sustained. In *Weston* v. *Mason* (8), which was an action on a bond brought against the sureties of the sheriff's bailiff, the condition recited that the sheriff had appointed the bailiff for the hundred of East Golson, and it did not appear that the warrant which he was charged not to have returned was directed to him as bailiff of that hundred; but the court said that, being in arrest of judgment, as it did not appear that it was not directed to him as bailiff of that hundred, which the defendant might have shown, it was sufficient. In *Bull* v. *Steward* (9), in an action against the bailiffs of the borough for an escape, it did not appear that the cause of action arose within the jurisdiction of the court; but it was held that after verdict the court would presume any thing proved at the trial which was necessary to be proved, unless the contrary appeared on the face of the record.

On these authorities the court might say, as the defendant has not shown that he was authorised to sell at the time he affirmed he was, and as it is proved he was not authorised at the sale, we will presume that he never had authority at any time. But the main ground is that he has created a belief in the plaintiff that he had authority when he clearly had no authority.

Max v. *Roberts* (10), which has been cited, does not apply: it did not appear that defendant had ever undertaken to carry the goods, and, therefore, he could not be answerable for taking them out of the due course of the voyage.

Rule discharged.

R. *v.* MEDLEY AND OTHERS

[COURT OF KING'S BENCH (Lord Denman, C.J.), February 7, June 6, 1834]

[Reported 6 C. & P. 292]

Master and Servant—Liability of master for act of servant—Nuisance—General authority to servant to manage works causing nuisance.

Nuisance—Public nuisance—Persons deprived of employment.

Water — Pollution — Nuisance — Destruction of fish — Fishermen deprived of employment.

The directors, superintendent and engineer of a gas company were indicted for a public nuisance in discharging effluent into a river, thus polluting the water, destroying large numbers of fish, and depriving fishermen of employment.

Held: (i) the fact that the fishermen were thrown out of employment was not of itself a public nuisance; (ii) the directors were answerable for the acts of the superintendent and engineer under a general authority to manage the works although they were personally ignorant of the particular plan adopted.

Notes. Referred to: *R.* v. *Stannard* (1863), 12 W.R. 208; *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; *Inland Revenue* v. *Cardiff Conservative Club Co.* (1894), 58 J.P. 120; *Sherras* v. *De Rutzen*, [1895–9] All E.R. Rep. 1167.

As to criminal liability of master at common law, see 10 HALSBURY'S LAWS (3rd Edn.) 276; and for cases see 14 DIGEST (Repl.) 46.

Indictment against the chairman and deputy chairman (Medley and Traherne), other directors, the superintendent (Leadbeter), the gas engineer (Hines), and other employees of the Equitable Gas Co. for nuisance.

The indictment alleged that from Oct. 10, 1832, the defendants discharged effluent

into the Thames, polluting the water, destroying large numbers of fish, and depriving fishermen of employment. The defendants pleaded Not Guilty.

The Solicitor-General (Campbell), Law, Mirehouse, Follett and *Bullock* for the prosecution.

Sir J. Scarlett, Serjeant Adams and *Kelly* for the defendants.

LORD DENMAN, C.J., in summing-up, said: This is an indictment which charges the defendants with conveying by certain pipes into the river a certain deleterious ingredient whereby the waters were corrupted and rendered unfit for human food, and also whereby the fish were diminished in number, and the fishermen thrown out of employ. With respect to the fishermen being thrown out of employ, I ought to lose no time in informing you that will not of itself be ground for an indictment, as if it were sufficient every successful speculation in trade might be the subject of a prosecution. The question of what is a nuisance is, as is evident, a question for the jury in each particular case. The words of the indictment convey the law upon the subject as well as any person sitting here can do. The question will be, whether there has been a noxious and deleterious ingredient conveyed into the river, whereby the water has been corrupted and rendered unfit for use; and if there has been, then whether, in the concluding words of the indictment, it was to the common nuisance of the king's subjects. If you think that this has been done and that it was conveyed from the premises of the defendants then you will find them guilty. The diminution of the number of fish took place before this establishment and there were also other causes contributing to it.

The second question you will have to consider will be, which of the defendants are guilty of the nuisance. As to Hines [the gas engineer], if you are satisfied that a nuisance has been committed no doubt you must find him guilty. It is said that the directors were ignorant of what had been done. In my judgment that makes no difference; provided you think that they gave authority to Leadbeter [the superintendent] to conduct the works they will be answerable. It seems to me both common sense and law that, if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants. It is quite clear that in great rivers of this sort there must be many inconveniences arising from a variety of causes, and the question, therefore, will be whether there has been produced by the special acts of this company that which you consider to amount to a nuisance. It seems to me that a great number of trifling objects may produce a deleterious effect, though the individual instances may not be the subject of indictment. In the present case you will say whether these particular individuals have done an act to the common nuisance of the king's subjects.

Guilty against the chairman, deputy chairman, superintendent and engineer and Not Guilty as to the other defendants.

A motion for judgment on the parties convicted was made in the course of Trinity Term, before LORD DENMAN, C.J., LITTLEDALE, TAUNTON and WILLIAMS, JJ. Affidavits were read from the defendants, Medley and Treherne, in which they stated that no complaints had been made to them at any time respecting the management of the works, nor were they at all aware of the nuisance complained of until the indictment was preferred; and all four defendants swore that the nuisance had been wholly abated by the establishment of an adequate system of evaporation.

Sir J. Scarlett, Serjeant Adams and *Kelly*, were heard in mitigation, and the *Attorney-General (Campbell)* and *Bullock*, in aggravation, of punishment.

LITTLEDALE, J., in giving judgment, said—The court have to pronounce judgment in this case of the King against William Medley, Edmund Treherne, Richard Leadbeter, and Edward Hines, for a nuisance; which is stated to have been committed by conveying very large quantities of noisome liquids, arising from the manufacture of gas, into the river Thames, whereby the water was rendered insalubrious and the fish destroyed. It has been proved, that the water was not only

rendered improper for domestic purposes, but that a great quantity of fish was actually destroyed by being poisoned. We think, under all the circumstances, that this is not a matter to be passed over merely by the infliction of a nominal fine. At the same time, as no complaint has been made since this indictment was preferred, we do not think it necessary to visit the offence of these defendants with severe punishment. Under all the circumstances of the case, the court adjudges that the defendants, William Medley and Edmund Treherne, the one being the chairman and the other the deputy-chairman of this company, which is called "The Equitable Gas Co.," do pay a fine of £25 each to the king; and that the other defendants, Richard Leadbeter and Edward Hines, the one the general superintendent of these gas-works, and the other the engineer, having also some part of the direction of the works confided to him, do each of them pay a fine of £10.

R. *v.* PINNEY

[COURT OF KING'S BENCH (Littledale, Parke and Taunton, JJ.), October 25-November 1, 1832]

[Reported 3 B. & Ad. 947; 5 C. & P. 254; 3 State Tr. N.S. 11; 1 Nev. & M.M.C. 307; 110 E.R. 349]

Riot—Suppression—Duty of magistrate—Failure to perform—Offence—Matters of defence and mitigation—Questions for jury—Right of magistrate to call on public for help—Duty to head special constables if called out.

A person entrusted with the duty of putting down a riot, whether by virtue of an office of his own seeking (as in the case of a magistrate) or one imposed on him (as that of a constable), must hit the exact line between excess and failure of duty. The difficulty of doing so, though it might be some ground for a lenient consideration of his conduct on the part of the jury, is no legal defence to a charge of neglect in the performance of his duty. Nor can a person so charged excuse himself on the mere ground of honest intention. He might fail to act to the extent of his duty from a perfectly good feeling, and that might be considered in apportioning punishment, but the question for the jury must be whether or not he did what his duty in point of law required. Accordingly, where a magistrate was charged with failing to take all proper steps to suppress a riot the question for the jury to decide was: Did the defendant do all that he knew was in his power to suppress the riot, that could reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity under the circumstances in which he was placed? Did he use those means which the law required to assemble a sufficient force for suppressing the riot and preventing the mischief which occurred? Did he make such use of the force that was obtained, and also of his own personal exertion, to prevent mischief as might reasonably have been expected from a firm and honest man?

The general duty of a magistrate with regard to rioters is to restrain, and, if necessary, to pursue, arrest, and take them. That he may be able to fulfil this he may call on the subjects of the Crown to aid him, and those subjects are bound to assist a magistrate in suppressing the riot, when reasonably warned.

The fact that a magistrate acted on the best advice available (e.g., legal advice) is a circumstance in his favour, but it cannot shelter him if he acted incorrectly in point of law. On any question of the provision of sufficient force the case must be considered as it presented itself to the magistrate at the time and not as if he could have foreseen events which subsequently occurred. It is not the duty of a magistrate to head special constables called out to stop violence or to ride with the military if they have been summoned.

Notes. With respect to the power of one or more justices in suppressing riots, see BURN'S JUSTICE, Riot, VI, VII (26th Edn.), and the books there cited, particularly HAWKINS, PLEAS OF THE CROWN, bk. 1, c. 65. As to the authority of private persons to act in suppressing a riot or affray, whether as assistants to the justices or peace officers, or of their own accord, see POPHAM'S REP. 121 [*Armes Case*], 2 CO. INST. 52, FOSTER'S PLEAS OF THE CROWN, 309, 1 EAST'S PLEAS OF THE CROWN, 297, 304, BURN'S JUSTICE, Riot, IV. "If there be a riot or breach of the peace in the presence of one or more justices, they may arrest the rioters themselves, or command any officers or others by word of mouth, without warrant, to arrest them, and they may, by virtue thereof, flagrante crimine, arrest them in the absence of the justice, by the true meaning of the statute of 34 Edw. 3, c. 1 [Justices of the Peace Act, 1361], and 13 Hen. 4, c. 7 [Riot Act, 1411], quod vide adjudged, 14 Hen. 7, c. 9, s. 10:" HALE'S PLEAS OF THE CROWN, Part II, c. 13, p. 114. The case referred to is *Sir Thomas Green's*, particularly the judgment of FINEUX, C.J. See, as to this case, LAMBARD'S EIRENARCHA, bk. 2, c. 5, pp. 185–7. As to the power and duty of private persons witnessing a felony, to endeavour to prevent it, and apprehend the felon, and the penalty incurred by neglecting to do so, see, among other authorities, HALE'S PLEAS OF THE CROWN, Part I, pp. 587, 588, Part II, pp. 75, 76; *Handcock* v. *Baker* (1800), 2 Bos. & P. 260; HAWKINS, PLEAS OF THE CROWN bk. 2, c. 12, v. 19; BURN'S JUSTICE, Arrest, III, 5. The law on several of the above subjects, and on the employment of the military in cases of disturbances, is very fully discussed by LORD MANSFIELD and LORD THURLOW, in the debates arising out of the riots in 1780: PARLIAMENTARY HISTORY, vol. 21, pp. 694, 736. See also the opinion of MR. LAW, BURN'S JUSTICE, Riot, II note (a), 23rd Edn.

Referred to: *R.* v. *Holden* (1833), 5 B. & Ad. 347; *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1; *R.* v. *Glamorgan County Council*, [1899] 2 Q.B. 536.

As to riot and the liability of magistrates, see 10 HALSBURY'S LAWS (3rd Edn.) 587–590, and ibid. vol. 25, pp. 160–162. For cases see 15 DIGEST (Repl.) 793, 794; 33 DIGEST (Repl.) 170.

Case referred to:

(1) *R.* v. *Kennett* (1781), 5 C. & P. 282; Nev. & M.M.C. 337; 15 Digest (Repl.) 794, *7462*.

Trial of an information filed by His Majesty's Attorney-General against the defendant, Charles Pinney, who, in October, 1831, was mayor of the city of Bristol.

It was alleged that on Oct. 29 there had been riots in the city and that attacks by the rioters, numbering 5,000 or more, had been made on the persons and property of divers of His Majesty's subjects, that the Bridewell and the gaol were broken into and the prisoners released, and that the Bishop's Palace was burned, but that the defendant, neglecting the duties of his office, did not execute the powers vested in him and did not use due means to suppress the rioting.

The case was tried at Bar in the Court of King's Bench at Westminster, by a special jury of the county of Berkshire. The trial began on Oct. 25, before LORD TENTERDEN, C.J., LITTLEDALE, J., PARKE, J., and TAUNTON, J., and lasted seven days. After October 27 LORD TENTERDEN was obliged to discontinue his attendance by illness which in a few days terminated fatally. The trial proceeded before the other three judges.

The Attorney-General (Sir Thomas Denman), *the Solicitor-General (Sir William Horne)*, *Serjeant Wilde*, *Serjeant Coleridge*, *Shepherd* and *Wightman* for the Crown.

Sir James Scarlett, *Campbell*, *Serjeant Ludlow* and *Follett* for the defendant.

Evidence was taken.

Nov. 1, 1832. **LITTLEDALE, J.,** summed-up the case. He stated that there was no doubt in point of law that a public officer guilty of a criminal neglect in the discharge of his duty was liable to an indictment or information, but he added

that the only instance he was aware of in which such an information as this had been prosecuted was the case of Mr. Kennett (1), who was Lord Mayor of London during the riots in 1780 and was tried before LORD MANSFIELD at nisi prius at Guildhall. He was charged with specific offences (with not reading the Riot Act, and with releasing some prisoners), as well as with general neglect of duty, whereas the present information only imputed general misconduct, and that extending over a part of three days. A more attentive consideration would, therefore, be requisite on the part of the jury.

The learned judge shortly stated the history of the riot and the substance of the information, and went on to observe that a party entrusted with the duty of putting down a riot, whether by virtue of an office of his own seeking (as in the ordinary case of a magistrate) or one imposed upon him (as in that of a constable) was bound to hit the exact line between excess and failure of duty, and that the difficulty of so doing, though it might be some ground for a lenient consideration of his conduct on the part of the jury, was no legal defence to a charge like the present. Nor could a party so charged excuse himself on the mere ground of honest intention. He might omit acting to the extent of his duty from a perfectly good feeling, and that might be considered in apportioning punishment, but the question for a jury must be whether or not he had done what his duty in point of law required. The subject of inquiry, therefore, in the present case would be: "Has the defendant done all that he knew was in his power to suppress the riots, that could reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances in which he was placed?" Honesty of intention, though not of itself sufficient to exculpate, would form an ingredient in the case, to be taken into consideration. The learned judge then stated, as the two points upon which this inquiry would turn, whether the defendant used those means which the law required to assemble a sufficient force for suppressing the riot and preventing the mischief which occurred, and whether he made such use of the force which was obtained, and also of his own personal exertion, to prevent mischief, as might reasonably have been expected from a firm and honest man?

The learned judge examined the the facts, and said that, to convict the defendant, they must all be agreed that he had failed in his duty on some one particular point. It was not sufficient if part of the jury thought him wrong in one instance, and part in another. He observed that the defendant during a great part of the transactions had been guided by the suggestions of a military officer, Major Mackworth, and of the Town Clerk Mr. Serjeant Ludlow, and it was a circumstance in his favour that he had acted on the best military and best legal advice that could be obtained, although such advice could not shelter him if he had acted incorrectly in point of law. With respect to the charge of not providing sufficient force beforehand, the case must be considered as it presented itself to the defendant at the time, and not as if he could have foreseen the extent of calamity which resulted from the removal of part of the military and from other circumstances, in which case he might have been expected to make what, in a different state of things would have been an over-exertion. It had been made a charge that on the first day of the riot the defendant did not head the special constables, but that was not, in point of law, any part of his duty. They were headed by the chief constables of the wards, whose duty it was and who were more fitted for it. The defendant gave directions for them to act, and, after having harangued the people (in doing which his life was exposed to danger), he remained in the Mansion House, where communication might be had with him if necessary. It was also stated in the indictment that he did not "organize" the special constables (a new term in law language, probably substituted for the more usual term "array") but neither was this any part of the duty of the mayor. It belonged rather to the chief constables, and the constables were in fact marshalled by Major Mackworth, who, as a military officer, was most competent to this kind of

duty. The learned judge, after commenting on some other facts of the case, proceeded as follows:

The next charge, and, in my mind, the most important, is that the defendant did not use those means which the law requires to assemble a sufficient force on the Sunday morning. On this point some reference has been made to the Special Constables Act, 1820 (1 Geo. 4, c. 37) [repealed Stat. Law. Rev., 1861] and the Special Constables Act, 1831 (1 & 2 Will. 4, c. 41) [repealed by Police Act, 1964]* authorising magistrates in certain cases to call out special constables and compel their attendance. The information does not contain any charge against the defendant founded on the provisions of either of these Acts, of not calling out such constables. If it had, there ought still to have been proof that some person had gone before the mayor and taken the proper steps to require him to call out the special constables, according to the direction of the Act in force at the time. There is no evidence of such steps having been taken, and although it has been under our consideration whether the defendant was not bound at all events to do what the Act prescribes, the majority of the court has decided, and the jury are to take it as the law, that in the present case no question can arise upon these statutes, and they must be laid entirely out of consideration. The question, therefore, will be whether the defendant performed what the general rules of the common law required of him. The general duty of justices of the peace with regard to rioters is to restrain, and, if necessary, pursue, arrest, and take them. That is the obligation arising from the nature of the office, and that they may be able to fulfil this, the justices are in such cases to call upon the king's subjects to aid them. They have authority to do so, and the king's subjects are bound to be assistant to them in suppressing the riot, when reasonably warned.

The material consideration in this case is whether the common law obligation thus thrown upon justices of the peace has been fulfilled on the present occasion. It has been proved, that when the mob went to the Mansion House on the Sunday morning there was no civil power to resist them, and that at the meetings which afterwards took place at the Guildhall and at the Council House on the Sunday morning and afternoon no adequate civil power was provided, which one should think might have been done in so large a place as Bristol. It is also said that on those occasions the mayor and magistrates had no plan to propose to the people, that magistrates were not there to receive the people who attended, and that afterwards, at the demolition and burning of the Bridewell, the gaol, the Bishop's Palace, and the other buildings that were destroyed, there was no adequate civil power to suppress the riots. There is, therefore, a sufficient prima facie case made out to call upon the defendant for an answer, and to put it upon him to show that he did what the law required of him.

The answer given by the mayor is that as soon as he left the Mansion House on Sunday morning he concerted measures to call out the civil power; that he directed the constables who had been on duty the day before to be summoned; that he personally called at several houses, and asked the inhabitants to attend him; that he required the same of people whom he accosted in the streets; and that he desired other persons both to go to the houses, and speak to people in the streets. It was Sunday, and it might be expected that the body of the people

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* The Special Constables Act, 1820, empowered justices to swear in special constables, upon the information on oath of five respectable householders, that tumult, riot, or felony had taken place or was reasonably to be apprehended. The Special Constables Act, 1831 (which received the royal assent on Oct. 15, 1831) repealed the former statute, and gave powers for the appointing of special constables upon the representation on oath of any credible witness. On the fifth day of this trial, during the proof of the defendant's case, a question arose, whether or not it could be made a matter of charge, without having been expressly alleged in the information, that the defendant did not use the powers given by the latter Act for appointing special constables; and there was some discussion on the Bench as to this point but PARKE, J., and TAUNTON, J., were clearly of opinion (though LITTLEDALE, J., expressed some doubt) that at all events it ought to have been proved that an information on oath had been submitted to the defendant before he could be made responsible for not having sworn in constables pursuant to the Act of 1831.

would not be scattered about in their private houses or shops, but attending their several places of worship. The mayor had, therefore, a better opportunity of getting the people together after divine worship should be over, if they had been disposed to come forward, than he would have had at equally short notice on another day. He, accordingly, sent summonses to the churchwardens and to the chapels, and these were received by the people assembled at the places of worship. Besides this, he had bills distributed and posted about the town. The notices addressed to the churchwardens not only requested that the people should assemble, but also they should form themselves into bodies, and as soon as they were formed come to the Guildhall. That is what the common law requires of the magistrate. He is to call the people together, and the defendant does call them in a manner most likely to be attended to, and he tells them to form themselves into bodies, and come, when so formed, to an appointed place. If they had attended, the occurrences of that day might have been different. Was this, then, a reasonable warning on the part of the mayor? If it was, he has done all that lay in his power, provided he gave the warning in sufficient time.

[The learned judge said that in the circumstances criminal neglect could not be imputed to the defendant because he did not call out the posse comitatus, and he continued:] Another charge against the defendant is that on being required to ride with Major Beckwith he did not do so. In my opinion, he was not bound to do so in point of law. I do not apprehend it to be the duty of a justice of peace to ride along and charge with the military. A military officer may act without the authority of the magistrate if he chooses to take the responsibility, but, although that is the strict law, there are few military men who will take upon themselves so to do, except on the most pressing occasions. Where it is likely to be attended with a great destruction of life a man, generally speaking, is unwilling to act without a magistrate's authority, but that authority need not be given by his presence. In this case the mayor did give his authority to act—the order has been read in evidence—and he was not bound in law to ride with the soldiers, more particularly on such an occasion as this, when his presence elsewhere might be required to give general directions. If he was bound to make one charge he ought to have made as many other charges as the soldiers made. It is not in evidence that the mayor was able to ride, or at least in the habit of doing so, and to charge with soldiers it is not only necessary to ride, but to ride in the same manner as they do; otherwise it is probable the person would soon be unhorsed and would do more harm than good. Besides that, if the mob were disposed to resist, a man who appeared in plain clothes leading the military would soon be selected and destroyed. I do not apprehend that it is any part of the duty of a person who has to give general directions, to expose himself to all kinds of personal danger. The general commanding an army does not ordinarily do so, and I can see no reason why a magistrate should. A case may be conceived where it might be prudent, but here no necessity for it has been shown.

The learned judge mentioned other heads of charge which had been laid against the defendant, and pointed out that the evidence did not support those charges.

PARKE, J., and **TAUNTON, J.** did not make any observations.

Verdict of Not Guilty.

HOWARD *v.* EARL DIGBY

[House of Lords (Lord Brougham, L.C., and other Lords), June 19, 21, 24, 30, July 11, 1834]

[Reported 8 Bli. N.S. 224; 2 Cl. & Fin. 634; 5 E.R. 928]

Husband and Wife—Pin-money—Payment to enable wife to dress to keep up dignity of her and her husband's position—Arrears—Presumption of acquiescence by wife—Surviving wife—Right against husband's estate to one year's pin-money—Right of wife's personal representatives to recover arrears—Effect of wife being of unsound mind.

Pin-money payable by a husband to his wife is not an ordinary debt, nor is it a gift from the husband to the wife out and out, but it is a sum set apart for a specific purpose, due to the wife in virtue of a particular arrangement and payable by the husband by force of that arrangement and for that specific purpose. The money is meant as pocket-money and to enable the wife to dress so as to keep up the dignity of her position and that of her husband and to support his and her rank in society. It is to be distinguished from money settled on the wife during the coverture for her sole and separate use.

If the payment of pin-money falls into arrear and the wife is living with and is supported by her husband it will be presumed that she acquiesced in the non-payment in consideration of her husband having provided those articles of dress and adornment which her pin-money was intended to purchase. If a wife survives her husband she will only be entitled to recover from his estate arrears for one year, for the money is intended, not to form a fund which can accumulate, but for the year by year acquirement of articles for the purposes mentioned. Furthermore, the court will take the view that, while a wife, during one year, might go without the means to dress herself and pay her tradesmen's bills, yet in respect of previous years it must be presumed that those bills would have been paid by her husband. At any rate, he would be liable to pay them.

While a surviving wife is entitled to a year's arrears as against her husband's estate, in the event of her death her personal representatives have no claim against that estate for arrears, for a payment of arrears to the wife's representatives would still leave the husband's estate liable for any properly incurred debt of the wife for which the arrangement under which she was to receive pin-money was designed to make provision.

The fact that the wife was of unsound mind is immaterial, for, if a person of unsound mind obtains goods from another and uses them for his own benefit he is liable to the person who pays for the goods, and that person is entitled to set off the money so paid against a claim by the person of unsound mind to money provided for him to pay for the goods.

Husband and Wife—"Necessaries"—Articles suitable to husband's and wife's station in life.

A husband is liable to pay his wife's debts to dressmakers and other persons provided that the articles supplied to the wife are of a kind suited to his and his wife's station in life. That is the meaning which the law affixes to the term "necessaries", and nothing will relieve the husband from a claim for necessaries.

Notes. Referred to: *Leach* v. *Way* (1835), 5 L.J.Ch. 100; *Lea* v. *Grundy* (1855), 24 L.T.O.S. 287; *Rowley* v. *Unwin* (1855), 2 K. & J. 138; *Ex parte Holden* (1863), 13 C.B.N.S. 641; *Moore* v. *Barber* (1865), 5 Giff. 43; *Dixon* v. *Dixon* (1878), 9 Ch.D. 587; *Edward* v. *Cheane (No. 2)* (1888), 13 App. Cas. 385; *Re J.*, [1902] 1 Ch. 574.

As to pin-money and necessaries, see 19 HALSBURY'S LAWS (3rd Edn.) 838, 839, 859–867; and for cases see 27 DIGEST (Repl.) 105, 155, 161, 181 *et seq.*

Case referred to:

(1) *Baxter* v. *Earl of Portsmouth* (1826), 5 B. & C. 170; 2 C. & P. 178; 108 E.R. 63; sub nom. *Bayster* v. *Earl of Portsmouth*, 7 Dow. & Ry. K.B. 614; 33 Digest (Repl.) 590, *55*.

Also referred to in argument:

Thomas v. *Bennet* (1725), 2 P. Wms. 341; 24 E.R. 757, L.C.; 44 Digest 395, *2283*.

Fowler v. *Fowler* (1735), 3 P. Wms. 353; 24 E.R. 1098; 20 Digest (Repl.) 507, *2142*.

Lord Townsend v. *Windham* (1750), 2 Ves. Sen. 1; 28 E.R. 1, L.C.; 44 Digest 530, *3469*.

Marshall v. *Rutton* (1800), 8 Term Rep. 546.

Powell v. *Hankey and Cox* (1722), 2 P. Wms. 82.

A.-G. v. *Parnther* (1793), 4 Bro. C.C. 409; 29 E.R. 962; 27 Digest (Repl.) 132, *960*.

Brodie v. *Barry* (1813), 2 Ves. & B. 36; 35 E.R. 232, L.C.; 33 Digest (Repl.) 649, *905*.

Ridout v. *Lewis* (1738), 1 Atk. 269; West temp. Hard. 302; 26 E.R. 171, L.C.; 27 Digest (Repl.) 161, *1173*.

Aston v. *Aston* (1749), 1 Ves. Sen. 264; 27 E.R. 1021, L.C.; 39 Digest (Repl.) 210, *864*.

Peacock v. *Monk* (1751), 2 Ves. Sen. 190; 28 E.R. 123, L.C.; 27 Digest (Repl.) 119, *876*.

Countess of Warwick v. *Edwards* (1728), 1 Dick. 51; 1 Eq. Cas. Abr. 140; 21 E.R. 186, L.C.; 23 Digest (Repl.) 347, *4144*.

Parker v. *Brooke* (1804), 9 Ves. 583; 32 E.R. 729; 27 Digest (Repl.) 159, *1160*.

Ball v. *Coutts* (1812), 1 Ves. & B. 292; 35 E.R. 114, L.C., 28 Digest (Repl.) 717, *2297*.

Murray v. *Barlee* (1834), 3 My. & K. 209.

Foljambe v. *Willoughby* (1824), 2 Sim. & St. 165; 57 E.R. 308; 28 Digest (Repl.) 584, *965*.

Parkes v. *White* (1805), 11 Ves. 209, L.C.

Dormer's Case (1724), 2 P. Wms. 262; 2 Eq. Cas. Abr. 581; 24 E.R. 723, L.C.; 33 Digest (Repl.) 621, *417*.

Appeal from a decision of SHADWELL, V.-C., reported 4 Sim. 588.

The appellant was the executor of Charles late Duke of Norfolk, the respondent was the personal representative of the late Dowager Duchess of Norfolk, and the suit was instituted to recover alleged arrears of annuities in the nature of pin-money secured to the duchess by indentures of lease, release and settlement, dated March, 1771, being the settlement made previously to and in contemplation of the marriage of the duchess, then Frances Fitzroy Scudamore, with the Duke of Norfolk, then the Hon. Charles Howard. Under that settlement and in the events which happened the duchess became entitled in 1777 to receive during the joint lives of herself, and of the duke one annuity or clear yearly rent-charge of £300 out of estates of the duke in augmentation of the pin-money secured to her out of estates of which she herself had been seised in fee-tail before her marriage, and in 1782 she became entitled to receive in like manner out of these last-mentioned estates another yearly rent-charge of £700 for her separate use for pin-money in lieu of the yearly sum of £500 theretofore payable for such pin-money and in addition to the yearly rent charge of £300.

Charles, Duke of Norfolk, died in December, 1815, having by his will appointed the appellant his executor, who duly proved the same and thereby became the duke's legal personal representative. Under a commission of lunacy issued against

the duchess in April, 1816, she was found to have been a lunatic without lucid intervals, from December, 1782. By an order of the Lord Chancellor, made in August, 1817, the custody of her person and estate was granted to the respondent and two other gentlemen, and they, by another order of the Lord Chancellor, made in August, 1819, were at liberty to institute a suit for the recovery of the arrears of the yearly rent-charges of £700 and £300, from 1782, the time from which the duchess was found to have been a lunatic, to the time of the duke's death. A bill was, accordingly, filed by the committee of the duchess against the appellant as the duke's executor and others, but before any further proceedings were had, in October, 1820, the Duchess died intestate, and letters of administration of her personal estate were granted to the respondent who thereby became her legal personal representative. As such he filed the present bill.

The cause came on to be heard before the vice-chancellor, and his Honour, by his decree dated November, 1831, declared that all the arrears claimed (£1,000 a year from 1782 to 1815) were due to the estate of the late duchess, and directed the appellant, admitting assets of the duke's estate, to pay the same to the respondent, with costs. The appellant appealed.

Sir Charles Wetherell and *Sir William Horne* for the appellant.
Sir Charles Pepys and *Stuart* for the respondent.

June, 21, 1834. **LORD BROUGHAM, L.C.** I regard this case as one of considerable importance, of some interest from the peculiarity of the facts, and of novelty in respect of judicial decision. It is a case of first impression, for there is no decision, no dicta even, in any other case, nor is there any authority of any text writer which can be cited either applicable to it or at all bearing upon it, so as to throw any light upon the question.

[His Lordship stated the facts and continued]: The duchess's committee having done nothing in this matter during her life, on her death her personal representative preferred a claim against the personal representative of the duke to this effect: The duchess had a right to so much a year for pin-money. If she had been a person of sound mind the demand could not have gone back beyond a year, because beyond a year, or a year and a fraction, the court never has allowed a claim for pin-money to go back. But this is said to be upon the presumption that the wife by acquiescence releases the claim, and, as that presumption can have no place in the case of a lunatic, the court, it is contended, is not confined to the year, or the year and a fraction, in this case as it would be in any other, but must go back the whole time; and, accordingly, £33,000, or thereabouts, is the sum which is substantially awarded by this decree, to be paid by the personal representative of the duke to the personal representative of the duchess in respect of an unsatisfied and unreleased claim of pin-money.

First, I must observe, there is no case in which it has ever been held, as far as I know, that the personal representatives of the wife can go back for a year, or even any part of a year, for the arrears of pin-money. That the wife herself can go back is admitted, but then they say, on the part of the respondent, if the wife can go back for a year, it follows as a matter of course that her representative can go back, because how can one have a claim which does not survive to the representative? I see a very material difference between the wife herself and her personal representative in respect of pin-money. There may be no difference in the case of an ordinary debt where there is no peculiar relation between the debtor and the creditor, which peculiar relation it is that distinguishes pin-money from all other cases. What signifies it to the debtor whether he pays the creditor himself, or his personal representative? What signifies it to me, if I owe £1,000 of annuity to A. B., whether I pay it to A. B. himself, or, if A. B. dies, I pay it to C. his representative? I am bound to pay him, and his executors, administrators and assigns, and though at law my debt is not assignable, yet in equity it is assignable, and I am bound to pay the representative just as much as I

was bound to pay the original creditor. But is that the same entirely and in all respects with pin-money? Very much the reverse.

This leads me to consider what pin-money is, and for what purpose and with what view it is provided, in what right the wife enjoys it, and by what obligation the husband pays it. It is not an ordinary debt; it is not a gift from the husband to the wife, out and out; it is not to be considered like money set apart for the sole and separate use of the wife during the coverture excluding the jus mariti; but it is a sum set apart for a specific purpose, due to the wife in virtue of a particular arrangement, payable by the husband by force of that arrangement and for that specific purpose. I am subject to be corrected upon this as upon all other subjects, and to be better informed, but I have not in this case received any such correction, I have not had the benefit of any light better than I possess myself. I have heard nothing whatever to shake my opinion that pin-money is with respect to the personal expense of the wife, for the dress and the pocket-money of the wife. Its very name implies a connection with the person; it means that which goes to deck the person of the wife, and, as I should say, upon a somewhat larger construction, to pay her ordinary expenses. A person in a humble station of life, pays his wife's bills as he pays his own; a person in a station a little higher is accustomed to make, for common convenience, an allowance to his wife of so much for house-keeping expenses and so much over for her own dress and the dress of her children. A person in a higher station still makes a general arrangement, which probably extends over years, if not over the whole coverture; and a person in the highest station makes the arrangement of pin-money by the marriage settlement, which is as much as to say: "You, the wife, shall not be reduced to the somewhat humiliating necessity of disclosing to me every want of a pound to keep in your pocket; or of taking my pleasure and obtaining my consent every time you want to go to the milliner's shop to order your dress, but you shall have so much, consistent with my estate and my income, which you shall retain apart from me and exempt from my control." It is a refinement which the law has introduced, peculiar to the bargain or arrangement previous to and upon the marriage. The husband exempting it from his control, may be supposed to say: "There shall be your dress-money, your pocket-money, your fund for separate personal expenses set apart for you during the coverture."

That I take to be clearly the nature of pin-money, and, if it be so, it is equally clear that no nobleman or person of however high and honourable degree, being in ever so wealthy circumstances, would ever dream of making an allowance to his wife for pin-money if he were at the same time to be paying all her bills year after year, her milliner's bills and others, over and above her pin-money. If it is the right construction of law upon pin-money that the husband is to pay the bills although he has provided the other fund, the sooner it is known to all persons about to enter the state of matrimony the better. But that being clearly, according to my view of the case, not the intendment of the law upon the subject, and pin-money being such as I have described it, I take it to follow that there is a difference between this provision and a debt to strangers—a difference arising from a separate fund being set apart as pin-money and from the mode in which it is to be expended, the kind of expense which it is intended to defray; an expenditure in which the husband as well as the wife may be said to have an interest, for the wife is to dress according to his rank, not her own. Here the lady became the wife of Mr. Howard immediately, but she became in expectancy a duchess because her husband, as it was known at that time, stood in the line of succession and made provision for the event of his succession to Edward then Duke of Norfolk. He was then to pay his wife, as duchess, so much more jointure and so much more pin-money. On Duke Edward's decease she was to become the first lady in the land as a subject, next to the Royal family. She was to be provided for according to the magnificence of that high station of Premier Duchess of England, occupying the highest station which any female subject of the King, out of his own Royal Family,

could possess. She was to be adorned according to her degree, not as Miss Frances Fitzroy Scudamore, or Mrs. Howard, but as the wife of Charles Duke of Norfolk, and Hereditary Earl Marshal of England. It was, therefore, the duke's interest that this money should be retained for supporting his wife's rank, and this ample provision was made plainly with a view to supporting the station of his wife. The duke, her husband, had the fund in a certain degree in his own power, and it is in contemplation of that power that the law says: "You shall not go back beyond a year." If his wife chose to dress herself like a mechanic's housewife, a farmer's dame, or a mere servant instead of the first duchess of the land, and to pay £25 of her £1,000 a year for dress, instead of appearing in the attire becoming her condition; if instead of paying for dress of which the Duke of Norfolk would have no reason to be ashamed when he took her to court, she dressed like a tradesman's wife, and filed a bill in Chancery for the savings of the annuities, the Court of Chancery would not have given her an account of the fund.

It is an error to suppose that the ground on which that court would refuse to go back more than a year is only because of the supposed satisfaction by acquiescence. That is not the sole reason. The court refuses to go back for the obvious reason that the money is meant to dress the wife so as to keep up the dignity of the husband, not for the mere accumulation of the fund, and as it is meant that the money should be expended for the husband's honour, to support his and her rank in society, if the femme did not choose to pay away the money to the baron's honour, she would in vain come to the Court of Chancery and pray "order payment of £9,000 into my banker's, for 10 years, for I only spent £1,000, when it was meant that I should spend £10,000." The Court of Chancery would say: "Your Grace comes here in vain; you might have asked it year by year, and we, if you had asked it, should have given it to you." That is good practice; it is sound reason and plain common sense. It provides a check and control to the husband; it secures the appropriation of the money to its natural and original purpose; and it is for that view quite as much as on account of the presumed satisfaction by acquiescence that the Court of Chancery, on principle and by a settled rule on the subject, will not allow a wife to claim pin-money beyond a year.

This illustrates the reason urged by the appellant's counsel, and the distinction they justly took in the course of this argument between the representative taking the money and the wife herself taking it. It is one thing to say that during the wife's lifetime, a year's arrear shall go to the wife, and a totally different thing to say that the Duke of Norfolk shall pay the wife's personal representative £1,000. The Court of Chancery sees that the Duke of Norfolk may have some interest and advantage in having paid the wife £1,000 of arrears because it pays the milliner's bills which, but for that, he is liable to pay. If his wife has run up £1,000 of debt with her milliner for dress, or with her jeweller for the wear and tear of jewellery and other ornaments, if she has incurred a bill which is consistent with the degree and station of the duke, he might be compelled by an action at law to pay it, but, if the pin-money is paid to the representative of the wife, the duke is still liable to the action and that forms a most material distinction between this and the case of a common debt. If I have a debt against the Duke of Norfolk, it is quite immaterial to him whether he pays it to me or to my representatives after my death, because, if he pays it to my representatives, he is not liable to pay it over again, but very different is this debt of pin-money, for, if he pays it to his duchess's representative the year after her death, he is liable to pay the duchess's milliners, if they bring an action against him for her dress, even after he has paid it to the duchess's personal representative. This is a convincing proof of the total difference between the two cases. It illustrates strongly that which is the foundation of my opinion, the difference between pin-money and other claims, but it also answers, and I think irresistibly answers, the argument urged with some plausibility for the respondent that, if the money due to the duchess

were a year's arrear, or a year and a fraction of a year's arrear as one of the cases gives it, therefore, the same must be equally due to the duchess's representatives. No case can be produced which shows that a single farthing has been given by the Court of Chancery, even for a month's arrear of pin-money, to the wife's representatives; to the wife herself it has been given, but never to her representatives.

I have dwelt so long upon this part of the case, not merely to illustrate the distinction I take between pin-money and other separate estate of the wife, but for another reason also, because it carries your Lordships a good way in the argument upon that part of the case of which I am now about to dispose, and materially aids the appellant's argument where he denies altogether his liability even for one year's arrear of this pin-money—denies that the personal representative of the duchess has a right to claim any arrears.

I proceed now, my Lords, to apply the argument to the first part of the case, with which alone I am now dealing. It is surely a very imperfect view which is taken of the foundation of the cases in Chancery allowing a year's arrear to be claimed by the wife during her life, to say that this is owing to a presumption of satisfaction of the income of former years. I think that that is not the only foundation. I have suggested another from the nature of pin-money, but I will state to your Lordships a ground which seems in the present case decisive against the judgment of his Honour. There is a presumption of actual satisfaction of the party's demand in this way. The wife having the pin-money allowed her for the purpose of her apparel and pocket-money, the court says: "We will not suppose you to be above a year without the means of dressing yourself according to your rank or paying your tradesmen's bills, but we will suppose that the year before, and in all preceding years, they were paid by the husband, and we know that, if he has not paid them, he is liable to pay them, being for necessaries according to his state and degree." Can any person who considers the subject doubt that precisely the same presumption is applicable to the case of this noble lady as to the case of any wife who might have been of sane mind all her life? It is true the duchess was of non-sane mind and memory; it is true that the inquisition declares this affliction to have begun in 1782. But is a lunatic incapable of receiving the benefits of the expenditure of money? May not money be expended for her? Might not the duke pay her milliner's bills? Might not he pay for the ornaments of the person decked in them to his credit and her own? Might not all this happen year after year, just as much if she were lunatic as if she were of sound mind?

The argument for the respondent is this: You cannot presume satisfaction because she cannot release a debt, being a lunatic; you cannot presume silence to be acquiescence, or an abandonment or waiver of her claim, because silence in a lunatic would not make that claim amount absolutely to anything. I agree that generally speaking it does not, but there is another principle, another presumption, to be taken into the account which is applicable to the case, and that is the ground upon which the court acts in giving nothing beyond the year, or at most the year and fraction. The presumption is that the money has been paid, if not directly to the wife in money, yet received to her use in bills paid by the husband in discharge of debts incurred for necessaries or ornaments for the use of the wife's person. Will any man contend that such a principle of decision does not apply to the case of a lunatic? Can it be doubted that a lunatic may receive payment by the discharge of her milliner's bills, and that thereby her demand for pin-money may be satisfied?

Pin-money is, in its nature, for the use and purpose of paying these bills. The only difference is that the Duke of Norfolk, instead of paying over to the duchess money wherewith she might pay her milliner, paid her milliner and saved her the trouble of transmitting the sum. The law on this point, at least, is as clear, both in equity and lunacy and at common law, as that a man's eldest legitimate son is his heir to freehold land. A lunatic cannot bind himself by bond or by bill; a lunatic cannot release a debt by specialty; he cannot be a cognizor in a statute

merchant, staple, a judgment, warrant of attorney, or any other security, I admit; A
but that a lunatic cannot receive payment of a debt, cannot receive money's worth, and thereby make himself, his executors and administrators, that is, his assets, liable in discharge for what he has received, I hear today for the first time. I do not say that I hear it broadly stated because the learned counsel are too good lawyers to state such a proposition directly, but I hear it assumed. I hear arguments built on the assumption, arguments which, but for that assumption, crumble B
into pieces the moment you touch them. It is the foundation of the whole of those arguments. I constantly pressed the learned counsel to say what possibility there was of distinguishing the case of the duchess being a lunatic from that of any other wife not being a lunatic in respect of the presumption of payment of milliner's bills, and the position that the duke, her husband, was not bound to pay twice over the money provided for the payment of these bills. I think I received not only no C
satisfactory answer, but no answer at all.

In *Baxter* v. *Earl of Portsmouth* (1), a heavy bill was made the subject of an action by a coachmaker against the earl's committee for whom I was of counsel. The earl was an undoubted lunatic, found so on inquisition after much litigation. The jury had carried back their finding beyond the period of the coachmaker's bill; consequently, the production of that inquisition was prima facie evidence of the D
lunacy. The jury, on the trial of the action, found for the plaintiff under the direction of the Lord Chief Justice, and the court afterwards refused to disturb the verdict, holding that the committee were bound to pay notwithstanding the finding upon the inquisition. A case occurred a year after at York, to the same effect. There we set up a defence of lunacy, and BAYLEY, J., would hardly allow the objection to be raised. He said: E

> "You cannot stultify yourselves in this way. Is a man of doubtful sanity to go about dealing with honest tradesmen, and to say afterwards that he will set up his lunacy to avoid paying the bills? There is nothing extravagant in this bill; there was nothing to give the party notice that he was dealing with a madman; he got the goods delivered to him." F

A verdict was recovered, and the defendants never sought to set it aside. The practice is the same in Chancery on matters of lunacy. Nothing is more common than for the Chancellor to confirm a master's report, making allowances to A. B. for moneys paid for the use of the lunatic, to C. D. for having maintained the lunatic, to E. F. for having clothed the lunatic. Upon what ground are all these G
allowances made? Not from kindness, not from charity, not for the convenience of the parties, but because they are debts; because in the eye of the court, be it a court of law, or a court of equity, or the Chancellor sitting in Lunacy, they are valid debts incurred by the insane person, and are discharged by the justice of the court. It is certainly done not for the interest of the lunatic, because that would be better consulted by rejecting the claim, and by saying: "Why did you throw away your money or your care on an insane person, who had not the power of H
paying you, or binding himself to pay you, and who could give no acknowledgment for it?"

These cases can, upon no conceivable principle, be distinguished from the one I am now considering, for they all show that a lunatic—whose silence would be no consent, whose acquiescence would not be a waiver, whose obligation by a bond I
would not bind him, whose consuance of a judgment would not bind him to the consuee—may, nevertheless, by receiving the property of another, and using it for his own benefit, or, as in this case, by receiving clothes, or the value in payment for millinery or repairs of articles of dress, so far bind himself to the person who pays for the goods as to enable the latter to set off the money so paid for the lunatic against a claim in our courts in pari materia, that is, against the claim of money which was provided for the alternative of his not paying for the goods. The duke pays for the dresses and so on instead of paying the

£1,000 a year, and the fact that the duchess was a lunatic is no more a reason for refusing him the power to set off money so paid to the milliners than if she were a person of sound mind, where, ex concessis, it is quite clear it would be set off. I feel no doubt upon this point that the judgment of the vice-chancellor cannot stand, and the case must be referred to the master, with power to the personal representative of the late duke to set off whatever may be proved to have been properly paid by him in respect of the lunatic's dress, etc.

Before concluding these observations, I shall add another observation which may, as it strikes me, further illustrate the distinction between pin-money and other property of the wife. I have shown the distinction between a claim of pin-money, and debts claimed by a stranger creditor against a stranger debtor. But observe also the material difference between this case of pin-money in all its incidents as well as in its nature; observe the different way in which the court deals with it and with money settled to the separate use of the wife. I was surprised to hear it said that these cases of separate estate are subject to the same rule as if they were pin-money, and that the claim of the wife in them also is confined to a year. Can anybody seriously maintain that as a proposition of law? Suppose I settle upon a wife, with no reference to pin-money, £1,000 a year to her sole and separate use, her receipts only to be a discharge and not mine, under her power alone to be recoverable, and exempted entirely from my control, and suppose that I vest a fund in trustees for that purpose, can any one doubt that the wife who had not received that annuity for six years would have a right to recover that arrear? Can it be contended that the wife's claim would be confined to a single year? Clearly, the trustees would be bound to see that the whole amount was paid her. That is the difference between the provision of separate estate, and pin-money, which is confined to a year or a year and a fraction.

June 24, 30, 1834. The House heard further argument from *Sir Charles Wetherell*, for the appellant.

LORD BROUGHAM, L.C.—I remain of opinion that this decree cannot stand. The Duchess of Norfolk having been thirty-three years insane and the duke having for the whole of that long period of time not only paid the expenses of her establishment with a munificence and liberality adequate to her station, but having also, beyond a doubt, paid all the personal expenses of her Grace for pocket-money, for trinkets, for millinery, in short for everything on account of which pin-money is generally supposed to be provided, her executors after her death claim £33,000 as arrears of pin-money, she having survived the duke five years, during which she had the ample jointure of £2,000 a year out of the duke's estate besides her own private fortune of £11,000 or £12,000 a year, all, in consequence of the lunacy, accumulating. To this demand the executors of the duke answer: "You cannot both have the pin-money, and also the payments made by the duke out of his own pocket for the very things to provide which pin-money was given." I also take leave to add, that this distinction on the subject of pin-money must be taken: There is no case in the books in which pin-money has been given, not even for one year, in any case to the representatives of the wife for the obvious reason, arising from the nature of pin-money, that it was meant not for the sustentation of the wife, but for her dress and ornament in a station suitable to the degree of her husband, so that the court gives the arrear to the wife of a year or a year and a fraction because, if it be not given to the wife, the husband is liable to pay her debt for necessaries according to her degree. He advances the money to her in order that he may exonerate himself from payment for those necessaries. But if the wife dies and her personal representatives make the claim (and this does not appear to have been considered in the court below), the fact of the husband or his representative paying the arrear to the wife's personal representatives does not in the least exonerate the husband or his estate, because he or his representative is just as liable to pay the undischarged debt for necessaries according to the husband's rank as if

he had not paid the amount to the personal representatives of the wife. I have, therefore, no doubt whatever, that you cannot allow the £33,000 without an account. The decree below says they are to have the whole £33,000 without any account, so that, even if the duke had paid £2,000 a year for expenditure of the wife in the nature of pin-money expenses, not one farthing of that can be deducted. At all events, therefore, there must be an account in the master's office and credit allowed for pin-money expenses, in so far as the duke's representatives shall be able to prove to the satisfaction of the master that he had paid those pin-money expenses.

July 11, 1834. In moving final judgment HIS LORDSHIP said: There is this material observation, which applies to both branches of the case, and in my view disposes of the whole. If a wife comes forward and makes the claim during coverture, of course the husband takes care that the bills are paid. He has an opportunity of controlling her so that she shall not go and game, for example, with her pin-money, and leave him to pay her milliners' bills. But if the same claim, whether it be for thirty-three years or for twelve months, may be made by her personal representatives after her death, either upon the husband if he is living, or upon his representatives if he has predeceased her, then what follows? He is bound to pay the pin-money and he is liable to the bills too, because a husband is liable to pay the bills of dressmakers and other such persons provided the articles furnished are of a kind suited to his and his wife's station in life. That is the meaning which the law affixes to the term necessaries. Therefore, the duke's representatives would be liable to pay the bills for which the pin-money was allotted. Can it be contended that such is the law, that such is consistent with the nature of this provision? It might as well be said that pin-money means an annuity set apart, a separate sum set apart for the wife during the coverture, which she may use as she pleases, and come upon her husband for her personal expenses besides. Such a proposition cannot be maintained in any consistency with principle, or deduced from any authority that can be referred to on the subject.

I have no doubt that the judgment appealed from is wrong. Everything which I before said has appeared to me, upon further consideration, to be well founded. I have no hesitation, therefore, in recommending to your Lordships to reverse the decree of the court below, after making one further observation—there is not only no one instance shown, but nothing like an instance, of pin-money having been allowed except to the wife. It is one thing to allow it to the wife, it is another thing to allow it to the wife's representatives. Should we affirm this decree, we should not only go the length of laying it down that pin-money is an unconditional provision and that all that the husband may have paid for the wife cannot be set-off against the claim, whether the claim be made during the wife's lifetime, or after her decease by her representatives, but we should be making a precedent of a claim of pin-money to any extent whatever allowed to the wife's personal representatives after the wife's death. I am not prepared to advise your Lordships to make any such precedent; it would be going further than any case has yet gone; it would be contrary to every principle of the law generally and to the whole spirit of the law upon this subject.

Appeal allowed.

Re WESTZINTHUS AND OTHERS AND ASSIGNEES OF LAPAGE & CO.

[Court of King's Bench (Denman, C.J., Parke, Taunton and Patteson, JJ.), November 25, 1833]

[Reported 5 B. & Ad. 817; 2 Nev. & M.K.B. 644; 3 L.J.K.B. 56; 110 E.R. 992]

Sale of Goods—Seller's lien—Stoppage in transitu—Document of title to goods transferred by buyer—Transferee taking bona fide for valuable consideration —Exercise of lien or right to stoppage subject to rights of transferee.

Guarantee—Surety—Sale of goods—Document of title transferred by buyer—Transferee taking bona fide for valuable consideration—Unpaid seller in position of surety for buyer—Right to satisfaction out of buyer's property in transferee's hands.

Where the buyer of goods transfers a document of title to the goods, e.g., a bill of lading, by way of pledge or security to a transferee who takes the document in good faith and for valuable consideration the right of an unpaid seller to a lien on the goods or to stop them in transitu and resume possession of them can only be exercised subject to the rights of the transferee.

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of L. at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, L. endorsed the bill of lading, and deposited it with H., who advanced money on it, having previously advanced money on other goods (the property of L.) deposited with him. Before W. had been paid for the oil L. became bankrupt, and on the arrival of the oil at Liverpool W.'s agents claimed it of the master of the ship, but the latter delivered it to H., who sold it with other goods of L. The proceeds of the goods belonging to L. were sufficient to satisfy the debt due from L. to H. H. paid himself his debt, and deposited the net proceeds of W.'s oil with a third person.

Held: W. had, at the time when his agents claimed it, no right to take possession of the oil because the property in it and the right to the possession was then vested in H., the endorsee of the bill of lading for value; W. had no legal right to the possession of the goods after H.'s lien was satisfied, but in a court of equity, the transfer to H. of the bill of lading would be treated as a pledge or mortgage, and W., by his attempted stoppage in transitu, acquired a right to the goods subject to H.'s lien against the assignees of L.; as, in the circumstances he was to be regarded as a surety to H. for L.'s debt, W. had a clear equity to oblige H. to pay his debt out of L.'s goods deposited with him in ease of such surety, and all the goods both of W. and L. having been sold, W. might insist on the proceeds of L.'s goods being appropriated to the payment of his debt; therefore, W. was entitled to have all the proceeds of the oil paid over to him.

Notes. Applied: *Spalding* v. *Riding* (1843), 6 Beav. 376; *Broadbent* v. *Barlow* (1861), 3 De G.F. & J. 570. Considered: *Rodger* v. *Comptoir d' Escompte de Paris* (1869), 21 L.T. 33. Applied: *Kemp* v. *Falk* (1882), 7 App. Cas. 573. Considered: *Sewell* v. *Burdick*, [1881-5] All E.R. Rep. 223. Referred to: *Phillips* v. *Huth* (1840), 6 M. & W. 572; *The Marie Joseph* (1866), Brown. & Lush. 449; *Meyerstein* v. *Barber* (1866), L.R. 2 C.P. 38; *Re Conley, Ex parte Trustee* v. *Barclays Bank, Ltd.*, [1938] 2 All E.R. 127.

As to the effect of the transfer of a document of title on the seller's lien and right to stoppage in transitu, see 34 Halsbury's Laws (3rd Edn.) 138, 139, and as to a surety's rights against the debtor, see ibid., vol. 18, pp. 474 et seq. For cases see 39 Digest (Repl.) 768 et seq.; 26 Digest (Repl.) 124 et seq.

Cases referred to:

(1) *Snee* v. *Prescot* (1743), 1 Atk. 245; 26 E.R. 157, L.C.; 39 Digest (Repl.) 765, *2426*.

(2) *Lickbarrow* v. *Mason* (1787), 2 Term Rep. 63; 100 E.R. 35; on appeal sub nom. *Mason* v. *Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; sub. nom. *Lickbarrow* v. *Mason* (1793), 4 Bro. Parl. Cas. 57; 6 East, 22, n, H.L.; 39 Digest (Repl.) 750, *2279*.

Also referred to in argument:

Hodgson v. *Loy* (1797), 7 Term Rep. 440; 101 E.R. 1065; 39 Digest (Repl.) 743, *2201*.

Lempriere v. *Pasley* (1788), 2 Term Rep. 485; 100 E.R. 262; 39 Digest (Repl.) 652, *1560*.

Wiseman v. *Vandeputt* (1690), 2 Vern. 203; 23 E.R. 732; 39 Digest (Repl.) 749, *2276*.

Aldrich v. *Cooper* (1803), 8 Ves. 382; 32 E.R. 402, L.C.; 20 Digest (Repl.) 526, *2395*.

Lanoy v. *Duke and Duchess of Athol* (1742), 2 Atk. 444; 9 Mod. Rep. 398; 26 E.R. 668, L.C.; 20 Digest (Repl.) 526, *2394*.

Re Goodman, Ex parte Goodman (1818), 3 Madd. 373; 56 E.R. 542; 4 Digest (Repl.) 415, *3695*.

Copis v. *Middleton* (1823), Turn. & R. 224; 2 L.J.O.S.Ch. 82; 37 E.R. 1083, L.C.; 26 Digest (Repl.) 124, *870*.

Rules Nisi to set aside an arbitrator's award.

By an order of the court matters in dispute between Westzinthus and the assignees of Lapage & Co., and between Rogers & Co. and the same assignees, were referred to an arbitrator, who stated the following facts upon his award.

In February, 1831, Westzinthus shipped, at Leghorn, twenty-three casks of oil, by the ship *Sarah* to John and Frederick Lapage who then carried on business as merchants in Liverpool under the name of Lapage & Co., in execution of an order transmitted by them to him. At the same time he drew a bill of exchange on them for the amount of the invoice of the oil. This bill, together with the bill of lading for the oil, was transmitted to agents of Westzinthus with instructions to deliver the bill of lading to Lapage & Co. upon their accepting the bill of exchange so drawn on them. Lapage & Co. accepted the bill of exchange, and the bill of lading was delivered to them.

On Mar. 14, 1831, Hardman & Co., brokers in Liverpool, who were in the habit of making advances in cash and by acceptances to Lapage & Co. upon goods placed by Lapage & Co. in the hands of Hardman & Co. for sale, Hardman & Co. were under cash advances and had accepted for Lapage & Co. to the amount of about £6,700 upon various goods, all of which were in the possession of Hardman & Co. Hardman & Co., at the request of Lapage & Co., accepted their draft for £1,500, falling due on July 15 (which was duly paid at maturity), as a further advance upon the goods already in the hands of Hardman & Co., and also on the twenty-three casks of oil by the *Sarah* which had not then arrived. On the same day (Mar. 14) the bill of lading of the oil by the *Sarah* was duly endorsed and delivered by Lapage & Co. to Hardman & Co. According to the agreement and the course of business between Lapage & Co. and Hardman & Co., the latter were entitled to hold all the goods and bills of lading as a security for their advances. On Mar. 16, a similar advance was made by Hardman & Co. of £1,000, on which occasion a bill of lading of oil, then expected by the ship *Frederick*, was handed and endorsed to Hardman & Co. by Lapage & Co. The facts as to this oil were the same as those relating to that by the *Sarah*, and questions regarding it were to abide the event of the award as to the oil by the *Sarah*.

On Mar. 19, 1831, Lapage & Co. committed acts of bankruptcy, and their acceptance of Westzinthus's bill was dishonoured at maturity. On Mar. 26 a commission

of bankruptcy was issued against them. On Mar. 24 the *Sarah* arrived at Liverpool, and on the same day the agents for Westzinthus, who held an endorsed part of the bill of lading, gave notice to the captain, in consequence of the failure of Lapage & Co., not to deliver the oil to them. They also demanded the delivery of the oil to be made to them as agents of Westzinthus under the bill of lading held by them, and tendered the captain the amount of the freight, but no tender or offer was made to Hardman & Co. to repay any part of the money advanced as hereinbefore mentioned. On April 7, 1831, the solicitors of Westzinthus wrote the following letter to Hardman & Co.:

"Gentlemen, As solicitors of M. Westzinthus of Leghorn, we address you upon the subject of twenty-three casks of oil, consigned by him per the *Sarah* to Messrs. Lapage & Co. of your town, of which you have illegally obtained possession after the same had been stopped in transitu on behalf of the consignor in consequence of the failure of Lapage & Co. We are informed that Lapage & Co. transferred to you the bill of lading of this oil, together with indigo and other property belonging to them, as a security for £1,500 advanced by you to them. We are also informed that you hold other property belonging to Lapage & Co., which you are also entitled to retain as a security for the £1,500. Without entering at present into any question as to the validity of the transfer of this bill of lading, we think it right to give you notice that, in any event, you will be required to apply the indigo and other property, really belonging to Lapage & Co. now in your possession, in payment, in the first instance, of your advances without having recourse to the oil in question except for any deficiency after you have realised the other securities, and, should the oil be more than sufficient to cover such deficiency, M. Westzinthus will claim the benefit of his stoppage in transitu, at least, to the extent of the surplus. If you should think it right, after this notice, to sell the oil before realising your other securities, M. Westzinthus will hold you responsible; and in that case he will claim any balance which may arise in your hands due to Lapage & Co. not exceeding the proceeds of the oil, and we give you notice not to pay such balance to Lapage & Co., or their assignees or creditors."

After the delivery of the oil had been stopped, the captain, on Mar. 27, delivered the oil to Hardman & Co. under an indemnity. At the time of the bankruptcy of Lapage & Co., they were indebted to Hardman & Co. in the sum of £9,271, advanced in the manner before described, and, as security for this sum, Hardman & Co. held goods of Lapage & Co. which had actually arrived, of which the net proceeds, when sold as after mentioned, were £9,961 1s. 7d. They also held the bill of lading of the oil by the *Sarah*, of which the net proceeds, when sold as hereinafter mentioned, were £331 7s. 7d., and the bill of lading of the oil by the *Frederick*, of which the net proceeds, when sold as hereinafter mentioned, were £1,106 10s. 10d. After the arrival of the oil by the *Sarah* and by the *Frederick* Hardman & Co. sold all such oil and other goods, the net proceeds of which amounted to the before-mentioned sums, making a total of £11,399. Out of that sum, Hardman & Co. paid themselves the £9,271 due to them. They deposited £1,437 18s. 5d. (the amount of the two parcels of oil in dispute) to abide the event of this award, and paid over the residue to the assignees of Lapage & Co. The goods, other than those by the *Sarah* and *Frederick* which Hardman & Co. had sold, had been sold by different persons to Lapage & Co., and not paid for, and those vendors, at the time of the bankruptcy, were creditors of Lapage & Co. for the amount. The bills drawn by Westzinthus and by Rogers & Co. for the amounts in respect of the oil by the *Sarah* and the *Frederick*, had not been paid or negotiated, but were still in the hands of the drawers or their agents.

The arbitrator was of opinion that Westzinthus and Rogers & Co. were respectively entitled to £18 13s. 4½d. per cent. on the proceeds of the goods per the *Sarah* and the *Frederick* (being such part of those proceeds as bore to the whole the same

proportion which the excess of the whole proceeds of the goods sold by Hardman & Co. over the debt to them from Lapage & Co. bore to such whole proceeds), and ought to stand in the situation of creditors of Lapage & Co., for the residue of such proceeds of the goods by the *Sarah* and the *Frederick*. He awarded and directed that the sums of £61 17s. 3d. and £206 11s. 7d. (being such per centage as aforesaid), together with such sums as any dividends already declared under the bankruptcy of Lapage & Co. on the residue of such amounts relating to the goods (that is to say, on the sums of £296 10s. 4d. and £899 19s. 3d.) would amount to, should be paid to Westzinthus and Rogers & Co., and that the residue of the disputed sums should be paid to the assignees of Lapage & Co., Westzinthus and Rogers & Co. should be paid such dividends as should thereafter be declared under the bankruptcy on such last-mentioned part of the sums in dispute. The arbitrator further directed that the bills of exchange should be delivered to the assignees. But if this court should be of opinion that Westzinthus and Rogers & Co. were entitled to the whole proceeds of the said goods respectively, then the arbitrator awarded that such proceeds should be respectively paid to them, and the said bills of exchange delivered to the said assignees; or if the court should be of opinion that Westzinthus and Rogers & Co. were not entitled, under their stoppage in transitu, to any part of the proceeds of such goods respectively, then he awarded, that so much of the said proceeds as the dividends already declared on the whole sums for which the said goods were sold by Westzinthus and Rogers & Co. respectively to Lapage & Co., amounted to, should be paid to Westzinthus and Rogers & Co. respectively; and the residue thereof to the said assignees, who were to pay to Westzinthus and to Rogers & Co. such dividends as should thereafter be declared upon such whole sums respectively.

A rule nisi was obtained on behalf of the assignees of Lapage & Co. to set aside so much of the award as gave to Westzinthus, and Rogers & Co., £18 13s. 4½d. per cent. on the amount for which the goods were sold and as directed that they should stand in the situation of creditors to Lapage & Co. for the residue. The rule proposed that, instead thereof, it should be declared that Westzinthus and Rogers & Co. were entitled only to so much as the dividends already declared amounted to. Another rule was obtained on behalf of Westzinthus and Rogers & Co. to set aside the same part of the award, and that Westzinthus and Rogers & Co. should be declared to be entitled to the whole proceeds of the goods. The court ordered that the case should be set down in the Special Paper for argument.

F. Pollock for the assignees of Lapage & Co.
J. H. Lloyd for Westzinthus and Rogers & Co.

Cur. adv. vult.

Nov. 25, 1833. **DENMAN, C.J.,** delivered the following judgment of the court — In this case, Westzinthus, who was the unpaid vendor at the time when his agents made the demand on the master of the vessel on board which the oil was, had no right to take possession on the insolvency of the vendee, Lapage because the property in, and also the right to the possession of, the goods, was unquestionably vested at that time in Hardman, the endorsee of the bill of lading, for a valuable consideration. The demand, therefore, of Westzinthus gave him no legal right to the property or possession of the goods, and it appears to us that he can have no claim at law except as arising out of the right of re-taking the possession of the goods themselves, which right was determined by the endorsement of the bill of lading. It is not necessary to determine what would have been his situation if either Lapage or himself had paid off Hardman's demand prior to the notice given to the master or to the actual receipt of the goods by the vendee.

But it is very properly urged, in the able argument in support of Westzinthus's claim, that every question of equity, as well as of law, was referred to the arbitrator, and that the unpaid vendor had, under the circumstances, an equitable title to the goods by virtue of the attempted stoppage, subject to Hardman's

A right thereto, and also an equitable right to compel Hardman, the creditor, to pay himself out of Lapage's own property, which all the other goods (except those of Messrs. Rogers & Co., whose claim abides the decision of this) certainly were. The learned arbitrator appears to have decided in favour of Westzinthus to this extent—that he had, by virtue of the demand or attempted stoppage in transitu, a preferable right, either at law or in equity, to the general creditors B of Lapage, but he has allowed him only a proportion of the proceeds of his goods, thinking that all the goods deposited by Lapage with Hardman should be proportionably charged with the payment of the debt due to him. He was, therefore, deducted £81 6s. 7½d. per cent., of the proceeds of Westzinthus's goods, being the proportion which the debt due to Hardman bears to all the proceeds, and directed the remainder to be paid over to him, and has, therefore, disallowed C the equity claimed by Westzinthus to oblige Hardman to pay himself out of Lapage's own goods.

We think that the arbitrator was right in allowing Westzinthus to be in a better position than the other creditors, but wrong in disallowing his claim to have all the proceeds paid over to him. As Westzinthus would have had a clear right at law to resume the possession of the goods on the insolvency of the vendee had it D not been for the transfer of the property and right of possession by the endorsement of the bill of lading for a valuable consideration to Hardman, it appears to us that, in a court of equity, that transfer would be treated as a pledge or mortgage only, and Westzinthus would be considered as having resumed his former interest in the goods subject to that pledge or mortgage, in analogy to the common case E of a mortgage of a real estate which is considered as a mere security and the mortgagor as the owner of the land. We, therefore, think that Westzinthus, by his attempted stoppage in transitu, acquired a right to the goods in equity (subject to Hardman's lien thereon) as against Lapage, and his assignees, who are bound by the same equities that Lapage himself was. This view of the case agrees with the opinion of BULLER, J., in his comment on *Snee* v. *Prescot* (1) in *Lickbarrow* v. F *Mason* (2) (6 East, at p. 29, n).

If, then, Westzinthus had an equitable right to the oil subject to Hardman's lien thereon for his debt, he would, by means of his goods, have become a surety to Hardman for Lapage's debt, and would then have a clear equity to oblige Hardman to have recourse against Lapage's own goods, deposited with him, to pay his debt in case of the surety, and, all the goods, both of Lapage and G Westzinthus, having been sold, he would have a right to insist upon the proceeds of Lapage's goods being appropriated, in the first instance, to the payment of the debt. The result is, that Mr. Lloyd's rule must be made absolute, and Mr. Pollock's discharged.

Orders accordingly.

BARTLETT AND ANOTHER *v.* PENTLAND

[Court of King's Bench (Lord Tenterden, C.J., Bayley, Littledale and Parke, JJ.), May 11, 1830]

[Reported 10 B. & C. 760; L. & Welsb. 235; 8 L.J.O.S.K.B. 264; 109 E.R. 632]

Insurance—Payment of policy money—Authority to broker to receive—No authority to bind assured by settlement of loss in account between him and insurers.

In the absence of an express or an implied agreement to the contrary an insurance broker has only authority to receive on behalf of the assured payment of losses in cash, and he has no authority to bind the assured by a settlement of the loss in account between him and the insurers. Any usage to the contrary will not be binding on an assured unless he is acquainted with that usage and adopts it.

Agent—Payment to agent of money for principal—Authority to agent to receive certain sum—Need for agent to receive full amount—Authority not extending to allow debtor to deduct debt owed by him to agent.

An authority given by a principal to his agent to receive money cannot be construed into an authority, not to receive the full amount owed to the principal by the debtor, but to allow the debtor to write off so much as may be due from the agent to him. If that were allowed, it would enable the agent to collude with the debtor to defraud the principal.

Notes. Considered: *Pearson* v. *Scott* (1878), 9 Ch.D. 198. Referred to: *Scott* v. *Irving* (1830), 1 B. & Ad. 605; *Barker* v. *Greenwood* (1837), 2 Y. & C. Ex. 414; *Robertson* v. *Jackson* (1845), 2 C.B. 412; *Partridge* v. *Bank of England* (1846), 9 Q.B. 396; *Bayliffe* v. *Butterworth* (1847), 1 Exch. 425; *Sweeting* v. *Pearce* (1859), 7 C.B.N.S. 449.

As to the settlement of losses by insurers and the authority of agents, see 22 Halsbury's Laws (3rd Edn.) 44–50; and for cases see 29 Digest (Repl.) 98 et seq.

Case referred to:

(1) *Russell* v. *Bangley* (1821), 4 B. & Ald. 395; 106 E.R. 982; 29 Digest (Repl.) 342, *2605*.

Also referred to in argument:

Todd v. *Reid* (1821), 4 B. & Ald. 210; 106 E.R. 915; 29 Digest (Repl.) 341, *2595*.

Gabay v. *Lloyd* (1825), 3 B. & C. 793; 5 Dow. & Ry. K.B. 641; 3 L.J.O.S.K.B. 116; 107 E.R. 927; 29 Digest (Repl.) 92, *385*.

Thorold v. *Smith* (1706), 11 Mod. Rep. 71, 87; Holt, K.B. 462; 88 E.R. 896, 912; 1 Digest (Repl.) 422, *796*.

Action by assureds to recover £835 upon a policy of insurance which the assureds had effected with the St. Patrick's Insurance Co., of which the defendant was secretary, on a cargo of wheat shipped on board a vessel which, with the cargo, was totally lost in the course of the voyage.

The plaintiffs, corn merchants carrying on business near Plymouth, were owners of a cargo of wheat shipped on board the ship *Rose* on a voyage from Boston to Plymouth, and by one James Mitchell, an insurance broker, they effected an insurance on the cargo in the ship to the amount of £835, with the St. Patrick's Insurance Co. at their office in Lombard Street, London. This company was established in 1824, and by a private Act of Parliament, 5 Geo. 4, c. clx, was enabled to sue and be sued by its secretary. The policy was in the usual form, stating that Mitchell, as well in his name as for and in the name and names of all and every other person and persons to whom the same did, might, or should appertain, did make insurance. In the copy of the policy forwarded by Mitchell

A to the plaintiffs he was stated to be agent. The agent of the company, when the policy was effected, knew that it was effected by Mitchell as agent of the plaintiffs and on their account, the letter of instructions having been communicated to him.

The ship sailed on the voyage in question. A total loss of the cargo happened by perils of the seas in November, 1825, and on Dec. 4 following the plaintiffs wrote B a letter to Mitchell containing the following passage:

> "We hope you will get the amount of insurance for us. You of course know better how to act than we do, as we never lost a vessel or cargo before. We have been in the habit of insuring for more than thirty years."

On Dec. 30 an adjustment of a total loss on the policy was made on behalf of the C company, as follows: "The company agree to settle a claim £100 per cent. for total loss on policy £835." Mitchell, the insurance broker, produced to the agent of the company the original policy of insurance, and the adjustment was written upon it in the usual manner. Mitchell had an account with the company, and effected from time to time insurances for other people with them. On the day of making the adjustment the sum of £835 was placed by the company to the D credit of Mitchell in that account, and, at the same time, a pen was struck through the name of the company's agent subscribed to the policy and to the memorandum of adjustment. On Jan. 3, 1826, Mitchell wrote to the plaintiffs a letter, from which the following is an extract:

> "I am in receipt of your esteemed favour of 1st instant. I received an E answer from Dunkirk to my letter respecting the loss of the *Rose*, but not any more satisfactory than the account which appeared in LLOYD'S LIST. They mention that a vessel had come on shore to the eastward of their harbour, but that no trace could be found of any of the crew, nor of any papers, nor even of the cargo she had on board; only a boat had been found near the spot, marked 'Rose of Jersey' and a spar branded in the same way. Under such F circumstances, the underwriters on your policy might have kept us out of a settlement for twelve months, as is the custom where no direct proof can be brought forward. They have, however, in this instance, agreed to settle at the regular time. The customary payment here is to wait one month, and then draw at three months, but you are now at liberty to value for half the amount at three months, and in a few posts I hope to be able to hand you a regular account of G what the balance will be, when you may value on me for the same at four months."

To this letter the plaintiffs, on Jan. 7, returned the following answer:

> "We are glad to hear you have agreed to settle with the underwriters; you will please to draw on them bills of £200 and £300 each, and remit us the drafts. We should think they can have no objection for you to draw on them for H the full amount. You will please to furnish us with your account of insurance for the last year, that we may remit you the amount. This is the first cargo we ever lost, and we trust it will be the last."

On Jan. 11 Mitchell replied to this letter as follows:

> "You appear to have misunderstood me about drawing for the loss per *Rose*. I The underwriters here will not accept for losses. In the present case the company might have kept you out of a settlement for twelve months and a day, which is according to law; but, on urging the matter with them, they have agreed to waive that point, and to settle unless something turn up to throw a doubt upon the loss of the vessel. As I mentioned to you before, the established custom here is for the assured to wait a month after the underwriters have agreed to settle, and then draw at three. In the present instance I give you leave to draw now for £400 at three months, subject to one month's discount, and £400 at four months, writing me a letter engaging to provide

for the bills in the event of the company not paying. You may draw these amounts in such sums as best suit your own purpose."

The plaintiffs replied by letter, and enclosed therein two bills of exchange for Mitchell's acceptance, value £400 each, which he duly accepted.

No balance was struck at the date of the adjustment, nor was any struck until Mar. 1 following, when, after crediting Mitchell's account, the amount of the loss on the policy in question, a balance of £228 4s. 1d. was due by the company to Mitchell. This was paid to Mitchell. On April 9, 1826, Mitchell became insolvent, and, he not having paid the bills or any part of the £835 to the plaintiffs, they were obliged to take up the bills. The placing of the £835 to the credit of Mitchell in the account between him and the St. Patrick's Co. was a bona fide transaction on the part of the company and not made in contemplation of Mitchell's insolvency. It was proved on the trial that the usage of Lloyd's Coffee House in the city of London, where a great majority of marine insurances were effected, was that when a policy was adjusted payment was made at the expiration of a month, at which time the broker's account was credited with the amount of the loss, and, if the premiums due fell short of such amount, the balance was paid to the broker in cash. If at the time of adjustment the amount of the premiums due from the broker to the underwriter exceeded the amount of the loss, it was usual for the underwriter to strike his name off the policy at that time, but the broker was not credited till the end of the month, it being considered that during the interval the assured might call for the money from the underwriter. In the present case, the amount of premiums due from Mitchell to the defendants when the loss was adjusted was £1,072 2s. 9d. The plaintiffs did not call for the money from the underwriters within a month, nor until after the failure of Mitchell. Neither the policy nor the adjustment, nor any notice of the adjustment, nor any notice of the credit in account given to Mitchell, was sent to the plaintiffs, but the policy remained in the hands of Mitchell till after his insolvency.

At the trial before LORD TENTERDEN, C.J., in 1827 the jury returned a verdict for the plaintiffs, awarding them £835 damages, subject to the opinion of the court on a Case which stated the facts set out above. The question for the opinion of the court was whether the credit given to Mitchell in account, or the payment of the balance of that account to him was a payment to the plaintiffs, in part or in all, of the sum of £835? If the court should be of opinion that it was not, the verdict to stand; if otherwise, a nonsuit to be entered, or a verdict for such sum as the court should direct.

Campbell for the plaintiffs.

Maule for the defendant.

LORD TENTERDEN, C.J.—I am of opinion that the plaintiffs are entitled to recover. An authority given by a principal to his agent to receive money cannot be construed into an authority, not to receive money, but to allow the debtor to write off so much as may be due from the agent to him. If that were allowed, it would enable the agent to collude with the debtor to defraud the principal. If the authority was originally to receive money and not to allow a set-off, the fact which exists in this case of the broker having struck out of the policy the name of the underwriter, was an act not authorised by the principal, for, if he did not authorise the broker to accept a set-off in payment, he cannot be supposed to have authorised him to do an act which would amount to a release of the debt. The fact of the name of the underwriter having been struck off the policy may have that effect, provided it be shown to have been done with the consent of the assured. It appears by the report of *Russell* v. *Bangley* (1) that I said that, if the name of the underwriter were struck off the policy, and the assured forbore to call for payment within the period warranted by the usage of the trade, the underwriter might be discharged. The expression is that he *might* be, not that he *would* be. I should certainly have expressed myself more accurately if I had

added: "if the name were struck off with the assent of the assured." BAYLEY, J., in that case did add that qualification, and BEST, J., intimated that, in order to discharge the underwriter, the name must be struck off with the privity of the assured. Here there is nothing to show that the name of the underwriter was struck off the policy with the consent of the assured. If that were the fact, it might have been proved. Nothing appeared to raise such a presumption.

As to the supposed usage at Lloyd's, the usage in a particular place, or of a particular class of persons, cannot be binding on other persons unless those other persons are acquainted with that usage and adopt it. Merchants residing in London and effecting insurances there may reasonably be supposed to be acquainted with that usage, and to act upon it. But there is nothing in the case to raise such a presumption against the present plaintiffs; on the contrary, there is everything to rebut such a presumption. It appears by the letters that the plaintiffs were ignorant of the usage, for they allowed themselves to be imposed upon by the representation which Mitchell made to them and acted on his misrepresentation. This was the first loss that ever occurred in their experience, so that they had had no opportunity of becoming acquainted with the usage.

If the original transaction on Dec. 30 was not binding on them has anything occurred since which can give the defendant the benefit of any partial payment the company may have made to the broker? If the plaintiffs had by their neglect, even though that neglect had been induced by the misrepresentation of their agent, placed the defendant in a situation different from that which he might have been in if no such neglect had taken place, there might be ground for contending that, in point of justice, they, and not the defendant, ought to be losers. But there has been nothing of that kind, because the transaction which took place after Dec. 30 will be found not to be of that character. After Dec. 30 the defendant was indebted to Mitchell, the broker, in a large sum of money. The payment made to Mitchell subsequently to that time must be understood to have been made in respect of that debt. The transaction of Dec. 30 was treated as complete and perfect. The defendant, therefore, has sustained no inconvenience by anything that has occurred since.

BAYLEY J.—I am of the same opinion. In this case the company knew at the time when the policy was effected that it was effected for the benefit of the plaintiffs, and, a loss having occurred, they were bound to pay that loss either to the plaintiffs themselves or to some person who was duly authorised by the plaintiffs to receive it. In making the payment to a third person, it was their duty to see whether he was authorised or not. Here, the company, knowing who the principals were, might have paid the broker by accepting a bill payable to the order of the principals, and by adopting that course they would have been perfectly secure. But if, instead of making the payment in that way, they make the payment to the broker in a manner which gives the latter an opportunity of misapplying the money, then, as the broker was not authorised to receive payment in that way, it was done at the peril of the underwriters.

The plaintiffs, in their letter of Dec. 4, say: "We hope you will get the amount of insurance for us." That gives authority to the broker to get payment in money, but not in any other way. Suppose that letter had been exhibited to the company, they would have known that the broker had authority to receive payment, and that they ought to pay him in such a manner as to enable him at once to pay his principals and make a remittance to them. If they had paid the broker in money, it would have become his duty to transmit the money to the plaintiffs, and they would have been the sufferers if he had omitted to transmit the money to them, but as the company did not put Mitchell in the possession of money so as to give him an opportunity of transmitting that money to the principals, but merely wiped off a debt of their own, and paid, not by money but by set-off, they did that which was not authorised by the plaintiffs. Suppose, at the time the

plaintiffs had sent the authority, the company had communicated to them that they would pay Mitchell not by money, but by set-off, can it be supposed that the plaintiffs would have assented to such a mode of payment? They would have repudiated it, and said that the company must pay them, the plaintiffs, in money, and that they had nothing to do with debts between Mitchell and the company. If the company had looked at the language of this letter, that appears to me the line of conduct which they would have been bound to adopt, and, if they had adopted that line of conduct, namely, by paying in money, Mitchell would, if he were an honest man, have transmitted that money to the plaintiffs.

The plaintiffs were desirous of doing that which would have made them secure, viz., of drawing on the company, but Mitchell misleads them, and tells them to draw upon him. Does their drawing upon him in pursuance of that direction exonerate the company? *Russell* v. *Bangley* (1) shows that it has not that effect. The drawing of the bill shows merely that the plaintiffs were not unwilling to get their money in that way if they could, but, if that bill were not paid, those originally liable to pay still continued liable. The company were bound to pay Mitchell in cash; they have not paid him in cash, and, therefore, they are still liable to pay the amount to the plaintiffs.

It is said that the company are entitled to credit for the sum of £228. I agree with my Lord that there is no ground for making such a distinction, and that the company are not entitled to credit for that sum. If that sum had been paid specifically on account of the debt in question in order to enable Mitchell to make a remittance to the plaintiffs, that might have varied the transaction with respect to that sum, but it was paid generally on account, and there are many other items in the account besides that of £335. I am, therefore, of opinion that the company, never having paid the plaintiffs the amount of their demand in money, and never having done that which is equivalent to payment, are liable.

LITTLEDALE, J.—A total loss having happened, it was the duty of the insurers to pay the amount to the assured, and, if they ought to have paid them in money and have not so done, the only question is whether they have done that which is equivalent to payment in money? They have settled an account with Mitchell, the broker, who was employed by the plaintiffs to conduct the transaction between them and the insurers. The only question, therefore, is whether Mitchell had authority from the plaintiffs to settle the account with the insurers in the way in which he has done?

There certainly was no express authority given by the plaintiffs to Mitchell so to do, but that authority might be implied if there had been any course of dealing between the plaintiffs and the insurers and Mitchell, in which losses had been set-off in this manner against a debt due from the broker to the underwriters. There certainly was no such course of dealing, because it appears that this was the first loss which the plaintiffs had ever had. If there was not any course of dealing from which such authority can be implied, is it to be inferred from the usage which is stated to have prevailed between the underwriters at Lloyd's and the brokers? The usage which prevailed at Lloyd's cannot be called in aid of the insurers in the present case, because they are not persons who effect insurances at Lloyd's. They are an Irish insurance company, and, although they have agents in this country, that does not make them subject to the same rules as those are who effect policies at Lloyd's. Secondly, it cannot be supposed that the plaintiffs are particularly cognizant of what is done at Lloyd's inasmuch as they reside, not in London, but at Plymouth.

If there was no express authority, no course of dealing between the parties, or usage from which such authority can be implied, the only question is whether any such authority can be collected from the letters stated in the Case? It appears that Mitchell misled the plaintiffs as to the mode in which they were entitled to be paid. They tell him that was the first time they had had any loss, and that

A he must know better how to act than they do. It may be said that that gave him authority to act according to the best of his judgment. Mitchell leads them to suppose that the company will pay the loss, not immediately, but at a certain time afterwards. They expect to be paid in money, and Mitchell tells them that the company might have kept them out of a settlement for twelve months, that the custom was to wait one month and then draw at three, but that they B might value for half the amount at three months. The plaintiffs understood that they or Mitchell were to draw on the company, for they desire him to draw on the company and to remit them, the plaintiffs, the drafts, but Mitchell tells them that the company will not accept for losses, but that they, the plaintiffs, might draw on him at three months subject to one month's discount. They did then draw upon Mitchell. The effect of this correspondence is that the plaintiffs, C having confided to Mitchell to settle in the best manner he could, afterwards, on his representation, draw on him two drafts which he accepted. It may be said that by so doing the plaintiffs agreed to give credit to Mitchell and to waive any right of action against the company, but it appears to me that that cannot be so because the plaintiffs drew on Mitchell in consequence of his having represented that the company would not accept for losses, and the plaintiffs fully expected D that either the company or Mitchell would take up the bills when they became due.

I think, therefore, that the plaintiffs did not by drawing the bill upon Mitchell abandon their right to sue the company because they drew upon him in consequence of his having represented that the money would not be paid by the company. There has been a settlement between Mitchell and the company, but E the plaintiffs have nothing to do with it. With regard to the other two sums, I entirely agree, for the reasons given, that they ought not to be deducted The judgment of the court must, therefore, be for the plaintiffs.

PARKE, J., having been concerned as counsel in the cause at the hearing in 1827, gave no opinion.

F *Judgment for plaintiffs.*

MARZETTI *v.* WILLIAMS AND OTHERS

[COURT OF KING'S BENCH (Lord Tenterden, C.J., Taunton and Patteson, JJ.), November 18, 1830]

[Reported 1 B. & Ad. 415; 1 Tyr. 77, n.; 9 L.J.O.S.K.B. 42; 109 E.R. 842]

Bank—Cheque—Payment—Payment refused by bank having funds to meet cheque—Clerk unaware of funds paid in earlier on same day—No loss by customer—Liability of bank.

A trader drew a cheque on his bank, and the following morning paid in a sum of cash which, with the money already in his current account, provided sufficient to enable the cheque to be met. The cheque was presented for payment in a different part of the same office some four hours later, and the clerk to whom it was presented, not knowing of the payment by the customer that morning, declined to pay it. The bank subsequently paid the cheque, and the trader did not prove any actual damage.

Held: (i) a banker who received a sufficient sum of money belonging to his customer was bound to pay a cheque drawn by the customer after the lapse of such a reasonable time as would afford an opportunity to the persons in his establishment to know the fact of the receipt of the money; (ii) a breach of that duty was a breach of contract; and (iii) the jury having found in an action by the customer that such a reasonable time had elapsed, the customer was entitled to nominal damages.

Notes. Although only nominal damages were awarded in this case, it appears that in similar circumstances, substantial damages can be awarded: see 11 HALSBURY'S LAWS (3rd Edn.) 285–286.

Applied: *Godefroy* v. *Jay* (1831), 7 Bing. 413; *Bushell* v. *Beavan* (1834), 1 Bing. N.C. 103. Explained: *Boorman* v. *Brown* (1842), 2 Gal. & Dav. 793. Applied: *Clifton* v. *Hooper* (1844), 6 Q.B. 468. Distinguished: *Westaway* v. *Frost* (1848), 17 L.J.Q.B. 286. Considered: *Re Gibson and Sturt*, *Re St. Albans Bank* (1850), 15 L.T.O.S. 95; *Robarts* v. *Tucker* (1851), 20 L.J.Q.B. 270. Applied: *Fray* v. *Voules* (1859), 1 E. & E. 839. Distinguished: *Bonomi* v. *Backhouse* (1859), E.B. & E. 646. Applied: *Dent* v. *Turpin*, *Tucker* v. *Turpin* (1861), 2 John. & H. 139. Distinguished: *Hyde* v. *Bulmer* (1868), 18 L.T. 293; *Cole* v. *Christie*, *Manson and Woods* (1910), 26 T.L.R. 469. Referred to: *Re Wise*, *Ex parte Atkins* (1842), 3 Mont. D. & De G. 103; *Wylie* v. *Birch* (1843), 4 Q.B. 566; *De Medina* v. *Grove* (1847), 10 Q.B. 172; *Bell* v. *Carey* (1849); 8 C.B. 95; *Beckham* v. *Drake* (1849), 2 H.L. Cas. 579; *Randall* v. *Moon* (1852), 12 C.B. 261; *Woods* v. *Finnis* (1852), 7 Exch. 363; *Churchill* v. *Siggers* (1854), 3 E. & B. 929; *Rolin* v. *Steward* (1854), 14 C.B. 595; *Swinfen* v. *Chelmsford* (1860), 2 L.T. 406; *Emanuel* v. *Roberts* (1868), 9 B. & S. 121; *Prehn* v. *Royal Bank of Liverpool* (1870), L.R. 5 Exch. 92; *Larios* v. *Bonony y Gurety* (1873), L.R. 5 P.C. 346; *Re General South American Co.*, [1874–80] All E.R. Rep. 1045; *Steljes* v. *Ingram* (1903), 19 T.L.R. 534; *Turpin* v. *Victoria Palace* (1918), 88 L.J.K.B. 569; *Neville* v. *London Express Newspaper, Ltd.*, [1918–19] All E.R. Rep. 61; *Wilson* v. *United Counties Bank*, [1920] A.C. 102; *Draper* v. *Trist*, [1939] 3 All E.R. 513; *Gibbins* v. *Westminster Bank, Ltd.*, [1939] 3 All E.R. 577; *Constantine* v. *Imperial Hotels, Ltd.*, [1944] 2 All E.R. 171.

As to nominal damages, see 11 HALSBURY'S LAWS (3rd Edn.) 220; as to breach of contract affecting reputation, see ibid. 285, 286; and for cases see 17 DIGEST (Repl.) 78, 79.

Cases referred to:

(1) *Burnett* v. *Lynch* (1826), 5 B. & C. 589; 8 Dow. & Ry. K.B. 368; 4 L.J.O.S.K.B. 274; 108 E.R. 220; 31 Digest (Repl.) 458, 5851.

(2) *Wells* v. *Watling* (1779), 2 Wm. Bl. 1233; 96 E.R. 726; 11 Digest (Repl.) 48, *691.*

(3 *Weller* v. *Baker* (1769), 2 Wils. 414.

(4) *Green* v. *Greenbank* (1816), 2 Marsh. 485; 28 Digest (Repl.) 523, *400.*

Rule Nisi obtained by the defendants to enter a nonsuit or for a new trial in an action in which the plaintiff, a trader, claimed damages for the wrongful dishonour by his bank (the defendants) of a cheque. At the trial the plaintiff was awarded nominal damages.

The declaration stated that the plaintiff at all material times was a wine merchant and a ship and insurance agent at London, and that the defendants were bankers in the city of London. That by the usage and custom of trade and commerce in the city of London, bankers, receiving into their care and custody the moneys, bills, notes and securities of their customers, and having in their hands cash balances of such their customers, and not having lent or advanced money to discount any bills or bill, notes or note, or other negotiable securities, or made any advances, or incurred, or entered into any engagements or contracts, or incurred or subjected themselves to any liabilities for or on account of their customers as aforesaid, nor having any lien or claim on such cash balances, were bound, and it had been and was their duty as bankers as aforesaid, to honour and pay the drafts or cheques of such their customers duly drawn for any part of such cash balances, when duly presented to such bankers for payment by any person or persons lawfully entitled to recover the money specified in such drafts or cheques. That the plaintiff was a customer of the defendants, who at the time of committing the grievance, etc., had in their hands, as such bankers as aforesaid, a cash balance of £109 19s. 6d., and defendants had not lent or advanced to the plaintiff any money, nor discounted any bills or bill, notes or note, or other negotiable securities for, nor made any advances, nor entered into any engagements or contracts, or incurred or subjected themselves to any liabilities for or on account of the plaintiff, nor had they any lien or claim on the said cash balance of the plaintiff so being in their hands as aforesaid. That on Dec. 18, 1828, while such cash balance was in the hands of the defendants as his bankers as aforesaid, the plaintiff drew a cheque directed to the defendants, and thereby required them to pay to certain persons named Sampson and Hooper, or bearer, £87 7s. 6d.; and delivered the same to Sampson and Hooper, who, while such cash balance of plaintiff, and which so exceeded the said sum of £87 7s. 6d., was in the hands of the defendants as his bankers as aforesaid, duly presented it for payment. Yet the defendants, not regarding their duty as such bankers as aforesaid, nor such usage and custom of trade as aforesaid, but contriving, etc., to injure the plaintiff in his credit and character as a trader, to cause it to be believed that he had drawn a draft or order upon them without having effects in their hands to pay and answer the same, etc., did not, nor would, when the said cheque was so shown and presented to them for payment as aforesaid, honour the said cheque, or pay to the said Sampson and Hooper, or either of them, the said sum of £87 7s. 6d. therein specified, but wholly refused so to do. The second count stated that the defendants were the plaintiff's bankers, and as such had been used to pay his cheques; and that at the material time, they, having sufficient money of his in their hands, and no lien or other lawful cause of refusal, did refuse to pay, etc., contrary to their duty as such bankers, and maliciously intending to injure the plaintiff. The third count stated the facts still more concisely, and there was a general averment of damage to the plaintiff's circumstances and credit. A count was added in trover for bank-notes and pieces of money. The defendants denied liability.

At the trial before PARKE, J., at the London sittings after Michaelmas Term, 1829, it appeared that the amount of the balance due from the defendants to the plaintiff, on the evening of Dec. 17, 1828, was £69 19s. 6d. A few minutes before eleven o'clock on the morning of the 19th, a further sum of £40, being a Bank

of England note, was paid in to his account. On the same day, about ten minutes before three o'clock, a cheque drawn by the plaintiff in favour of Messrs. Sampson and Hooper, for £87 7s. 6d., was presented at the banking-house of the defendants for payment. The clerk, to whom it was presented, after having referred to a book, said there were not sufficient assets, but that the cheque might probably go through the clearing house. The cheque was paid on the following day.

Upon this evidence it was contended by counsel for the defendants, first, that the plaintiff, having declared in tort as for a breach of duty, must be nonsuited, inasmuch as he had not proved any damage. Secondly, that a banker was not bound to know that a particular sum had been paid in an hour or half an hour before the cheque of his customer was drawn. He must be allowed a reasonable time to ascertain the state of the account between him and them, and it was not to be supposed he could know without special notice that a sum paid in by a customer, was to be drawn out an hour or two afterwards, the state of the account, in point of practice, being generally ascertained at the close of each day when the books were made up, it could only be expected that the clerk should look at the book at the time when the cheque was presented, and give an answer according to the state of the account as it then appeared.

The learned judge was of opinion, that a banker who received a sum of money belonging to his customer, became his debtor the moment he received it, and was bound to pay a cheque drawn by such customer after the lapse of such a reasonable time as would afford an opportunity to the different persons in his establishment of knowing the fact of the receipt of such money, and that the refusal to pay a cheque under such circumstances was a breach of duty for which an action would lie; and he directed the jury to find for the plaintiff, if they were of opinion that such a reasonable time had intervened between the receipt of the money at eleven o'clock and the presentment of the cheque at three, observing also, that it could not be expected if a sum of money was paid to a clerk in a large banking office, and immediately afterwards a cheque presented to another clerk in a different part of the office, that the clerk to whom the cheque was presented, should be immediately acquainted with the fact of the cash having been paid in, but a reasonable time must be allowed for that purpose, and he told the jury that in forming their judgment whether such a reasonable time had elapsed, they must consider whether the defendants ought or ought not, between eleven and three o'clock, to have had in some book, an entry of the £40 having been paid in, which would have informed all their clerks of the state of the account. The jury having found for the plaintiff on the first three counts, counsel for the defendants asked whether they found that the defendants acted maliciously. The learned judge said there was no evidence of malice in fact; and if malice was a question for the jury, they must be taken to have negatived malice. The defendants obtained a rule nisi for a new trial.

Brougham and *Thesiger* for the plaintiff, showed cause against the rule.

Sir James Scarlett, *Campbell*, *Justice* and *Williams* for the defendants, supported the rule.

LORD TENTERDEN, C.J. I think that the plaintiff is entitled to have a verdict for nominal damages, although he did not prove any actual damage at the trial. I cannot think there can be any difference as to the consequences resulting from a breach of contract by reason of that contract being either express or implied. The only difference between an express and an implied contract is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract by circumstances, and the general course of dealing between the parties; but whenever a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence. Counsel for the defendants was compelled to admit in this case that if the action were founded on an express contract, the plaintiff would have been entitled to

recover nominal damages, although no actual damage were proved. This action is, in fact, founded on a contract, for the banker does contract with his customer that he will pay cheques drawn by him, provided he, the banker, has money in his hands belonging to that customer. Here that contract was broken, for the defendants would not pay the cheque of the plaintiff, although they had in their hands money belonging to him, and had had a reasonable time to know that such was the fact. In this case a plaintiff might, for the breach of that contract, have declared in assumpsit. So in *Burnett* v. *Lynch* (1), the plaintiff might have declared as for breach of a contract. It is immaterial in such a case whether the action in form be in tort or in assumpsit. It is substantially founded on a contract; and the plaintiff, though he may not have sustained a damage in fact, is entitled to recover nominal damages. At the same time I cannot forbear to observe, that it is a discredit to a person, and, therefore, injurious in fact, to have a draft refused payment for so small a sum, for it shows that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade. My judgment in this case, however, proceeds on the ground that the action is founded on a contract between the plaintiff and the bankers, that the latter, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his cheques; and there having been a breach of such contract, the plaintiff is entitled to recover nominal damages.

PARKE, J.—I am of the same opinion. This action being substantially founded on a contract, I think it can make no difference whether it is in form tort or assumpsit. There is no authority for any such distinction. This case, therefore, must be considered as if the action were founded on a contract by the bankers, to pay all drafts presented within a reasonable time after they receive such money, so as to allow them to pass it to their customer's account. It is admitted that, where there is a breach of an express contract, nominal damages may be recovered. The only difference, however, between an express and an implied contract, is as to the mode of proof. An express contract is proved by direct evidence; an implied contract by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the legal consequences resulting from the breach of it must be the same; one is, that wherever there is a breach of contract or any injury to the right arising out of that contract, nominal damages are recoverable. An extreme case may be put where a party who had sustained no inconvenience, might bring an action; but the remedy in that case would be to deprive such party of costs.

TAUNTON, J.—The defendants were guilty of a breach of duty, which duty the plaintiff at the time had a right to have performed. The jury have found that when the cheque was presented for payment, a reasonable time had elapsed to have enabled the defendants to enter the £40 to the credit of the plaintiff, and, therefore, that they must or ought to have known that they had funds belonging to him. That was sufficient to entitle the plaintiff to recover nominal damages, for he had a right to have his cheque paid at the time when it was presented, and the defendants were guilty of a wrong by refusing to pay it. The form of the declaration, whether it be in tort or assumpsit, makes no substantial difference, nor can it be any real ground of distinction whether the foundation of the action be an express or an implied assumpsit.

There are many instances where a wrong, by which the right of a party may be injured, is a good cause of action although no actual damage be sustained. Trespass, quare clausum fregit, is maintainable for an entry on the land of another, though there be no real damage, because repeated acts of going over the land might be used as evidence of a title to do so, and thereby the right of the plaintiff might be injured. So an action may be maintained by a commoner for an injury done to his common, without proving actual damage. In *Wells* v.

Watling (2), which was an action by a commoner for surcharging the common, the evidence was that the defendant, in 1777, turned on a greater number of sheep than he ought. There was no evidence that the plaintiff had turned on any sheep in that year. It was objected that the action was not maintainable, because the plaintiff, not having used the common during the period of the defendant's misfeasance, could not by possibility have sustained any damage. But it was held that the action was maintainable; DE GREY, C.J., said that it was sufficient if the right be injured, whether it be exercised or not; and NARES, J., observed, that in the case of the dippers at Tunbridge Wells (*Weller* v. *Baker* (3)), it was held that a probable damage was a sufficient injury on which to ground an action.

Here, independently of other considerations, the credit of the plaintiff was likely to be injured by the refusal of the defendants to pay the cheque; and as it was the duty of the defendants to pay the cheque when it was presented, and that duty was not performed, I think the plaintiff, who had a right to its being performed, is entitled to recover nominal damages. The case put in argument, of the holder of a cheque being refused payment, and called back within a few minutes and paid, is an extreme case, and a jury probably would consider that as equivalent to instant payment. That, however, is not the present case. Here the refusal to pay was not countermanded till the following day.

PATTESON, J.—I think the verdict was right. The action is in form founded in tort, but is in substance founded on a contract. The relation in which the parties stood to each other, viz., that of banker and customer, was created by their own contract, not by the general operation of law. *Green* v. *Greenbank* (4), shows that the circumstance of the action being in form for a tort is immaterial, if the substantial ground of it be a contract. This action, therefore, lies, if the plaintiff could have brought assumpsit, and as it is quite clear that he could have maintained assumpsit for the breach of contract, he may on the same ground maintain this action of tort, unless there be some distinction in this respect between an express and an implied contract. But the only distinction between the two species of contracts is as to the mode of proof. The one is proved by the express words used by the parties, the other by circumstances showing that the parties intended to contract. As soon as it is made out, either by direct or circumstantial evidence, that there was such a contract, either of the parties may maintain an action against the other without showing any actual damage. The rule for entering a nonsuit must, therefore, be discharged.

Rule discharged. Judgment for plaintiff for nominal damages.

WILLIAMS AND OTHERS *v.* RAWLINSON

COURT OF COMMON PLEAS (Best, C.J., Park, Burrough and Gaselee, JJ.), May 11, 1825]

[Reported 3 Bing. 71; 10 Moore, C.P. 362; Ry. & M. 233; 3 L.J.O.S.C.P. 164; 130 E.R. 440]

Guarantee—Surety—Right against creditor—Debt owing by debtor before bond given by surety—After bond given sums paid by debtor to creditor—Appropriation—Right of creditor to appropriate to debt existing before bond.

T., who had a banking account with the plaintiffs, was indebted to them for £10,247. The defendant, who was not notified of this indebtedness, entered into a bond to secure the payment by himself to the plaintiffs of all sums which the plaintiffs should thereafter advance to T., not exceeding in the whole the sum of £5,000. Subsequently, the plaintiffs advanced sums to T., and T. paid sums to the plaintiffs which, to T.'s knowledge, the plaintiffs applied first in the reduction of the antecedent debt of £10,247. T. became bankrupt, having a total liability to the plaintiffs of £10,732. In an action by the plaintiffs on the bond, the defendant claimed that the sums paid by T. after the execution of the bond should be applied first in liquidating the advances made after the execution of the bond, and not the antecedent debt.

Held: in the absence of any agreement touching the debts to which the subsequent payments by T. were to be applied, the plaintiffs were entitled to apply them first in discharging the antecedent debt, and, there being no fraud or improper concealment by the plaintiffs in not notifying the defendant of T.'s indebtedness, the defendant was liable on the bond to the extent of £5,000.

Notes. Considered: *Re Sherry, London and County Banking Co.* v. *Terry* (1884), 25 Ch.D. 692. Referred to: *Re Boys, Eedes* v. *Boys, Ex parte Hop Planters Co.* (1870), L.R. 10 Eq. 467.

As to appropriation where account guaranteed, see 2 HALSBURY'S LAWS (3rd Edn.) 172, 236, 237; and 18 HALSBURY'S LAWS (3rd Edn.) 493, 494; as to avoidance of guarantee for fraudulent concealment, see ibid. 495 et seq.; and for cases see 26 DIGEST (Repl.) 96–99.

Cases referred to:

(1) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 572; 35 E.R. 781; 3 Digest (Repl.) 192, *370*.

(2) *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39; 106 E.R. 281; 3 Digest (Repl.) 307, *966*.

(3) *Pidcock* v. *Bishop* (1825), 3 B. & C. 605; 5 Dow. & Ry. K.B. 505; 3 L.J.O.S.K.B. 109; 107 E.R. 857; 26 Digest (Repl.) 221, *1712*.

(4) *Carter* v. *Boehm* (1766), 3 Burr. 1905; 1 Wm. Bl. 593; 97 E.R. 1162; 29 Digest (Repl.) 42, *3*.

Also referred to in argument:

Brook v. *Enderby* (1820), 2 Brod. & Bing. 70; 4 Moore, C.P. 501; 129 E.R. 884; 12 Digest (Repl.) 549, *4170*.

Action on a bond.

One Threlfall having a banking account with the plaintiffs, bankers in London, and being indebted to them on that account £10,247 9s. 1d., under a balance struck in January, 1822, the defendant and others then executed to the plaintiffs a bond on a £9 stamp, in the penal sum of £10,000. The recital to the condition of the bond stated that the said John Threlfall had for some time past had a banking account with the obligees; that the defendant and others had agreed to join Threlfall in the above bond, for the purposes and on the conditions thereunder written; and that it had been expressly agreed between the above parties, that such bond should not in anywise prejudice or affect a certain bond dated Nov. 29,

1817, which was executed and given by the said John Threlfall and others to the above obligees, and their late partner William Moffatt the younger; but that all rights and remedies under or by virtue thereof, should remain in full force and effect.

The condition of the above obligation was, that if Threlfall, his heirs, executors or administrators, should from time to time and at all times thereafter reimburse to the obligees or the survivor of them, and every other person who should become partner with them in the banking business, their executors or administrators, all and every sum and sums of money, which the obligees or the survivor of them, or any partner in their banking-house, should within ten years thereof advance or pay, or be liable to advance or pay on account of accepting, endorsing, discounting, paying, or satisfying any bill or bills of exchange, drafts, notes, orders, or other engagements whatsoever, that the said Threlfall should from time to time draw or cause to be drawn on them, or make payable at their banking-house; and also all other sums of money which the obligees or the survivor of them, or any partner in their banking business, should lay out or advance or become liable to pay on the credit of Threlfall or on his account, and all such charges and allowances for advancing and paying such bill or bills, drafts, notes, acceptances, advances, payments, engagements, and accommodations, not exceeding the sum of £5,000 in the whole, together with interest for such sum and sums of money as they or any of them should at any time within the period aforesaid be in advance on account of Threlfall, as is usually charged by bankers in such and the like cases; and should from time to time and at all times within the period, and to the amount aforesaid, indemnify the obligees or the survivor of them, or any partner in their banking business, from all actions, suits, losses, costs, charges, expenses, and demands which should be occasioned by their accepting, endorsing, discounting, paying, etc., for Threlfall as aforesaid, then the bond was to be void.

In an action on this bond, the breach of condition suggested was that after the making of the bond in January, 1822, and before the commencement of this suit, the plaintiffs had advanced and paid, and were liable to advance and pay a large sum, to wit, £20,000 for accepting, endorsing, discounting, paying, etc., bills, etc., which Threlfall during the time last aforesaid had drawn upon and made payable at their banking-house; and that they had otherwise laid out and were liable to pay on the credit of Threlfall other sums to a large amount, to wit, the amount of £10,000, and that the charges and allowances upon such payments, etc., at the rate usually charged by bankers, amounted to a further large sum, to wit, £5,000; that the several sums so advanced and paid, and the charges upon them, amounted to a large sum, exceeding the sum of £5,000, to wit, the £35,000, of which premises Threlfall had notice, and yet neither he, the defendant, nor the other obligors, had reimbursed the plaintiffs the £5,000.

At the trial before Best, C.J., Guildhall sittings after Hilary Term last, it appeared that subsequently to the execution of the bond in 1822, the plaintiffs had continued their advances to Threlfall, and at the close of the account afterwards, upon his becoming bankrupt, he stood indebted to them £10,732 12s. 11d. But subsequently to the first advances to the extent of £15,000 after the execution of the bond, he had paid into the plaintiff's bank more than the sum of £5,000; and it did not appear that at the time of executing the bond the defendant had received any notice that Threlfall then owed the plaintiff £10,247 9s. 1d. Threlfall, however, saw the accounts every fortnight, received the vouchers half-yearly, and knew how the payments were applied.

The jury found a verdict for the plaintiffs for £3,978 (£1,022 having previously been paid on account), subject to a motion to be made to this court to reduce the amount to £485 2s. 10d. (the difference between the first balance above mentioned and the last), if the court should think fit. *Serjeant Cross* accordingly moved for a rule nisi to that effect, on the ground (inter alia) that however the law might be as between the creditor and the debtor, yet, as between the creditor and the

surety (who was ignorant of the debt of £10,247 9s. 1d. outstanding at the time of his executing the bond), and according to the true construction of the bond, the sums paid by Threlfall after the execution of the bond, ought to be applied, first, in liquidating advances made also after the execution of the bond, and not to the preceding debt of £10,247 9s. 1d.; and that the bond was intended to cover only one advance of £5,000. The court granted a rule.

Serjeant Wilde for the plaintiffs, showed cause against the rule.
Serjeant Cross for the defendant, supported the rule.

BEST, C.J.—On the part of the defendant, this case has been put on the only ground which it was possible to urge. If I could collect on the face of the bond that it was intended that the various sums paid in to the plaintiff's bank by Threlfall subsequently to the execution of the bond, should go to the new account, the defendant would be entitled to make his rule absolute. But the contrary appears; and it was impossible for the plaintiffs to have entered into such an agreement, for had they done so, the £10,000* already due might never have been paid, and in the absence of any agreement touching the debts to which the subsequent payments were to be applied, the plaintiff had a right to apply them first in discharge of the earlier account. The bond recites that Threlfall had had a banking account with the obligees, and that the defendant and others had agreed to join Threlfall in the bond for the purposes and on the conditions therein contained, and that it had been agreed that the bond should not prejudice a prior bond given by Threlfall to the obligees. These words are not very clear, but I cannot collect from them any agreement that money subsequently received should not be applied in discharge of the prior debt. When the money was paid, nothing was said as to the account to which it was to be applied, and if the two accounts were blended, the course of business is to apply the payments to the earlier; that is the principle laid down in *Clayton's Case* (1), and confirmed in *Bodenham* v. *Purchase* (2); but here, the accounts must have been blended, for the defendant's principal agreed to such an application of his payments; his accounts were settled half yearly, and he must have seen that the remittances subsequent to the bond had been applied to the £10,000. If so, cadit questio; for, unless by distinct agreement, the surety can have no control over the way in which the principal shall make his payments, and no such agreement appears on the face of the bond. *Pidcock* v. *Bishop* (3), as it has been stated, does not apply to the present case, for the whole transaction between the creditor and the debtor was a direct fraud upon the surety, and there is no pretence for imputing fraud to the present plaintiffs. It has been argued that the defendant's undertaking is analogous to an insurance; a transaction, in which, according to LORD MANSFIELD, there must always be uberrima fides; but the same learned person, upon the occasion in which he established that principle [in *Carter* v. *Boehm* (4)], referred also to the maxim, aliud est celare, aliud tacere. But there has been nothing like an improper concealment in this cause; it might have been pleaded, if there had; the bond was expressly given for the continuance of an old banking account, and it is well known that such accounts are not carried on till the old balance has been secured.

PARK, J.—There is no colour for reducing the verdict which has been given: if the defence had been founded on fraud or undue concealment, the result might have been very different; and in *Pidcock* v. *Bishop* (3), as the case has been stated to us, the decision of the court must have turned on the fraud practised on the surety. In the present instance nothing has been done which was not warranted by the course of business.

BURROUGH, J., concurred.

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* The sum actually due was £10,247 9s. 1d., but was referred to as £10,000 for convenience.

GASELEE, J. I feel considerable difficulty in this case, and I am not prepared to say that the judgment the court is pronouncing is altogether satisfactory to me; but I can find no authority the other way, and, therefore, concur in the decision we have come to. The bond was to run for ten years. Threlfall was to commence a new account; and it is not clear that it was not the intention of the parties that all sums paid in by him subsequently should be carried to that account, or that the partners should rely on the old securities for the payment of the old account; but I can see no agreement on the part of the bankers to let the payment of the £10,000 stand by for so many years; and if there had been any undue concealment on that head, it might have been pleaded. Had the bond clearly stated the existence of the former balance, there could have been no difficulty; but even as the case stands at present, the defendant's rule must be discharged.

Rule discharged.

Serjeant Cross then moved in arrest of judgment, that, according to the terms of the bond, the plaintiffs were not to allow Threlfall to be more than £5,000 in their debt at one time; whereas it was averred that he owed them a sum exceeding £5,000, to wit, £35,000 at the time of the action. If they had limited their credit to £5,000, as the defendant intended, Threlfall might never have been involved in difficulty, and the defendant never have been called on. He might have known enough of Threlfall to be willing to trust him with a limited credit of £5,000, but might have foreseen, as he had refused to incur, the risk of a more extended credit.

The court, however, held there was nothing in the objection, the meaning of the bond being clearly that whatever the plaintiffs advanced, the defendant would contribute £5,000 towards indemnifying them; and *Serjeant Cross* took nothing.

ROBSON AND ANOTHER *v.* DRUMMOND

[COURT OF KING'S BENCH (Lord Tenterden, C.J., Littledale, Parke and Patteson, JJ.), May 2, 1831]

[Reported 2 B. & Ad. 303; 9 L.J.O.S.K.B. 187; 109 E.R. 1156]

Contract—Personal contract—Agreement by A. to provide and maintain carriage for B.—Assignment of rights by A. to C.—Right of B. to consider agreement at end.

A., a coachmaker, entered into an agreement to furnish B. with a carriage, for a term of five years for a payment of seventy-five guineas a year. At the time of making the contract C. was in partnership with A., but this was unknown to B., the business being carried on in the name of A. only. Before the expiration of the first three years, the partnership between A. and C. was dissolved, A. assigning all his interest in the business and the contract in question to C., and the business was afterwards carried on by C. alone. B. was informed by C. that the partnership was dissolved and that he (C.) had become the owner of the carriage then in B.'s service. B. refused to continue the contract with C., and returned the carriage to him at the end of the current year. In an action by A. and C. against B. for the payments which under the contract would become due during the last two years of its continuance,

Held: the contract was personal, and A. having become incapable of performing his part by assigning his interest to C., it was competent to the defendant to consider the agreement at an end.

Notes. Applied: *Humble* v. *Hunter*, [1843–60] All E.R. Rep. 468; *Re Edwards, Ex parte Chalmers* (1872), 42 L.J. Bcy. 2. Distinguished: *British Waggon Co.* v. *Lea & Co.*, [1874–80] All E.R. Rep. 1135. Applied: *Jaeger's Sanitary Woollen System Co.* v. *Walker* (1897), 77 L.T. 180. Distinguished: *Phillips* v. *Alhambra Palace Co.*, [1901] 1 K.B. 59. Referred to: *Wentworth* v. *Cock* (1839), 10 Ad. & El. 42; *Beckham* v. *Drake* (1841), 9 M. & W. 79; *International Fibre Syndicate* v. *Dawson* (1901), 84 L.T. 803; *Whiteley* v. *Hilt*, [1918] 2 K.B. 808; *Davies* v. *Collins*, [1945] 1 All E.R. 247; *Edwards* v. *Newland*, [1950] 1 All E.R. 1072.

As to contractual rights which are not capable of assignment, see 8 HALSBURY'S LAWS (3rd Edn.) 259; and for cases see 12 DIGEST (Repl.) 661 et seq.

Cases referred to in argument:

Lucas v. *De La Tour* (1813), 1 M. & S. 249; 105 E.R. 93; 36 Digest (Repl.) 510, *752*.

Lloyd v. *Archbowle* (1810), 2 Taunt. 324; 127 E.R. 1102; 36 Digest (Repl.) 508, *732*.

Mawman v. *Gillett* (1809), 2 Taunt. 325, n.; 127 E.R. 1103; 36 Digest (Repl.) 511, *764*.

Rule Nisi obtained by the plaintiffs to set aside a nonsuit and enter a verdict in an action for breach of contract.

On February 2, 1824, the plaintiff, Sharpe, agreed to furnish the defendant with a new chariot, from that day for the term of five years thence next ensuing, at seventy-five guineas per annum, each yearly payment to be paid in advance. Sharpe was to keep the chariot in all necessary repair, violence excepted, to supply the same with new wheels when required and to new paint it once in the said term; and at the expiration of the term, the defendant was to cause the chariot to be delivered to Sharpe, with all its appointments in good condition, fair wear and tear excepted.

At the trial before LORD TENTERDEN, C.J., it appeared that Sharpe, the second plaintiff, in February, 1824, and for several years preceding, carried on business as a coachmaker in South Street, Grosvenor Square, and that at the time of the contract Robson, the first plaintiff, was a secret partner with Sharpe, but that was not known to the defendant, the business being carried on in the name of Sharpe only. A chariot was built according to the terms of the contract and delivered to the defendant who kept it from February, 1824, to February 1, 1827. The business was carried on in the separate name of Sharpe until June, 1826, when he retired from the business and Robson continued to carry it on.

On June 30, 1826, Robson addressed the following letter to the defendant:

> "Sir, I beg leave respectfully to inform you, that the partnership between Mr. Sharpe and myself, as coachmakers, carried on under the name of Sharpe only, at No. 19, South Street, is now dissolved, and the whole of the partnership property having been sold by public auction on the 28th and 29th instant under an order of the Court of Chancery, I have become the purchaser of the chariot now in your service, pursuant to contract, and will do myself the honour of waiting on you without delay, to receive your commands relative thereto, and also to give any explanation you may require. I beg at the same time to inform you, that the business will in future be carried on by me as usual on the same premises."

The defendant, in answer, informed Robson that the agreement for the hire of the carriage had been entered into with Sharpe only, that as he, the defendant, did not choose to continue the job with any other person, the carriage would be returned on February 2, 1827, the end of the then current year.

On Dec. 21, 1826, Sharpe was told by the defendant that he was ready to continue the job with him according to the contract to its termination, or would return the chariot to him at the end of the then current year. Sharpe said he could not continue the contract, because he had no longer anything to do with it, as all

the partnership property belonging to him and Robson had been sold by auction; that the agreement and the chariot jobbed by the defendant had been purchased by Robson, and that if the defendant decided on returning the chariot at the end of the current year he must send it to Robson, because he, Sharpe, could not take it in. On Feb. 1, 1827, the chariot was taken to Robson's place of business and left there.

The action was brought to recover the price stipulated to be paid for the use of the carriage from Feb. 1, 1827 to February, 1829. LORD TENTERDEN, C.J., was of opinion that the action was not maintainable and directed a nonsuit but reserved liberty to the plaintiff to move to enter a verdict for £157 10s. A rule nisi was obtained to enter a verdict.

Campbell and *White* for the defendant, showed cause against the rule.
Hutchinson for the plaintiffs, supported the rule.

LORD TENTERDEN, C.J.– It is unnecessary to decide whether, if Sharpe had continued in the partnership until the expiration of the five years during which the contract made by him was to continue in force, the action in the joint names of him and his partner might not have been maintained.

After the partnership between the plaintiffs, Robson and Sharpe, had ceased to exist, and after Sharpe had ceased to carry on the business of a coachmaker, the defendant offered to continue the job with Sharpe, but he replied that that was impossible. The defendant may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe and, therefore, have agreed to pay money in advance. Sharpe, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person and to say that he contracted with Sharpe alone and not with any other person. On that ground I think the nonsuit was right. The rule for setting it aside must, therefore, be discharged.

LITTLEDALE, J.– The nonsuit was right. I am disposed to think there was no objection to the plaintiffs suing on a contract made by Sharpe only on behalf of himself and his partner. As to the other point, however, I think this contract was personal and that Sharpe having gone out of the business, it was competent to the defendant to consider the agreement at an end. He may have been induced to enter into the contract by reason of the confidence he reposed in Sharpe. At all events had a right to his services in the execution of it.

PARKE, J. This is a very clear case. The defendant made his contract with Sharpe by name, not knowing that any other person had an interest in the subject-matter, and although Robson had an interest in it so as to entitle him to sue jointly with Sharpe, the defendant has the same rights against Sharpe and his partner, and he may make the same defence to this action brought by them as if he had contracted with Sharpe alone and the action had been brought by him.

The contract was to continue for five years. At the end of the third year there was a dissolution of partnership between the plaintiffs, and notice of that dissolution, and of Sharpe having assigned all his interest in the contract to Robson, was given to the defendant who said he would not continue the contract with Robson. The very fact of Sharpe's having transferred his interest in the contract to Robson (a mere stranger as far as the defendant was concerned) was equivalent to saying (that which he did afterwards say), that he would not perform his part of the contract. That is an answer to the present action brought in the names of Sharpe and Robson, for the defendant had a right to have the benefit of the judgment and taste of Sharpe to the end of the contract and which, in effect, he had declined to supply. It is true that the defendant will have an advantage which he would not have had if the contract had continued for the whole five years for he will have had the use of the carriage during the first three, and will not be bound to keep it during the last two, when it must be worse for wear. But this

arises from the default of one of the plaintiffs in not performing his part of the contract.

PATTESON, J.—This case admits of no doubt. It is, in substance, a case where a person having made a contract in his own name attempts to back out of it and transfer it to a third person. That he had no right to do. The rule for setting aside the nonsuit must be discharged.

Rule discharged.

POLHILL *v.* WALTER

[COURT OF KING'S BENCH (Lord Tenterden, C.J. and other judges), November 6, 1831, January 20, 1832]

[Reported 3 B. & Ad. 114; 1 L.J.K.B. 92; 110 E.R. 43]

Misrepresentation—Innocent misrepresentation—Presumption of intention to mislead—Acceptance of bill on behalf of another—Liability.

The making of a representation which a person knows to be untrue, and which is intended, or calculated from the mode in which it is made, to induce another to act on the faith of it and incur damage is a fraud in law although the person making the representation did so without any corrupt motive.

A bill was presented for acceptance at the office of the drawee when he was absent. A., who lived in the same house as the drawee, being assured by one of the payees that the bill was perfectly regular and believing that the acceptance would be sanctioned and the bill paid by the drawee, was induced to write on the bill an acceptance as by the procuration of the drawee. The bill was dishonoured when due, an endorsee brought an action against the drawee, and, on proof of the above facts, was nonsuited. The endorsee then sued A. for falsely, fraudulently, and deceitfully representing that he was authorised to accept by procuration. On the trial the jury negatived all fraud.

Held: A. must be considered as having intended to represent to all who received the bill in the course of its circulation that he had authority to accept the bill, and, therefore, he was liable.

Notes. Explained and Distinguished: *Freeman* v. *Baker* (1833), 5 B. & Ad. 797. Considered: *Wilson* v. *Barthorpe* (1837), Murp. & H. 81. Considered and Distinguished: *Tyrrell* v. *Woolley* (1840), 1 Man. & G. 809. Explained: *Moens* v. *Heyworth* (1841), H. & W. 138. Applied: *Crawshay* v. *Thompson* (1842), 4 Man. & G. 357. Considered and Distinguished: *Smout* v. *Ilbery* (1842), 10 M. & W. 1. Considered: *Fuller* v. *Wilson* (1842), 3 Q.B. 58. Applied: *Gibson* v. *D'Este* (1843), 2 Y. & C.Ch. Cas. 542. Explained: *Wilson* v. *Fuller* (1843), 3 Q.B. 68. Applied: *Davis* v. *Clarke* (1844), 6 Q.B. 16. Considered and Distinguished: *Rawlings* v. *Bell* (1845), 1 C.B. 951; *Murray* v. *Mann* (1848), 17 L.J.Ex. 256. Distinguished: *Wilde* v. *Gibson*, [1843–60] All E.R. Rep. 494; *Watson* v. *Poulson* (1851), 18 L.T.O.S. 126. Considered and Doubted: *Thom* v. *Bigland* (1853), 8 Exch. 725. Considered: *Cohen* v. *Wright* (1857), 8 E. & B. 647. Applied: *Eastwood* v. *Bain* (1858), 28 L.J.Ex. 74. Considered: *Collins* v. *Cave* (1859), 4 H. & N. 225; *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery*, [1874–80] All E.R. Rep. 529. Considered and Distinguished: *Derry v. Peek*, [1886–90] All E.R. Rep. 1. Considered: *London and Southern Counties Investment Advance and Discount Co.* v. *Clamp* (1890), 7 T.L.R. 131. Explained and Distinguished: *Oliver* v. *Bank of England*, [1901] 1 Ch. 652. Considered: *Yonge* v. *Toynbee*, [1908-10] All E.R. Rep. 204; *Edwards* v. *Porter*, [1925] A.C. 1. Referred to: *Collins* v. *Evans* (1844), 5 Q.B. 820; *Freeman* v. *Cooke* (1848), 18 L.J.Ex. 114; *Milne* v. *Marwood* (1853), 3 C.L.R. 228; *Udell* v. *Atherton* (1861), 7 H. & N.

172; *Sheen* v. *Bumpstead* (1862), 1 H. & C. 358; *Hollman* v. *Pullin* (1884), Cab. & El. 254; *Armstrong* v. *Jackson*, [1916-17] All E.R. Rep. 1117.

As to misrepresentations and fraud, see 26 HALSBURY'S LAWS (3rd Edn.) 826 et seq., as to irrelevancy of representor's motive, see ibid. 846; and for cases see 35 DIGEST (Repl.) 24 et seq.

Cases referred to:

(1) *Foster* v. *Charles* (1830), 6 Bing. 396; subsequent proceedings, 7 Bing. 105; 4 Moo. & P. 741; 9 L.J.O.S.C.P. 32; 131 E.R. 40; 35 Digest (Repl.) 37, *294*.

(2) *Corbett* v. *Brown* (1831), 8 Bing. 33; 1 Moo. & S. 85; 1 L.J.C.P. 13; 131 E.R. 312; 35 Digest (Repl.) 36, *286*.

Also referred to in argument:

Williamson v. *Allison* (1802), 2 East, 446; 102 E.R. 439; 39 Digest (Repl.) 510, *527*.

Max v. *Roberts* (1810), 12 East, 89; 41 Digest 208, *475*.

R. v. *Everett* (1828), 8 B. & C. 114; 2 Man. & Ry. K.B. 35; 1 Man. & Ry. M.C. 288; 6 L.J.O.S.M.C. 83; 108 E.R. 985; 39 Digest (Repl.) 244, *25*.

Pasley v. *Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest (Repl.) 25, *165*.

Tapp v. *Lee* (1803), 3 Bos. & P. 367; 127 E.R. 200; 35 Digest (Repl.) 21, *126*.

Haycraft v. *Creasy* (1801), 2 East, 92; 102 E.R. 303; 35 Digest (Repl.) 8, *26*.

Rule Nisi obtained by the plaintiff to enter the verdict in an action of deceit.

The first count of the declaration stated that J. B. Fox, at Pernambuco, according to the usage of merchants, drew a bill of exchange, dated April 23, 1829, on Edward Hancorne, requesting him, sixty days after sight thereof, to pay Turner, Brade & Co., or order £140 16s. 8d. value received, for Robert Lott; that afterwards the defendant did falsely, fraudulently, and deceitfully represent that he was duly authorised by Hancorne to accept the bill on behalf and by the procuration of Hancorne and did falsely and fraudulently pretend to accept the same by the procuration of Hancorne; that the bill was endorsed over, and by various endorsements came to the plaintiff, of which the defendant had notice; that the plaintiff, relying on the pretended acceptance and believing that the defendant had authority from Hancorne so to accept the bill on his behalf, and in consideration thereof and of the endorsement of the delivery of the bill to him, the plaintiff received and took from the last endorsers the bill as and for payment of the sum of money in the bill specified, for certain goods and merchandises of the plaintiff sold to the endorsers; that when the bill became due it was presented to Hancorne for payment; that Hancorne did not pay, whereupon the plaintiff brought an action against Hancorne as the supposed acceptor thereof; and that the plaintiff lost £140 16s. 8d. and also expended £42 7s., in unsuccessfully suing Hancorne and costs.

The second count of the declaration stated that it was the duty of the defendant to pay the sum in the bill specified, as the acceptor thereof but that he had refused. The defendant denied liability.

At the trial before LORD TENTERDEN, C.J., it appeared in evidence that the defendant had formerly been in partnership with Hancorne, but was not so at the time of the present transaction. The latter, however, still kept a counting-house on the premises where the defendant carried on business. The bill of exchange drawn on Hancorne was, in June, 1829, left for acceptance at that place and afterwards, a banker's clerk accompanied by one Armfield, then a partner in the house of the payees, called for the bill. The defendant stated that Hancorne was out of town and would not return for a week or ten days and that it had better be presented again. This the clerk refused and said it would be protested. Armfield then represented to the defendant that expense would be incurred by the protest and assured him that it was all correct; whereupon the defendant, acting on that assurance, accepted it per procuration of Hancorne. After this acceptance,

it was endorsed over by the payees. On the return of Hancorne, he expressed his regret at the acceptance, and refused to pay the bill. The plaintiff sued him and was nonsuited.

The present action was brought to recover the amount of the bill and the costs incurred in that action, amounting to £196. The defendant's counsel contended that as there was no fraudulent or deceitful intention on the part of the defendant he was not answerable. LORD TENTERDEN was of that opinion but left it to the jury to determine whether there was such fraudulent intent or not. The jury found a verdict for the defendant. Counsel for the plaintiff obtained a rule nisi.

Campbell and *F. Kelly* for the defendant, showed cause against the rule.
Sir James Scarlett and *Lloyd* for the plaintiff, supported the rule.

LORD TENTERDEN, C.J., delivered the judgment of the court, in which, after stating the pleadings and facts, he continued: On the argument, two points were made by the plaintiff's counsel. First it was contended that although the defendant was not guilty of any fraud or deceit, he might be made liable as acceptor of the bill; that the second count was applicable to that view of the case and that, after rejecting the allegations of fraud and falsehood in that count, it contained a sufficient statement of a cause of action against him, as acceptor. We are clearly of opinion that the defendant cannot be made responsible in that character. It is enough to say that no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honour, which the defendant certainly was not.

This distinguishes the present case from that of a pretended agent, making a promissory note (referred to in ROSCOE'S DIGEST OF THE LAW OF BILLS OF EXCHANGE, note 9, p. 47), or purchasing goods in the name of a supposed principal. Indeed it may well be doubted if the defendant, by writing this acceptance, entered into any contract or warranty at all, that he had authority to do so and, if he did, it would be an insuperable objection to an action as on a contract by this plaintiff that at all events there was no contract with or warranty to him.

Secondly, it was contended that the allegation of falsehood and fraud in the first count was supported by the evidence and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant or a wicked motive of injury to the plaintiff. It was said to be enough if a representation is made which the party making it knows to be untrue and which is intended by him or which, from the mode in which it is made, is calculated to induce another to act on the faith of it, in such a way as to incur damage and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, a fraud. For this position *Foster* v. *Charles* (1) was cited, which was twice under the consideration of the Court of Common Pleas and to which may be added *Corbett* v. *Brown* (2). The principle of these cases appears to us to be well founded and to apply to the present.

It is true that there the representation was made immediately to the plaintiff and was intended by the defendant to induce the plaintiff to do the act which caused him damage. Here, the representation is made to all to whom the bill may be offered in the course of circulation and is, in fact, intended to be made to all, and the plaintiff is one of those; and the defendant must be taken to have intended that all such persons should give credit to the acceptance and, thereby, act on the faith of that representation because that, in the ordinary course of business, is its natural and necessary result.

If the defendant, when he wrote the acceptance, and thereby in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and on the evidence there can be no doubt that he did), the

representation was untrue to his knowledge and an action will lie against him by the plaintiff for the damage sustained in consequence.

If the defendant had had good reason to believe his representation to be true, as for instance, if he had acted on a power of attorney which he supposed to be genuine but which was, in fact, a forgery, he would have incurred no liability for he would have made no statement which he knew to be false. That is very different from the present case in which it is clear that he stated what he knew to be untrue though with no corrupt motive.

It is of the greatest importance in all transactions, that the truth should be strictly adhered to. In the present case, the defendant no doubt believed that the acceptance would be ratified and the bill paid when due, and if he had done no more than to make a statement of that belief, according to the strict truth, by a memorandum appended to the bill, he would have been blameless. But then the bill would never have circulated as an accepted bill, and it was only in consequence of the false statement of the defendant that he actually had authority to accept, that the bill gained its credit and the plaintiff sustained a loss. For these reasons we are of opinion that the rule should be made absolute to enter a verdict for the plaintiff.

Rule absolute.

DOE d. PRING AND ANOTHER *v.* PEARSEY

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Trinity Term, 1827]

[Reported 7 B. & C. 304; 9 Dow. & Ry. K.B. 908; 5 L.J.O.S.K.B. 310; 108 E.R. 737]

Land—Waste land—Waste land adjoining highway—Presumption of ownership by owner of adjoining enclosed land.

Waste land which adjoins a highway is presumed to belong to the owner of the adjoining enclosed land, whatever be his tenure.

Notes. Applied: *White* v. *Hill* (1844), 14 L.J.Q.B. 79. Referred to: *R.* v. *Hatfield* (1835), 4 Ad. & El. 156; *Kingsmill* v. *Millard* (1855), 11 Exch. 313; *A.-G.* v. *Tomline* (1877), 5 Ch.D. 750; *Chamber Colliery Co.* v. *Rochdale Canal Co.*, [1895] A.C. 564; *Re White's Charities, Charity Comrs.* v. *London Corpn.*, [1898] 1 Ch. 659; *Mappin* v. *Liberty*, [1903] 1 Ch. 118; *London City Land Tax Comrs.* v. *Central London Rail. Co.*, [1913] A.C. 364; *Collis* v. *Amphlett*, [1918] 1 Ch. 232.

As to the extent of the manor re waste land, see 8 HALSBURY'S LAWS (3rd Edn.) 274 et seq.; and for cases see 26 DIGEST (Repl.) 333 et seq.

Case referred to in argument:

Steel v. *Prickett* (1819), 2 Stark. 463, N.P.; 26 Digest (Repl.) 333, *514*.

Rule Nisi obtained by the defendant to enter a nonsuit in an action of ejectment brought to recover possession of a cottage and garden in Taunton, Somerset. Plea, not guilty.

At the trial before BURROUGH, J., at the Somerset Assizes, 1827, it appeared that the cottage in question had been built by the defendant's father in 1804, on a slip of waste land.

The waste land was by the side of the turnpike road adjoining enclosed land which was copyhold, the property of John Roberts, one of the lessors of the plaintiff and which, at the time of serving the ejectment, was in the occupation of his tenant James Pring. It appeared by the court rolls, that Roberts had been admitted to six acres of land lying in one close, called Fullands, and also to four acres in Fullands. There was no evidence to show what number of acres the enclosed land contained. It was contended that, as the adjoining land belonged to Roberts, the prima facie presumption was that the waste between his land and

the high road belonged also to him. On the other hand it was insisted that that presumption only took effect where the owner of the adjoining lands was a freeholder.

The judge directed the jury to find for the plaintiff but reserved liberty to the defendant to move to enter a nonsuit. The defendant obtained a rule nisi accordingly.

F. Pollock and *C. F. Williams*, for the plaintiff, showed cause against the rule.
Erskine and *Carter*, for the defendant, supported the rule.

BAYLEY, J.—It is desirable that there should be one certain and definite rule applicable to all cases of this description. It is a prima facie presumption that waste land on the sides and the soil to the middle of a highway belongs to the owner of the adjoining freehold land. The rule is founded on a supposition that the proprietor of the adjoining land, at some former period, gave up to the public for passage all the land between his enclosure and the middle of the road. That rule applies not only to freehold but to copyhold lands also.

There was no evidence to show when the road was first made but it was a turnpike road. If the road existed at the time when the copyhold was first granted, namely, from time immemorial, the right of property in the road and the waste adjoining might, in that case, have remained in the lord; but if the road were taken out of the land after the copyhold was granted, then the presumption would be that the property in the road and the waste adjoining was in the copyholder. We ought not to presume that the road in question was made before the time of legal memory. The probability is that it was made long since; and if it was made within the time of legal memory, then the prima facie presumption is that the waste land adjoining the road belonged to Roberts, the copyhold tenant of the land next adjoining, and not to the lord. The rule for entering a nonsuit must, therefore, be discharged.

HOLROYD, J.—I am also of opinion that the verdict is right. I see no reason for confining the rule to cases where the person in possession of the adjoining land is a freeholder. It applies equally whether the party occupying the adjoining land be a freeholder, leaseholder, or copyholder. As to the property granted, a copyholder stands in the place of the lord, the leaseholder in the place of the lessor. It is very improbable that when a lease or grant is made of land near the high road and there is, between the highway and the land enclosed, a small quantity of unenclosed land, of little or no use to the lord or lessor, that he should separate it from the rest or reserve to himself such land. When a grant of land near to a road is made (even where it is enclosed and separated from the land adjoining) the prima facie presumption is, that the land on that side of the fence on which the road is, passes likewise with it.

Generally speaking, where an enclosure is made the party making it erects his bank and digs his ditch on his own ground on the outside of the bank. The land which constitutes the ditch, in point of law, is a part of the close though it be on the outside of the bank. If something further is done for his own convenience when that which constitutes the fence is dug out from his land, as, for instance, if a small portion of unenclosed land near a public or private way is left out of the enclosure to protect and secure the occupation of that part of the land which is enclosed, that, in point of law, is a part of the close on which the enclosure is made. If any grant of such land, being copyhold, had been made before the enclosure, the subsequent grants would probably continue to be made in the same way, notwithstanding the enclosure, and all the land both within and without the enclosure would, therefore, pass by those grants.

Therefore, the rule that waste land near a highway is to be presumed, prima facie, to belong to the owner of the enclosed land next adjoining, is not confined to a case where the owner of that land is a freeholder but extends equally to cases where

the owner is a leaseholder or a copyholder. In either case evidence may be given to rebut the prima facie presumption; but it is of considerable importance that the prima facie presumption should be constant and uniform and not left to depend on a variety of particular circumstances, some of which may be beyond the time of actual memory although not beyond the time of legal memory.

LITTLEDALE, J.—I am entirely of the same opinion. If any act of ownership by the lord of the manor be proved, then there will be an end of any presumption; but where no such act of ownership is proved, the presumption does arise that the waste belongs to the owner of the adjoining land. It is not very likely that the lord should exercise any acts of ownership on these small strips of land where there is little herbage for cattle to depasture on, and where there are no trees growing. It is admitted that the presumption is in favour of the owner of the adjoining land where he is a freeholder, and I think very reasonably so.

We do not know the origin of these rights. In all probability the rule that the presumption is to be in favour of the owner of the adjoining land has arisen from its being a matter of convenience to the owners of adjoining land, and to prevent disputes as to the precise boundaries of property. If the rule of presumption as to the right of ownership applies to every freeholder, I see no reason why it should not apply to a copyholder. Suppose the road were made through ancient copyhold land, the copyholder would have a right to have his copyhold renewed (if he was tenant in fee-simple) to the same extent as he had it before. If, before the road was made, his copyhold extended to the line which afterwards was the middle of the road, he would have a right to have his copyhold renewed in the same way as before. There is no reason, therefore, why the same presumption should not be made in his case as well as in that of a freeholder.

The same rule will apply if the road be made through the waste of a manor. In that case if the lord of the manor intends to reserve his right to the unenclosed land near the road, he must take care to do it by exercising acts of ownership upon it. And if the lord of the manor make a conveyance in fee, and grant his freehold, the same rule will apply as in other cases. It would be extremely inconvenient if a different rule of presumption were to prevail if the adjoining land is freehold, copyhold, or leasehold. If, according to the argument urged in this case, the presumption does not apply to copyholders—for the same reason it will not apply to a leaseholder. For a copyholder stands in the same relation to the lord of the manor as a leaseholder does to a freeholder.

I think it is convenient and reasonable that the presumption should be the same in the case of a copyholder as it is in that of a freeholder. This rule must, therefore, be discharged.

Rule discharged.

DOE d. BISHOP OF ROCHESTER *v.* BRIDGES

[Court of King's Bench (Lord Tenterden, C.J., and other judges), January 21, 1831]

[Reported 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 109 E.R. 1001]

Landlord and Tenant—Lease—Surrender by deed poll in consideration of new lease—New lease voidable—No revival of prior lease.

Statutory Duty—Performance—Manner specified in statute creating obligation—Sole means of performance.

On Sept. 24, 1811, a lease of land belonging to a bishop in right of his see was granted. The land tax had been redeemed with money raised pursuant to the Land Tax Redemption Act, 1802, but the amount of the redeemed land tax was not expressly reserved and made payable as rent during the term granted as required by s. 88 of the Act, although the tax had in fact been regularly paid to the bishop. This lease had been granted in consideration of the surrender of a prior lease dated July 12, 1794, which had been surrendered by deed poll dated Sept. 21, 1811.

Held: (i) as the redeemed land tax had not been reserved and made payable as rent, the lease was voidable by the successor of the bishop; (ii) the prior lease of 1794 was not revived by reason of the avoidance of the lease of 1811; (iii) an obligation created by an Act which enforced the performance in a specified manner could not be enforced in any other manner.

Notes. Section 86 of the Land Tax Redemption Act, 1802, was repealed by the Finance Act, 1896, s. 40 and Schedule, Part I, repealed by the S.L.R. Act, 1908. The Finance Act, 1963, s. 68 (43 Halsbury's Statutes (2nd Edn.) 606), provided for the ultimate extinction of land tax.

Applied: *Stevens* v. *Jeacocke* (1848), 11 Q.B. 731. Distinguished: *Couch* v. *Steel* (1854), 3 E. & B. 402. Approved: *Lamplugh* v. *Norton* (1889), 22 Q.B.D. 452. Applied: *Clegg, Parkinson & Co.* v. *Earby Gas Co.*, [1896] 1 Q.B. 592; *Pasmore* v. *Oswaldtwistle U.D.C.*, [1895–9] All E.R. Rep. 191. Considered: *Johnston and Toronto Type Foundry Co.* v. *Consumers' Gas Co. of Toronto*, [1898] A.C. 447; *Devonport Corpn.* v. *Tozer* (1903), 67 J.P. 269. Applied: *Hulme* v. *Ferranti*, [1918] 2 K.B. 426. Considered: *R.* v. *Poplar Borough Council, Ex parte London County Council (No. 1)*, [1921] All E.R. Rep. 429; *A.-G. of Trinidad and Tobago* v. *Gordon Grant & Co.*, [1935] A.C. 532; *Badham* v. *Lambs, Ltd.*, [1946] K.B. 45; *Cutler* v. *Wandsworth Stadium, Ltd.*, [1949] 1 All E.R. 544. Applied: *Watt* v. *Kesteven County Council*, [1954] 3 All E.R. 441. Considered: *Sephton* v. *Lancashire River Board*, [1962] 1 All E.R. 183. Referred to: *Doe d. Egremont* v. *Forwood* (1842), 3 Q.B. 627; *Doe d. Biddulph* v. *Poole* (1848), 11 Q.B. 713; *Doe d. Earl of Egremont* v. *Courtenay*, [1843–60] All E.R. Rep. 685; *Waghorn* v. *Collison* (1922), 127 L.T. 8; *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] All E.R. Rep. 127; *Everett* v. *Griffiths*, [1924] 1 K.B. 941; *Stepney Borough Council* v. *John Walker & Sons, Ltd.*, [1934] A.C. 365; *R.* v. *Hurle-Hobbs, Ex parte Simmons*, [1945] 1 All E.R. 273; *Clark* v. *Brims*, [1947] 1 All E.R. 242; *Wilkinson* v. *Barking Corpn.*, [1947] 2 All E.R. 24; *Solomons* v. *Gertzenstein*, [1954] 2 All E.R. 625.

As to redemption of land tax on ecclesiastical land, see 23 Halsbury's Laws (3rd Edn.) 395, and as to effect of surrender of lease, see ibid. at p. 684; and for cases see 31 Digest (Repl.) 320, 321, 568, 569. As to statutes creating a new liability, see 36 Halsbury's Laws (3rd Edn.) 441, 442; and for cases see 44 Digest (Repl.) 346 et seq.

Cases referred to in argument:

Roe d. Earl of Berkeley v. *Archbishop of York* (1805), 6 East, 86; 102 E.R. 1219; sub nom. *Doe d. Earl of Berkeley* v. *Archbishop of York*, 2 Smith, K.B. 166; 31 Digest (Repl.) 567, *6882*.

Earl of Bedford's Case (1586), 7 Co. Rep. 7 b; 77 E.R. 421; 40 Digest (Repl.) 829, *3043*.

Lord Mountjoy's Case (1589), 5 Co. Rep. 3 b; Moore, K.B. 197; 77 E.R. 52; 31 Digest (Repl.) 245, *3795*.

Dean and Chapter of Worcester's Case (1605), 6 Co. Rep. 37a; 77 E.R. 307; 38 Digest (Repl.) 799, *162*.

Taylor d. Atkyns v. *Horde* (1757), 1 Burr. 60; 1 Keny. 143; 97 E.R. 190; on appeal (1758), 6 Bro. Parl. Cas. 633, H.L.; 40 Digest (Repl.) 771, *2554*.

Earl of Cardigan v. *Montague* (1754), Sugden on Powers, 8th Edn., App. 918, L.C.; 40 Digest (Repl.) 774, *2588*.

Jones d. Cowper v. *Verney* (1739), Willes, 169; 125 E.R. 1115; 40 Digest (Repl.) 775, *2594*.

Hunt v. *Singleton* (1597), Cro. Eliz. 564; 78 E.R. 809; 19 Digest (Repl.) 542, *3787*.

Lloyd v. *Gregory* (1638), Cro. Car. 501; W. Jo. 405; 79 E.R. 1032; sub nom. *Fludd* v. *Gregory*, 2 Roll. Abr. 495; 31 Digest (Repl.) 575, *6961*.

Commendam Case, Colt and Glover v. *Bishop of Coventry and Litchfield* (1617), Hob. 140; Moore, K.B. 898; 80 E.R. 290; sub nom. *Colt* v. *Glover*, 1 Roll. Rep. 451; sub nom. *Colt's Case*, Jenk. 300, Ex Ch.; 19 Digest (Repl.) 416, *2226*.

Goodtitle d. Edwards v. *Bailey* (1777), 2 Cowp. 597; 98 E.R. 1260; 30 Digest (Repl.) 381, *240*.

Wilson v. *Sewell* (1766), 1 Wm. Bl. 617; 4 Burr. 1975; 96 E.R. 359; 31 Digest (Repl.) 576, *6962*.

Davison d. Bromley v. *Stanley* (1768), 4 Burr. 2210; 98 E.R. 152; 31 Digest (Repl.) 576, *6963*.

Action of ejectment tried before ALEXANDER, C.B., at the Kent Spring Assizes, 1829, when a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench on a Case.

The Case stated that by indenture of lease, dated July 12, 1794, made between Samuel, the then Lord bishop of Rochester, of the one part, and Charles Lord Romney, Baron of Romney, in the county of Kent, of the other part, the bishop, for the considerations therein mentioned, did for himself and his successors, grant and demise to Charles Lord Romney and his assigns the premises therein described, to hold to Charles Lord Romney, his heirs and assigns, for and during the lives of Charles Lord Romney, the Honourable Charles Marsham, his son, and Robert Marsham, his brother's son, and the life of the longest liver of them.

In 1806 the land tax charged on the premises demised in 1794 was redeemed by Walker, then bishop of Rochester, with moneys raised for that purpose by sale of property of the see, by virtue of the Land Tax Redemption Act, 1802. By deed poll dated Sept. 21, 1811, under the hand and seal of Charles Earl of Romney, reciting the before-mentioned lease, and that Charles Lord Romney, the lessee in the same and one of the lives therein mentioned, was then lately deceased, and that Charles Earl of Romney (in the indenture called the Hon. Charles Marsham) had lately become possessed of the premises demised by the indenture, Charles Earl of Romney, for certain considerations, did grant, surrender, yield, and deliver up unto Walker, Lord Bishop of Rochester, all the premises by the indenture of lease granted or intended so to be, and all his estate and interest therein, together with the indenture of lease to be cancelled, to the intent that the estate thereby created might merge and be ended, and that the bishop might be thereby enabled to make a new lease of the same premises, to hold to Charles Earl of Romney, his heirs and assigns, for and during his life and those of Robert Marsham, and of the Hon. Charles Viscount Marsham, an infant, and the life of the longest liver of them, subject to the same accustomed yearly rent, and with the like covenants and agreements, as were contained in the recited indenture.

On the execution of the deed poll, the lease of 1794 was delivered up to Walker, Bishop of Rochester, for the purpose of being, and was in fact, cancelled; and on Sept. 24, 1811, an indenture of lease was executed between Walker, Lord Bishop of Rochester, of the one part, and Charles Earl of Romney, of the other part, whereby the bishop, as well in consideration of the surrender of the lease of July 12, 1794, as for other good causes, did demise, grant, and to farm let unto Charles Earl of Romney and his assigns, all the premises before demised by the surrendered lease, to hold unto him, his heirs and assigns, for the three lives last above mentioned at the accustomed yearly rents of £17 13s. 4d., and 10s., payable quarterly, clear of all rates, taxes, assessments, charges, deductions, and payments whatsoever, imposed or to be imposed upon the premises, or any part thereof, by authority of Parliament, or otherwise. This lease contained a proviso for re-entry on non-payment of rent, and covenants on the lessee's part to repair, etc.; but there was no reservation of the amount of redeemed land tax, in the nature of rent, or covenant for the payment thereof by the lessee, nor was any mention made of such land tax. The land tax, in respect of the demised premises, was, before the passing of the Land Tax Redemption Act, 1802, payable as land tax by the lessee for the time being under the covenant for payment of rent clear of all deductions; and since the passing of the Act, and since the execution of the lease of Sept. 24, 1811, the amount was from time to time paid, together with the rent reserved by the last-mentioned lease, to Walker, Lord Bishop of Rochester, or for his use, till his death in 1827; after which, and upon the lessor of the plaintiff succeeding to the see of Rochester, the validity of the last-mentioned lease was disputed, and no payment of rent or land tax has since been made.

The questions for the opinion of the court were, (i), whether the lease of Sept. 24, 1811, was either void or voidable under the Land Tax Redemption Act, 1802, s. 88, as not making the redeemed land tax payable in the nature of rent, or for any other reason?. And it it were void or voidable, then, (ii), whether the lease of July 12, 1794 was revived or was now in force?

Coleridge for the plaintiff.
Bacon for the defendant.

Jan. 21, 1831. **LORD TENTERDEN, C.J.**, delivered the following judgment of the court.—In this case, our opinion, formed with some reluctance, is in favour of the plaintiff.

The lease made by the late bishop on Sept. 24, 1811, passed an interest derived out of his estate in the tenements, and was binding upon him and valid during his incumbency, but we think it was voidable by his successor. The land tax was redeemed by sale of part of the possessions of the bishopric: upon that redemption it ceased to exist as a tax; the see has lost the estate sold for the redemption, and will have no equivalent, unless entitled to a perpetual payment equal to the amount of the annihilated tax. The legislature, in giving the power of redemption, evidently intended that this equivalent should be received, and we are to look at the [Land Tax Redemption Act, 1802] to learn by what mode the intention is to be carried into effect. We there find that, during the continuance of existing leases (the terms of which could not be altered), it is provided [by s. 88] that the amount of the redeemed tax shall be considered as rent, and paid and recovered as such, and, therefore, if not paid, it might be levied by distress, a plain and easy remedy. Perhaps it might have been as well if this provision had not been confined to existing leases, but had extended to all future time and future leases, so as to render any alteration in the form of the leases unnecessary; but this is not the mode adopted. The mode adopted by the legislature is to require that, in all future leases, the tax shall be added to the ancient and accustomed yearly rent, and be reserved and made payable as such accustomed yearly rent, and be recovered and recoverable as such accustomed yearly rent, by the like remedies as bishops, etc., may use for the recovery of the ancient accustomed yearly rent.

As the Act has provided for its payment and recovery in this manner, it appears to us that there can be no other mode of enforcing the payment. The lessee is under no contract to pay it; the covenant for payment of the reserved rent, clear of all taxes, will not apply, because this payment has, by the redemption, ceased to exist as a tax. Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case. It appears by this Case, that the payment was regularly continued after the new lease in the same manner as under the former lease after the redemption of the tax, and that it was offered to the present bishop, and there can be no reason to suppose that it would not have been continued, considered as a mere honorary engagement; but engagements of that nature cannot be regarded in a court of law. The only mode by which the rights of the successor can be secured, is to consider this payment as being virtually an addition to the ancient rent, and incorporated therewith to all intents, and so as to become parcel thereof within the meaning and effect of the restraining statutes; and the consequence necessarily follows that the lease became voidable, and it has been avoided by the present bishop.

We think the lease of 1794 is not revived by the avoidance of the lease of 1811. The surrender of the prior lease was by a deed under seal: a surrender, therefore, in fact: and none of the doctrine on the subject of surrenders by implication of law is applicable to the subject. Unfortunately the new lease is in terms precisely conformable to the intent mentioned in the deed of surrender. The surrenderor obtained exactly the lease for which he bargained, and, therefore, it cannot be said that the new lease is a fraud or deception upon him; and if the surrender be deemed conditional, the condition has been complied with. The provision [s. 88] of the Act of Parliament was unfortunately not thought of, although it is manifest that the redemption was known to the lessee, because it appears that after the redemption the amount of the tax was paid to the bishop during the remainder of the lease of 1794.

For these reasons, we are of opinion that the plaintiff is entitled to retain the verdict.

Judgment for plaintiff.

A

FRAGANO *v.* LONG

[Court of King's Bench (Bayley, Holroyd and Littledale, JJ.), Easter Term, 1825]

[Reported 4 B. & C. 219; 6 Dow. & Ry. K.B. 283; 3 L.J.O.S.K.B. 177; 107 E.R. 1040]

B *Sale of Goods—Passing of property—Goods appropriated to buyer when dispatched from premises of seller—Right of buyer to maintain action for negligence against shipowner.*

The plaintiff, resident at Naples, sent an order to M. & Co., hardwaremen at Birmingham, "to dispatch certain goods to him on insurance being effected. Terms, three months' credit from the time of arrival." Having marked the C package with the plaintiff's initials, M. & Co. dispatched the goods by the canal to Liverpool and effected an insurance declaring the interest to be in the plaintiff. The goods were delivered at Liverpool by the agent of M. & Co. to the owner of a ship bound to Naples through whose negligence the goods were damaged.

D **Held:** the property in the goods vested in the plaintiff as soon as they were dispatched from Birmingham; the terms of the order did not make the arrival of the goods at Naples a condition precedent to the plaintiff's liability to pay for them; and, therefore, the plaintiff might maintain an action for the damage done to the goods through the negligence of the shipowner.

Notes. The transfer of property as between seller and buyer and the rules for E ascertaining the time when the property passes are dealt with by s. 16 and s. 18 of the Sale of Goods Act, 1893 (22 Halsbury's Statutes (2nd Edn.) 995, 996).

Applied: *Alexander* v. *Gardner* (1835), 1 Bing. N.C. 671. Considered: *Tronson* v. *Dent* (1853), 8 Moo. P.C.C. 419; *Browne* v. *Hare* (1859), 4 H. & N. 822; *Joyce* v. *Swann* (1864), 17 C.B.N.S. 84; *Castle* v. *Playford* (1872), L.R. 7 Exch. 98; *Martineau* v. *Kitching* (1872), 26 L.T. 836; *Anderson* v. *Morice* (1875), L.R. 10 F C.P. 609. Referred to: *Re Wiltshire Iron Co., Ex Parte Pearson* (1868), 3 Ch. App. 443.

As to remedies against carrier for loss or injury to goods, see 4 Halsbury's Laws (3rd Edn.) 195 et seq.; and for cases see 8 Digest (Repl.) 166 et seq. As to sale of goods and appropriation by delivery, see 34 Halsbury's Laws (3rd Edn.) 62 et seq.; and for cases see 39 Digest (Repl.) 608 et seq.

G Cases referred to in argument:

Craven v. *Ryder* (1816), 6 Taunt. 433; 2 Marsh. 127; 128 E.R. 1103; 39 Digest (Repl.) 769, *2457*.

Rugg v. *Minett* (1809), 11 East, 210; 103 E.R. 985; 39 Digest (Repl.) 495, *421*.

Rule Nisi obtained by the defendant for a new trial in an action of assumpsit H against defendant as owner of the brig or vessel *James and Theresa*, for negligence in shipping a cask of hardware.

At the trial before Hullock, B., at the Lancaster Summer Assizes, 1824, it appeared that Mason & Sons, hardwaremen at Birmingham in April, 1822, received an order from the plaintiff residing at Naples, of which the following is a translation:

I "Naples, Mar. 28, 1822. Order transmitted by G. Fragano, [the plaintiff] of this city, to Mason & Sons of Birmingham, through Mr. F. L. for the following merchandise, to be dispatched on insurance being effected. Terms to be three months' credit from the time of arrival."

The order then specified the goods. In pursuance of this order, the cask of hardware in question marked with the plaintiff's initials was sent by the canal from Birmingham, by Mason & Sons, to Messrs. Stokes, their shipping agents at Liverpool, with directions to forward the same to Naples. An insurance was effected, and the

interest declared to be in the plaintiff. On July 3, 1822, Messrs. Stokes received a notice of the arrival of the goods from the canal carrier, and sent their porter who received the goods from the carrier, and took them in a cart to the quay, where the *James and Theresa* was lying, and delivered them on the quay to the mate of that vessel, who gave the following receipt:

"Received in good order and condition on board the *James and Theresa*, for Naples, one cask of hardware. G.F. Samuel Smith, Mate. From W. and J. Stokes."

The goods were left in the custody of the mate, and before they were actually put on board, by some accident the cask fell into the water, by which the injury complained of was sustained. Upon this evidence the jury, under the direction of the learned judge, found a verdict for the plaintiff.

In Michaelmas Term a rule nisi for a new trial was obtained by the defendant, on the ground, (i), that no bill of lading having been made out, the property in the goods was never vested in the plaintiff; (ii), that by the terms of the order, the goods were not to be at the plaintiff's risk until after their arrival at Naples.

F. Pollock for the defendant, supported the rule.

Crompton, for the plaintiff, showed cause against the rule.

BAYLEY, J.—Considering this case apart from the order given by the plaintiff, it is quite free from doubt either in law or justice. It appears, however, that the plaintiff sent an order to Mason & Sons at Birmingham, for the goods in question "to be dispatched on insurance being effected. Terms to be three months' credit from the time of arrival." But for that order the goods never would have left Mason's warehouse, and when sent, they were marked with the plaintiff's initials. If the goods had been destroyed by lightning on the road to Liverpool, Fragano, the plaintiff, must have borne the loss. At Liverpool, Stokes & Co., Mason's shipping agents, shipped the goods and took a receipt. It is argued that the agent was thereby enabled to maintain an action for the goods, but that the plaintiff as his principal could not. I think that position is not correct, although there might have been some difficulty had Stokes & Co. set up an adverse interest. It, therefore, seems to me, that as the goods left Mason's warehouse by the order of the plaintiff, they were at his risk, and that he can maintain an action for them, unless the form of the order which he gave for them deprives him of that right.

It has been urged that the form of the order throws the risk upon the vendor until the arrival of the goods, for they were not to be paid for until three months from that period, and consequently that the arrival was a condition precedent to Mason's right to sue for the price. If, however, the goods were not to be paid for unless they arrived, why should the plaintiff insure them? That shows that the arrival was not considered as a condition precedent to the payment. If the goods arrived, three months from the arrival was to be the period of credit; if they did not arrive, still the plaintiff would be bound to pay in a reasonable time after the arrival became impossible. If this were not so, the insurance would be altogether nugatory, for the plaintiff could not sue upon it, neither could Mason, the interest being declared to be in the plaintiff. For these reasons, I am of opinion that the form of the order for the goods does not vary the case, and that the verdict was properly found for the plaintiff.

HOLROYD, J. I also think that the verdict found for the plaintiff was right. It has been argued that neither the mate nor the owner of the vessel was liable to any one but Stokes & Co., from whom the goods were received. But it is a principle of law that the real owner of the goods, for whom Stokes & Co. were agents, may sue for the loss, although the defendant was not informed of his existence. It has been urged that the plaintiff had no interest in the goods, and the terms of the order have been adverted to in support of that argument; but I think that the goods became his property as soon as they were sent off by Mason

& Co. When goods are to be delivered at a distance from the vendor, and no charge is made by him for the carriage, they become the property of the buyer as soon as they are sent off. It was next contended that the plaintiff was not liable to the vendor unless the goods arrived; but the order for insurance is decisive as to that. The policy was to protect the plaintiff, and shows that he considered he should be the sufferer if the goods were lost on the voyage, which he could not have been had the arrival of the goods been a condition precedent to his liability to the vendors. The expiration of three months was to be the time of payment if the goods arrived; if they did not arrive the law would imply a promise to pay in a reasonable time.

LITTLEDALE, J., concurred.

Rule discharged.

MOORE *v.* RAWSON

[COURT OF KING'S BENCH (Abbott, C.J., Bayley, Holroyd and Littledale, JJ.), Michaelmas Term, 1824]

[Reported 3 B. & C. 332; 5 Dow. & Ry. K.B. 234; 3 L.J.O.S.K.B. 32; 107 E.R. 756]

Easement—Light—Loss of right—Non-user of ancient light—Presumption of abandonment—No intention to resume user—Wall with window demolished by owner—Blank wall erected in its place.

The right to light is acquired by enjoyment and may be lost by a discontinuance of the enjoyment unless the party who ceases to enjoy does, at the same time, some act to show an intention of resuming the enjoyment within a reasonable time.

The plaintiff, a reversioner, brought an action for obstructing his right of light. The plaintiff's premises comprised an ancient house adjoining which there had formerly been a building in which there was an ancient window overlooking the land of the defendant. About seventeen years previously the former owner of the plaintiff's premises had pulled down this building and erected on its site another building with a blank wall facing the defendant's land. About three years before commencement of the action the defendant erected a building next to the plaintiff's blank wall. The plaintiff then opened a window in the blank wall in the same place where the ancient window had been in the demolished building.

Held: by erecting the blank wall, the predecessor of the plaintiff not only ceased to enjoy the light, but had evinced an intention never to resume the enjoyment, and, therefore, the plaintiff could not maintain an action against the defendant for obstructing the new window.

Notes. Considered: *Stokoe* v. *Singers* (1857), 8 E. & B. 31; *Jones* v. *Tapling* (1861), 11 C.B.N.S. 283. Applied: *Crossly v. Lightowler* (1867), 2 Ch. App. 478; *Cook* v. *Bath Corpn.* (1868), L.R. 6 Eq. 177. Considered: *Public Works Comrs.* v. *Angus & Co.*, *Dalton* v. *Angus & Co.*, [1881–5] All E.R. Rep. 1. Distinguished: *Cooper* v. *Straker* (1888), 40 Ch.D. 21. Considered: *Midland Rail. Co.* v. *Gribble*, [1895] 2 Ch. 287; *Young* v. *Star Omnibus Co.* (1902), 86 L.T. 41. Referred to: *Garritt* v. *Sharp* (1835), 4 Nev. & M.K.B. 834; *R.* v. *Chorley* (1848), 12 Q.B. 515; *Rowbotham* v. *Wilson* (1857), 8 E. & B. 123; *Webb* v. *Bird* (1862), 13 C.B.N.S. 841; *Hall* v. *Litchfield Brewery Co.* (1880), 49 L.J.Ch. 655; *Scrutton* v. *Stone* (1893), 9 T.L.R. 478; *Wheaton* v. *Maple*, [1893] 3 Ch. 48; *Chastey* v. *Ackland*, [1895] 2 Ch. 389; *A.-G.* v. *Reynolds*, [1911] 2 K.B. 888; *Swan* v. *Sinclair*, [1925] A.C. 227.

As to effect of mere non-user of easement, see 12 HALSBURY'S LAWS (3rd Edn.) 564; and for cases see 19 DIGEST (Repl.) 92 et seq.

Cases referred to in argument:

Lethbridge v. *Winter* (1808), 1 Camp. 263, n.; 26 Digest (Repl.) 315, *330*.

Barker v. *Richardson* (1821), 4 B. & Ald. 579; 106 E.R. 1048; 19 Digest (Repl.) 67, *373*.

Rule Nisi obtained by the defendant to enter a nonsuit in an action for obstructing the plaintiff's right to light. The defendant denied liability.

At the trial before HULLOCK, B., at the last Derbyshire Spring Assizes, it appeared that the plaintiff was seised in fee of a messuage and building, with a yard, garden, and appurtenances, situate at Ripley, in Derbyshire, in the occupation of a tenant from year to year. The defendant was the owner of other messuages and premises next adjoining the plaintiff's, on the northern side thereof. The plaintiff's messuage was an ancient house and adjoining to it there had been a building formerly used as a weaver's shop. The old shop had ancient windows for the convenience of light to the weavers who worked looms there. About seventeen years ago the then owner and occupier of the premises took down the old shop, and erected a stable on the same site, having a blank wall next adjoining the premises of the present defendant. This building had latterly been used as a wheelwright's shop. About three years ago, and while the plaintiff's premises continued in this state, the defendant erected a building next to the blank wall, and the plaintiff then opened a window in that wall, in the same place where there had formerly been a window in the old wall, and the action was brought for the obstruction of this new window by the building so erected by the defendant.

The learned baron directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi was obtained by the defendant accordingly.

Serjeant Vaughan and *N. R. Clarke* for the plaintiff, showed cause against the rule.

Denman and *Reader* for the defendant, supported the rule.

ABBOTT, C.J.—I am of opinion that the plaintiff is not entitled to maintain this action. It appears that many years ago the former owner of his premises had the enjoyment of light and air by means of certain windows in a wall of his house. On the site of this wall he built a blank wall without any windows. Things continued in this state for seventeen years. The defendant, in the interval, erected a building opposite the plaintiff's blank wall, and then the plaintiff opened a window in that which had continued for so long a period a blank wall without windows, and he now complains that that window is darkened by the buildings which the defendant so erected.

It seems to me that, if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him at least to show that at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that was not a perpetual, but a temporary abandonment of the enjoyment; and that he intended to resume the enjoyment of those advantages within a reasonable period of time. I think that the burden of showing that lies on the party who has discontinued the use of the light. By building the blank wall, he may have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect. For these reasons I am of opinion, that the rule for a nonsuit must be made absolute.

BAYLEY, J. The right to light, air, or water, is acquired by enjoyment, and will, as it seems to me, continue so long as the party either continues that enjoyment or shows an intention to continue it. In this case the former owner of the

plaintiff's premises had acquired a right to the enjoyment of the light; but he chose to relinquish that enjoyment, and to erect a blank wall instead of one in which there were formerly windows. At that time he ceased to enjoy the light in the mode in which he had used to do, and his right ceased with it. Suppose that, instead of doing that, he had pulled down the house and buildings, and converted the land into a garden, and continued so to use it for a period of seventeen years: and another person had been induced by such conduct to buy the adjoining ground for the purposes of building. It would be most unjust to allow the person who had so converted his land into garden ground, to prevent the other from building upon the adjoining land which he had, under such circumstances, been induced to purchase for that purpose. I think that, according to the doctrine of modern times, we must consider the enjoyment as giving the right; and that it is a wholesome and wise qualification of that rule to say, that the ceasing to enjoy destroys the right, unless at the time when the party discontinues the enjoyment he does some act to show that he means to resume it within a reasonable time.

HOLROYD, J. –I am of the same opinion. It appears that the former owner of the plaintiff's premises at one time was entitled to the house with the windows, so that the light coming to those windows over the adjoining land could not be obstructed by the owner of that land. I think, however, that the right acquired by the enjoyment of the light, continued no longer than the existence of the house with the windows in respect of which the party had the right of enjoyment and, therefore, when the house and the windows were destroyed by his own act, the right which he had in respect of them was also extinguished.

If, indeed, at the time when he pulled the house down, he had intimated his intention of re-building it, the right would not then have been destroyed with the house. If he had done some act to show that he intended to build another in its place, then the new house, when built, would in effect have been a continuation of the old house, and the rights attached to the old house would have continued. If a man has a right of common attached to his mill, or a right of turbary attached to his house, if he pulls down the mill or the house, the right of common or of turbary will prima facie cease. If he show an intention to build another mill or another house, his right continues. But if he pulls down the house or the mill without showing any intention to make a similar use of the land, and after a long period of time has elapsed, builds a house or mill corresponding to that which he pulls down, that is not the renovation of the old house or mill, but the creation of a new thing, and the rights which he had in respect of the old house or mill, do not in my opinion attach to the new one.

In this case, I think, the building of a blank wall is a stronger circumstance to show that he had no intention to continue the enjoyment of his light than if he had merely pulled down the house. In that case he might have intended to substitute something in its place. Here, he does in fact substitute quite a different thing, a wall without windows. There is not only nothing to show that he meant to renovate the house so as to make it a continuance of the old house, but he actually builds a new house different from the old one, thereby showing that he did not mean to renovate the old house. It seems to me, therefore, that the right is not renewed as it would have been, if, when he had pulled down the old house, he had shown an intention to rebuild it within a reasonable time, although he did not do so eo instanti.

LITTLEDALE, J.—According to the present rule of law a man may acquire a right of way, or a right of common (except, indeed, common appendant) upon the land of another, by enjoyment. After twenty years' adverse enjoyment the law presumes a grant made before the user commenced, by some person who had power to grant. But if the party who has acquired the right by grant ceases for

a long period of time to make use of the privilege so granted to him, it may then be presumed that he has released the right.

It is said, however, that as he can only acquire the right by twenty years' enjoyment, it ought not to be lost without disuse for the same period; and that as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a similar non-user, to raise a presumption of a release. This reasoning, perhaps, may apply to a right of common or of way. But there is a material difference between the mode of acquiring such rights and a right to light and air. The latter is acquired by mere occupancy; the former can only be acquired by user, accompanied with the consent of the owner of the land; for a way over the lands of another can only be lawfully used, in the first instance, with the consent, express or implied, of the owner. A party using the way without such consent would be a wrongdoer; but when such a user, without interruption, has continued for twenty years, the consent of the owner is not only implied during that period, but a grant of the easement is presumed to have taken place before the user commenced. The consent of the owner of the land was necessary, however, to make the user of the way (from which the presumption of the grant is to arise) lawful in the first instance.

But it is otherwise as to light and air. Every man on his own land has a right to all the light and air which will come to him, and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owner of the adjoining land. He, therefore, begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected his building the owner of the adjoining land may, afterwards, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant; for although a right of common (except as to common appendant) or a right of way being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant, yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air.

The right, therefore, is acquired by mere occupancy, and ought to cease when the person who so acquired it discontinues the occupancy. If, therefore, as in this case, the party who has acquired the right once ceases to make use of the light and air which he had appropriated to his own use, without showing any intention to resume the enjoyment, he must be taken to have abandoned the right. I am of opinion, that as the right is acquired by mere user, it may be lost by non-user. It would be most inconvenient to hold that the property in light and air, which is acquired by occupancy, can only be lost where there has been an abandonment of the right for twenty years. I think that if a party does any act to show that he abandons his right to the benefit of that light and air which he once had, he may lose his right in a much less period than twenty years. If a man pulls down a house and does not make any use of the land for two or three years, or converts it into tillage, I think he may be taken to have abandoned all intention of re-building the house; and, consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or

does anything to show that he did not mean to convert the land to a different purpose, then his right would not cease.

In this case, I think that the owner of the plaintiff's premises abandoned his right to the ancient lights, by erecting the blank wall instead of that in which the ancient windows were; for he then indicated an intention never to resume that enjoyment of the light which he once had. Under those circumstances, I think that the temporary disuse was a complete abandonment of the right.

Rule absolute.

WILKINSON *v.* MALIN AND OTHERS

[COURT OF EXCHEQUER (Lord Lyndhurst, C.B., Bayley, Bolland and Gurney, BB.), Trinity Term, 1832]

[Reported 2 Cr. & J. 636; 2 Tyr. 544; 1 L.J.Ex. 234; 149 E.R. 268]

Charity—Relief of poverty—Education of poor children.

Where trustees are appointed to apply funds for the relief of the poor of a parish they may, in the exercise of their discretion, apply those funds, or part of them, for the education of the poor children of the parish, that being an applying the funds for the relief of the poor within the language of an instrument of that description.

Trust—Administration—Decision of majority of trustees—Trust of general or public nature.

When trustees are appointed to perform a trust of a public or general nature, e.g., to apply the trust money towards the repair of a church, the relief of the poor of a parish, and the repairing of highways and a bridge in the parish, the act of the majority of the trustees is the act of the whole. Also **held** in the case of the appointment or dismissal of a schoolmaster of the parish school maintained by the trust.

Landlord and Tenant—Tenancy—Service tenancy—Dismissal of servant—Right of master to possession of premises—Schoolmaster.

Where a schoolmaster occupied a dwelling-house as an incident of his appointment as schoolmaster, **held**, that he had no interest in the house distinct from his interest of appointment as schoolmaster, and when he was legally removed from that office his interest and right to possession of the premises ceased.

Notes. Considered: *Perry* v. *Shipway* (1859), 1 Giff. 1. Followed: *Re Campden Charities* (1880), 49 L.J.Ch. 676. Referred to: *Re Campden Charities* (1881), 18 Ch.D. 310; *Re Whiteley, London* v. *Whiteley*, [1910] 1 Ch. 600.

As to charities for education and the relief of the poor, and as to the powers, duties, and liabilities of trustees, see 4 HALSBURY'S LAWS (3rd Edn.) 213–221, 378–387; and for cases see 8 DIGEST (Repl.) 316 et seq., 494 et seq.

Cases referred to:

(1) *Grindley* v. *Barker* (1798), 1 Bos. & P. 229; 126 E.R. 875; 13 Digest (Repl.) 226, *477*.

(2) *Cortis* v. *Kent Water-works Co.* (1827), 7 B. & C. 314; 5 L.J.O.S.M.C. 106; 108 E.R. 741; 13 Digest (Repl.) 257, *836*.

(3) *Withnell* v. *Gartham* (1795), 6 Term Rep. 388; 1 Esp. 321; 101 E.R. 610; 17 Digest (Repl.) 49, *580*.

Also referred to in argument:

R. v. *Foxcroft* (1760), 2 Burr. 1017; 97 E.R. 683; sub nom. *Oldknow* v. *Wainwright*, 1 Wm. Bl. 229; 13 Digest (Repl.) 259, *853*.

Cook v. *Loveland* (1799), 2 Bos. & P. 31; 126 E.R. 1138; 13 Digest (Repl.) 360, *1678*. A

Sanders v. *Owen* (1699), Carth. 426; 5 Mod. Rep. 386; 87 E.R. 721; sub nom. *Owen* v. *Saunders*, Colles, 70; 1 Ld. Raym. 158; sub nom. *Saunders* v. *Owen*, 12 Mod. Rep. 199; 2 Salk. 467; 3 Salk. 250; H.L.; 33 Digest (Repl.) 272, *992*.

Doe d. Warner v. *Browne* (1807), 8 East, 165; 103 E.R. 305; 31 Digest (Repl.) 64, *2212*. B

R. v. *Beeston* (1789), 3 Term Rep. 592; 100 E.R. 750; 13 Digest (Repl.) 296, *1130*.

R. v. *Whitaker* (1829), 9 B. & C. 648; 7 L.J.O.S.K.B. 332; 100 E.R. 241; 13 Digest (Repl.) 226, *478*. C

Blacket v. *Blizard* (1829), 9 B. & C. 851; 4 Man. & Ry.K.B. 641; 2 Man. & Ry. M.C. 369; 109 E.R. 317; sub nom. *Freeman* v. *Meymott*, *Blackett* v. *Blizard*, 8 L.J.O.S.K.B. 85; 13 Digest (Repl.) 254, *814*.

Doe d. Jones v. *Jones* (1830), 10 B. & C. 718; 5 Man. & Ry.K.B. 616; 8 L.J.O.S.K.B. 310; 109 E.R. 616; 19 Digest (Repl.) 572, *4122*.

Doe d. Aslin v. *Summersett* (1830), 1 B. & Ad. 135; 8 L.J.O.S.K.B. 369; 109 E.R. 738; 31 Digest (Repl.) 502, *6268*. D

Doe d. Nicholl v. *McKaeg* (1830), 10 B. & C. 721; 5 Man. & Ry.K.B. 620; 8 L.J.O.S.K.B. 311; 109 E.R. 618; 31 Digest (Repl.) 479, *6045*.

Lord Huntingtower v. *Gardiner*, *Same* v. *Ireland* (1823), 1 B. & C. 297; 2 Dow. & Ry. K.B. 450; 1 L.J.O.S.K.B. 120; 107 E.R. 111; 44 Digest (Repl.) 327, *1602*. E

Harris v. *Beavan* (1828), 4 Bing. 646; 1 Moo. & P. 633; 6 L.J.O.S.C.P. 149; 130 E.R. 918; 31 Digest (Repl.) 473, *5991*.

Rule Nisi obtained by the defendants calling on the plaintiff to show cause why a verdict in his favour should not be set aside and a verdict entered for the defendants in an action brought by the plaintiff for trespass and for the forcible entry by the defendants into a dwelling-house and premises at Willoughby, Warwickshire, which were occupied by the plaintiff as schoolmaster, and of which, he alleged, he was seised in his demesne as of fee, and for assault. F

By deed, dated in 1434, J. Hayward and M. his wife conveyed divers messuages, lands, tenements, and hereditaments situate in Willoughby and other places in the county of Warwick to trustees therein named and their heirs, upon trust to apply the yearly issues and profits thereof from time to time towards the repairs of the church of Willoughby, the relief of the poor in Willoughby, buying of armour and setting forth soldiers, mending of causeways and highways and repairing of Sawbridge bridge in the parish of Willoughby. By order of commissioners of charitable uses, confirmed by the Court of Chancery on July 10, 1609, it was ordered that certain fraudulent leases of the trust premises should cease, and that the surviving feoffees of the same should convey to ten trustees, therein named, and their heirs, upon trust that the issues and profits should from time to time be employed to the aforesaid charitable uses; that in what manner the same should be employed by the trustees should be contained in the deed of conveyance; and that, when all the feoffees but five should die, the five surviving feoffees should make like conveyance upon the like trusts to the use of themselves and five other persons, inhabitants of Willoughby of the best and most sufficient persons and their heirs. G H I

By lease and release, of May 22 and 23, 1807, the trust premises in Willoughby, described as being now or late in the tenure or occupation of John Cowley and William Cowley, were conveyed by the surviving trustees to ten new trustees. Long before 1816, a school had been established for the education of the poor of Willoughby, the expenses of which had been paid out of the above trust funds. The income of the charity having for many years averaged £400 per annum, the

A trustees in that year, in exercise of the discretion given them by the trust deeds of applying the funds generally towards the relief of the poor of Willoughby, applied part of such funds in the erection of a school-house and other requisite buildings for the purpose of such school on the lands in Willoughby, described in the deed of 1807. On Dec. 26, 1816, the trustees for the time being appointed a schoolmaster and mistress at a salary of £40 per annum.

B In September, 1818, all the trustees then remaining, being seven in number, viz., J. Malin, T. Ellard, W. Ellard, M. Jephcott, C. Cowley, T. Cock, and H. Mills, assembled for electing a schoolmaster, and, after some intimation of dissent by two of them, the other five concurred in electing the plaintiff, but no form of voting took place. The plaintiff was then told that he must be a married man; that the salary was to be £20 to the master, and £20 to the mistress; and that C it was required that he should be competent to teach the boys, and she the girls. The plaintiff was afterwards duly licensed to perform the office of schoolmaster in the school, by the bishop of the diocese. In January, 1819, the plaintiff and his wife entered on their duties, and became occupiers of the school-house and premises. By lease and release of Nov. 26 and 27, 1827, M. Jephcott, J. Malin, T. Cock, C. Cowley and W. Ellard, being the surviving trustees, conveyed the D messuage or tenement and land forming the trust premises in Willoughby, describing them as formerly in the tenure or occupation of John Cowley and William Cowley, and now of William Cowley, unto and to the use of W. Dester, T. Hesom, T. Hancock, J. Cock, W. Crupper, and their heirs, on trust that they, M. Jephcott, J. Malin, T. Cock, C. Cowley, W. Ellard, W. Dester, T. Hesom, T. Hancock, J. Cock, and W. Crupper, and their heirs, should employ the yearly income, E rents, issues, and profits of the said hereditaments and premises towards such charitable uses, intents, and purposes, as in the original deed of grant mentioned.

Disputes having arisen between some of the trustees and the plaintiff, on Jan. 14, 1830, two notices were served on the plaintiff, one signed by J. Malin, M. Jephcott, T. Cock, T. Hesom, and T. Hancock, purporting to be a discharge of the plaintiff F from his office of schoolmaster from Dec. 25 then next, and requiring him to give up possession of the school-house and premises from and after this day or other end of the year of his tenancy which should expire next after half a year from the delivery thereof. On Jan. 25, 1831, another notice, signed by the same trustees, was served on the plaintiff, demanding peaceable possession of the school-house, garden, and premises, and giving him notice to quit. The plaintiff G alleged that subsequently they entered the premises and ejected him. When the case came before BAYLEY, J., at the Warwickshire Spring Assizes, 1832, the jury found a verdict for the plaintiff, assessing the damages. In answer to a question from the judge, they found that the plaintiff's salary was £40 a year. A rule nisi was obtained on behalf of the defendants calling on the plaintiff to show cause why the verdict should not be set aside and a verdict entered for the H defendants.

Clarke, *Serjeant Adams*, *Serjeant Stephen*, *Humphrey* and *Busby*, for the plaintiff, showed cause against the rule.

Serjeant Goulburn and *M. D. Hill*, for the defendants, supported the rule.

Cur. adv. vult.

I Trinity Term, 1832. **LORD LYNDHURST, C.B.,** delivered the following judgment of the court.—One of the points argued at the Bar, which stands for the decision of the court, is whether or not the plaintiff was duly appointed master of the school, which is the subject of this inquiry. A charity was established in the reign of Henry VI, and trustees were appointed to whom certain estates were conveyed for purposes specified, viz., for the relief of the poor, the repair of the church and highways and of a particular bridge, and to pay the fifteenths, when it should be required, to defray the expenses of soldiers. Thus, all the

objects I have enumerated were objects of a public nature, and these trustees were appointed to take certain estates and apply their produce to them.

It has been considered for many years that, under that part of the trusts which enabled the trustees to apply these funds for the relief of the poor, they were at liberty to apply part of the funds to instruct the poor children of the parish. A school-house has been accordingly built, and those poor children have been instructed at that school. We are of opinion that that application of the funds comes within the terms of the trusts, and that where trustees are appointed to apply funds for the relief of the poor of a parish they may, in the exercise of their discretion, apply those funds, or part of them, for the education of the poor children of the parish, that being an applying the funds for the relief of the poor within the language of an instrument of this description.

At the time when the plaintiff was appointed schoolmaster, there were seven trustees. Those seven trustees met for the purpose of electing a schoolmaster. At that meeting, five of the seven trustees concurred in his appointment, and two dissented, but did nothing upon that dissent. It was stated in evidence merely that five concurred and two dissented, but the latter did no act, as it appears in the evidence, consequent upon that dissent. It is unnecessary, however, in the view which we take of the subject, to say whether or not that is to be considered as a concurrent election by the seven, because we are of opinion, that in a case of this description, where all the trustees were assembled for the purpose of making the election, and the majority of them so assembled concurred in the appointment of a schoolmaster, the act of the majority, in that respect, is to be considered as the act of the whole body. This is a trust of a public nature, and we are of opinion, that, when trustees are appointed for the purpose of performing a trust of a public and general nature like this, the act of the majority is the act of the whole. In *Grindley* v. *Barker* (1), EYRE, C.J., says that where persons are entrusted with powers of a general nature, and they all meet for the purpose of performing their duty the act of the majority is the act of the whole. That case was recently cited in *Cortis* v. *Kent Water-works Co.* (2) by one of the learned judges, and was adopted by him and apparently by the whole court. We are of opinion that this is a public trust, or of a public nature, namely, a trust to apply funds for the repair of the church, and for other subjects in which the whole parish were interested. Therefore, we think it comes within the principle to which I have referred. But it was said at the Bar that the principle only applies to cases where the trustees are appointed under some public authority, as under an Act of Parliament or some public body. We are of opinion that it is not subject to that limitation and, in fact, in *Withnell* v. *Gartham* (3) the charity was founded, and its officers were appointed, not by any public authority, but, as in the present case, by an individual. It is true that in that case the churchwardens and vicar for the time being were the trustees and that the churchwardens usually acted by a majority, but that was merely made use of as a circumstance from which it was to be inferred that the intention of the donor was that the act of the majority should bind the whole and should be considered as the act of the whole body. Other circumstances were also there relied upon, namely, that the objects of the trusts would be defeated if one dissenting trustee should prevent the application of the funds in the manner directed by the trusts. That would apply equally in this case, and, considering the nature of the trusts, we are of opinion, that it was the intention of the founder, and fairly to be collected from the objects he had in view, that the act of the majority of the trustees should bind the rest.

The next question for consideration is whether the master was duly and properly dismissed. The dismissal was in this form. There was no public meeting, nor any declaration by a majority assembled at a public meeting, that the schoolmaster should cease to act in that situation, but five out of the trustees, not assembled in that formal manner, gave notice that the schoolmaster should.

within a certain time, retire from his office. In the first place, at the time when the notice was given, there were ten trustees, so that the persons who gave notice did not even constitute a majority of the whole body. In the next, even if they did constitute a majority of the whole body, it is the whole body that is to dismiss, and not a majority of it. So that, if there is a meeting, and a majority are for dismissal, then the declaration of the majority is not merely the declaration of the majority, but of the whole body, which whole body does, in fact, dismiss. Therefore, in a case of this description, where there was no meeting and five individuals gave their opinion, or said that the dismissal should take place in a short time, or that the party should cease to act as schoolmaster, we are of opinion that that is not a valid dismissal within the meaning of this trust.

Both notices stand on the same footing, and are governed by the same principles. Though I have hitherto stated the second question to relate to the dismissal of the schoolmaster, the actual terms of the last issue are, whether the interest and right of possession were lawfully put an end to and determined before the trespass complained of. It becomes material, therefore, to consider next what his interest and right of possession were. He was appointed at the salary of £40 a year with permission to occupy the dwelling-house and a right to occupy it as long as he continued schoolmaster. That occupation was incident to his appointment of schoolmaster, and he had no interest in the house distinct from his interest of appointment of schoolmaster. As soon, therefore, as he was properly removed from his office of schoolmaster, we should in effect decide that his interest and right of possession in the premises had ceased.

[HIS LORDSHIP dealt with two questions of practice which do not now call for report, and concluded]: We are of opinion, therefore, that the rule should be discharged.

Rule discharged.

CLIFTON *v.* COCKBURN

[LORD CHANCELLOR'S COURT (Lord Brougham, L.C.), February 26, 28, March 1, 8, 1834]

[Reported 3 My. & K. 76; 40 E.R. 30]

Settlement—Mistake—Error in construction—Payment to person not entitled—Subsequently, also in error, money to which payee entitled paid away from him—Right to set-off.

If a payment is made by a settlor to a person in accordance with a mistaken construction of the settlement, and later, also through error of law, the settlor pays away money belonging to the payee, the one sum cannot be set-off against the other, and the payee is entitled to recover the latter money without being called on to refund the former.

Family Arrangement—Disturbance—Reluctance of court—Settlement—Error in construction—Obscure error—Settlement acted on for substantial period.

The court always leans strongly in support of family arrangements and is reluctant to disturb them. A construction, far from being plainly and grossly erroneous, imposed on a clause in a family settlement ought not, if acted on by the makers of the settlement over a substantial period, to be disturbed by the court after their decease.

Mistake—Mistake of law and fact—Distinction—Payment—Relief against error of law—Difficulty in application of rule.

Per LORD BROUGHAM, L.C.: The distinction between payment made in error of law and payment in error of fact is more easy to lay down in general terms than to follow out in particular cases, even as regards the application of the rule, admitting it to be a correct one, and I think I could, without much difficulty put cases in which a court of justice, especially a court of equity, would find it

an extremely hard matter to hold by the rule and refuse to relieve against an error of law.

Notes. Considered: *Rogers* v. *Ingham*, [1874–80] All E.R. Rep. 209. Referred to: *Re Diplock's Estate, Diplock* v. *Wintle*, [1947] Ch. 716.

As to recovery of money paid under a mistake, see 26 HALSBURY'S LAWS (3rd Edn.) 921–927; and for cases see 35 DIGEST (Repl.) 158 et seq. As to family arrangements, see 17 HALSBURY'S LAWS (3rd Edn.) 215 et seq.; and for cases see 24 DIGEST (Repl.) 1117 et seq.

Cases referred to:

(1) *Hutcheon* v. *Mannington* (1791), 1 Ves. 366; 4 Bro. C.C. 491, n.; 30 E.R. 389, L.C.; 20 Digest (Repl.) 355, *805*.

(2) *Sitwell* v. *Bernard* (1801), 6 Ves. 520; 31 E.R. 1174, L.C.; 43 Digest 615, *569*.

(3) *Kilvington* v. *Gray* (1825), 2 Sim. & St. 396; 4 L.J.O.S. Ch. 80; 57 E.R. 397; 43 Digest 616, *572*.

(4) *Pusey* v. *Desbouvrie* (1734), 3 P. Wms. 315; 2 Eq. Cas. Abr. 270; 24 E.R. 1081, L.C.; 35 Digest (Repl.) 133, *274*.

(5) *Broderick* v. *Broderick* (1713), 1 P. Wms. 239; 24 E.R. 369, L.C.; 25 Digest (Repl.) 294, *990*.

(6) *Cocking* v. *Pratt* (1750), 1 Ves. Sen. 400; 27 E.R. 1105; 35 Digest (Repl.) 93, *1*.

(7) *Ramsden* v. *Hylton*, *Hylton* v. *Biscoe* (1751), 2 Ves. Sen. 304; 28 E.R. 196, L.C.; 12 Digest (Repl.) 569, *4335*.

(8) *Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126; 27 E.R. 934; 35 Digest (Repl.) 130, *253*.

(9) *Cory* v. *Cory* (1747), 1 Ves. Sen. 19; 27 E.R. 864, L.C.; 24 Digest (Repl.) 1127, *96*.

(10) *Stockley* v. *Stockley* (1812), 1 Ves. & B. 23; 35 E.R. 9, L.C.; 24 Digest (Repl.) 1133, *149*.

Also referred to in argument:

Garth v. *Cotton* (1753), 1 Ves. Sen. 524, 546; 3 Atk. 751; Dick. 183; 27 E.R. 1182, 1196; 2 Digest (Repl.) 108, *764*.

Gaskell v. *Harman* (1805), 11 Ves. 489; 32 E.R. 1177, L.C.; 44 Digest 556, *3725*.

Wood v. *Penoyre* (1807), 13 Ves. 325; 33 E.R. 316; 23 Digest (Repl.) 411, *4823*.

Walker v. *Shore* (1815), 19 Ves. 387; 34 E.R. 361; 20 Digest (Repl.) 364, *884*.

Earl of Stair v. *Macgill* (1827), 1 Bli. N.S. 662; 1 Dow. & Cl. 24; 4 E.R. 1020, H.L.; 44 Digest 538, *3549*.

Bernard v. *Mountague* (1816), 1 Mer. 422; 35 E.R. 729; 44 Digest 556, *3727*.

Taylor v. *Hibbert* (1820), 1 Jac. & W. 308; 37 E.R. 393; 23 Digest (Repl.) 324, *3922*.

Stott v. *Hollingworth* (1818), 3 Madd. 161; 56 E.R. 470; 23 Digest (Repl.) 413, *4838*.

Fitzgerald v. *Jervoise* (1820), 5 Madd. 25; 56 E.R. 804; 43 Digest 616, *573*.

Angerstein v. *Martin* (1823), Turn. & R. 232; 2 L.J.O.S.Ch. 88; 37 E.R. 1087, L.C.; 43 Digest 616, *574*.

Hewitt v. *Morris* (1824), Turn. & R. 241; 2 L.J.O.S.Ch. 87; 37 E.R. 1090, L.C.; 43 Digest 616, *575*.

Law v. *Thompson* (1827), 4 Russ. 92; 6 L.J.O.S.Ch. 56; 38 E.R. 739; 44 Digest 1169, *10117*.

Pullen v. *Ready* (1743), 2 Atk. 587; 26 E.R. 751, L.C.; 35 Digest (Repl.) 96, *19*.

Nicholls v. *Leeson* (1747), 3 Atk. 573; 26 E.R. 1131, L.C.; 30 Digest (Repl.) 341, *34*.

Currie v. *Goold* (1817), 2 Madd. 163; 56 E.R. 295; 35 Digest (Repl.) 172, *572*.

Skyring v. *Greenwood* (1825), 4 B. & C. 281; 6 Dow. & Ry. K.B. 401; 107 E.R. 1064; 35 Digest (Repl.) 171, *563*.

Appeal by the defendants against a decree of Sir John Leach, M.R., in so far as it was not thereby declared that Dame Eliza Cockburn, deceased, was, according to the true construction of a settlement of Jan. 1, 1791, entitled to the interest which accrued due on the clear residue of the estates of Charles Rumley and Dr. Davis from the date of that settlement till the time when the plaintiff, Charles Claude Clifton, the son of Lady Cockburn by an earlier marriage, came of age, and in so far as it was not also thereby declared that so much Carnatic stock and money as had been transferred or paid to the plaintiff and his trustees in respect of the estate of Dr. Davis over and above what they were entitled to according to such construction ought to be set off against the Carnatic stock and money to which they were entitled in respect of Major Rumley's estate.

Dame Eliza Cockburn had been twice married in the East Indies before her marriage to Sir William Cockburn, her surviving husband, and one of the defendants in this suit. By her first husband, Mr. George Clifton, she had two children, Frances, who died under age, and Charles Claude, the present plaintiff. During her first marriage, Major Rumley, an intimate friend of her family, deposited with her a sealed packet upon his departure to the war then waged against Hyder Ali in which he died. Before his death he found means to communicate, by writing to Mrs. Clifton, his desire that she should open the packet. This she did, and found it to contain his will, and a bond for 31,500 star pagodas from Omdut ul Omrah, then heir apparent of the Nabob of Arcot, who afterwards succeeded his father Wallah Jah upon the throne of the Carnatic. The bond was to secure a debt from the Omrah, but Major Rumley had taken the precaution of making Mrs. Clifton the obligee as he intended the sum should be paid to her, whom he also left executrix and residuary legatee in his will. It was admitted that she took a beneficial interest in the bond only under the will.

After the decease of her first husband, Mrs. Clifton married Dr. Davis, resident physician at the court of Arcot, who also was to a considerable amount a creditor of the Nabob. By this second marriage there was no family, and Mrs. Davis, possessed of the fortune which she derived under Major Rumley's will and of that which she took under Dr. Davis's bequest, in 1791 contracted a third marriage with Captain (afterwards Sir William) Cockburn, by whom she had several children. Before she contracted this third marriage, Lady Cockburn was desirous of making a provision for the children of the first. A settlement was, accordingly, executed on Jan. 1, 1791, of all her property derived under the wills of Major Rumley and Dr. Davis, one half to her sole and separate use and the other half to the two children of the first marriage, or the survivor of them, to vest in each at majority or marriage, and in case of their both dying under age and unmarried, then to Lady Cockburn's separate use, together with the other half, the interest of the children's moiety before the principal vested to Lady Cockburn—as one party contends—that interest before the time of vesting, as the other party maintains, to be Lady Cockburn's only in case it should during that interval be realised and laid out pursuant to the directions of the settlement. At the date of this marriage Mr. Clifton, the plaintiff, was fourteen years of age, and his sister a year or two younger. She died before reaching majority, and the question turned upon the right to the interest on the Arcot bonds (which formed the principal, if not the only, property of Lady Cockburn) for the period which elapsed between her third marriage and the year 1798 when the plaintiff came of age.

Many years elapsed before a prospect was opened of the bonds ever yielding anything, and a longer period intervened before any arrangement was made for liquidating the debts which the bonds represented. It was not till above fifteen years after the settlement and eight years after Mr. Clifton came of age that an arrangement made between the East India Co., and the creditors of the Nabob received the sanction of Parliament. Seven years more elapsed before that arrangement led to any adjudication or award by which the amount due to those entitled under the settlement could be ascertained and they put in possession of any funds that were

tangible or convertible into money. The award then made allotted to those claimants who had established their demands the principal sums proved by them to be due with interest on the same at different rates down to the year 1804. This principal and interest were formed into one capital, stock, called Carnatic stock, equivalent to it, was allotted, and interest from that period (1804) downwards to the date of the award in 1813 was also awarded in money. The stock was to bear interest afterwards, and to be transferable. To Lady Cockburn there was in this way awarded, first, on account of the bonds of Dr. Davis, £74,724 Carnatic stock, and £16,094 sterling for interest since 1804, so that the stock represented as well the original principal of the debt as its interest down to 1804, while the money represented the interest which since 1804 had accrued due both upon that principal and interest. Afterwards the commissioners awarded a further sum of £45,345 Carnatic stock to her as executrix of Major Rumley, and six years later a further sum of £7,591 like stock was awarded to her in the same character.

It was admitted that, for many years after the award was made, the stock thus received was dealt with by Lady Cockburn under the rights and powers of the settlement as if she had only a title to the moiety of the principal and to the interest upon that moiety, and from the settlement of 1791 to the time of her death in 1829, she took the same view of the matter and uniformly continued to act upon this supposition.

After her death the terms of the settlement appear to have been more narrowly examined, and those entitled under her will, conceiving that the interest of the moiety settled upon Mr. Clifton from the date of the deed till he attained majority and, consequently, such portion of the interest awarded by the commissioners as corresponded to that interest, was reserved by Lady Cockburn under the settlement, discussions took place between the parties. At first these discussions were amicable, but later they became much less friendly, and the present proceedings were taken.

Sir Edward Sugden, *Tinney* and *Garratt* for the defendants.
Knight, *Wigram* and *Richards* for the plaintiff.

Mar. 8, 1834. **LORD BROUGHAM, L.C.,** stated the facts and continued: When the interference of friends proved unavailing and legal proceedings were instituted, the court before which the question was brought had two things to consider—(i) the construction of the settlement, and (ii) the proceedings of the parties, and especially of Lady Cockburn after the funds had been realised by the award of the commissioners in 1813. These are the two points which must now be considered here when the case is brought before the court by appeal from his Honour's decree.

On the construction of the settlement, the question is whether or not the interest of the fund secured to the children of the first marriage is reserved to Lady Cockburn during their minority. I am of opinion that it is. [His Lordship examined the terms of the settlement in detail, and continued:] The authority of decided cases is seldom calculated to throw much light upon questions of construction so special in the circumstances in which they arise and by which they are surrounded as the present. We may, however, sometimes gather from them a few hints or analogies, or approximations to a principle. *Hutcheon* v. *Mannington* (1), decided by Lord Thurlow, and still more *Situell* v. *Bernard* (2), on which Lord Eldon appears to have bestowed great pains, and which he decided after taking the long vacation to consider it, so far as they go support the view which I have taken of the present instrument. In the former Lord Thurlow appears to have held that with reference to the vesting of a right, or the party in whom it should vest, nothing can depend upon the dispatch, or slowness, or caprice of trustees in making an investment or a sale in the case of a direction given to them which they can at any time fulfil. The latter also was the case of a direction to sell with all convenient speed. But in *Kilvington* v. *Gray* (3), the direction was to purchase on certain terms, and in a given county, and the present Master of the Rolls, then vice-chancellor, there held that this did not differ from *Situell* v. *Bernard* (2), and he gave the tenant for

life the interest from a year after the testator's death. I have weighed this settlement and have given my opinion plainly upon its construction, not expressing greater doubt than I feel on it. But it would be most unbecoming to say that I or anyone can consider the point as involving no difficulty. It is enough to know that others, to whose opinion the greatest deference is due, regarded it in a different light; enough that his Honour, in the court below, held a confident opinion of an opposite kind. That it is of doubtful import, therefore, that it is of difficult interpretation, must be assumed from the fact. That the makers of the deed themselves imposed upon it a meaning contrary to that which I am giving it—that they acted on that construction which I am treating as a misconstruction—that they knew of none other, living and dying, and making all their family arrangements upon the footing of it, is undeniable, and this is the next and most important light in which the case presents itself to our view.

Lady Cockburn survived her marriage thirty-nine years, and, while it is contended, on the one hand, that a construction acted on for so long a period of time cannot now be disturbed, it is, on the other, denied that any such lapse of time can be alleged, because nothing was done till the year 1813. I am of opinion, however, that the former of these positions is much more near the truth than the latter. Indeed, from the nature of the transactions, nothing was likely to be done until the funds were realised or about to become tangible. During the earlier period, while the amount was as uncertain as the time of payment, there was no likelihood of the fund being dealt with either in the family or with strangers. As soon as the uncertainty ceased, the very month after the award, the deed of August, 1813, was executed. Other arrangements were afterwards made respecting the fund, down to within a few years of Lady Cockburn's death, so that we are warranted in saying, with the Master of the Rolls, that for nearly forty years she and those who advised her, acted upon the supposition that the interest during minority belonged to the children, in the case which arose of the funds not being realised before the time of vesting. Some question may be made as to the first seven years, but that would only have the effect of making the term of acting upon this construction thirty-two instead of thirty-nine years.

The first awards made by the commissioners on July 9, 1813, were upon the two branches of Lady Cockburn's claim, as executrix of Dr. Davis. On Aug. 12 in the same year a deed was executed by her, with Sir William Cockburn's concurrence, wherein, after reciting the settlement of 1791 and the award of the commissioners, Lady Cockburn, in order to give Mr. Clifton the benefit of the settlement so far as she safely could with reference to possible claims upon Dr. Davis's estate covenants to transfer the whole stock awarded by the commissioners (except a trifling sum due to herself) into the joint names of Sir William, herself, and Mr. Clifton's trustees, on trust to pay half the yearly interest to herself and the other half to Mr. Clifton, for six years and at the end of that period to transfer the whole to the trustees of the settlement of 1791. She also gives him half the sum awarded for interest since 1804, that sum representing the interest on the minority interest as well as on the rest. Here, then, is a distinct recognition of Mr. Clifton's right to the minority interest, and an actual transfer to him of the interest of that minority interest during six years, which he received for the six years accordingly, and in 1819 a deed poll was executed by Lady Cockburn and Sir William, whereby the capital stock was divided into two equal parts and one transferred to Mr. Clifton, his trustees, and parties to whom he had pledged it.

In December, 1813, the further award of £45,345 Carnatic stock was made in Lady Cockburn's favour, as executrix of Major Rumley, but, in consequence of outstanding claims on the major's estate which remained to be liquidated, no settlement was come to with Mr. Clifton concerning this sum until 1819. In that year it was agreed that both Lady Cockburn and Mr. Clifton should receive from the last-mentioned sum of stock yearly payments of £580 each, being equal moieties of the interest which it was deemed safe to appropriate having regard to the claims upon

the estate. No doubt was started with respect to the interest during the minority and its accumulations belonging to Mr. Clifton: and on the footing of this arrangement Mr. Clifton gave Sir W. Cockburn a bond of indemnity, in case of those claims exceeding the reserve thus kept to meet them. In August, 1819, the further award of £7,591 stock, on account of Major Rumley's bonds, was made to Lady Cockburn. But though some loan transactions have since taken place between Mr. Clifton and Sir William Cockburn, no deed or agreement appears to have been executed upon this last payment being made, nor any further settlement as to the stock received under Major Rumley's will.

Throughout the whole of the transactions which took place during Lady Cockburn's life, the same assumption always prevailed, that Mr. Clifton was entitled to one half of the minority interest, whether it came from Major Rumley's or from Dr. Davis's estate, and as well in those transactions in which both parties concurred as in matters necessarily confined to Lady Cockburn, or to Lady Cockburn and the family of her third husband. Thus, in 1817 she made her will and distributed by it her whole property among the Cockburns, but she expressly states that "having provided for her son, Charles Clifton, during her life, she has now nothing to leave him and his dear children, but her blessing and prayers." Nor could anything be more just, for the settlement, as she understood it, and as she had acted upon it, gave him one half the fortune she possessed at her last marriage, with all the interest accruing upon it at the time when it was reduced into possession. It gave him as much as Sir William Cockburn and all her second family together. So in 1826 she executed her power of appointment by a deed of which much has been said in the course of this cause, and she appointed, or professed to appoint, her whole personal estate. But it is clear, as well from the deed itself as from all the evidence in the cause, that she proceeded upon no supposition of the minority interest having been reserved to her in the event which had happened of the fund being realised after Mr. Clifton had attained majority. This deed, it is true, contains errors of calculation and of fact, hardly conceivable in a person apparently so accurate in all business transactions. Thus it sets out with stating that a power of naming new trustees in the settlement of 1791 had been reserved to Sir William Cockburn and herself, which is quite contrary to the fact, and it states the stock in which her fortune had become invested as £83,000, whereas its amount, on her own assumption with respect to the bond for 31,500 pagodas, is no more than £80,602. But the assumption which it makes respecting the bond may be taken either as founded on an error in law, or in fact. It can make no difference in the conclusion to which we must come upon this instrument.

When Mr. Clifton comes forward to claim his rights under the settlement, and alleges that, whatever these may have been according to its legal construction, Lady Cockburn had concluded herself and parties claiming under her from setting up that construction upon one point by the deeds of 1813 and 1819, which transferred to him his share according to one construction of the original instrument, he has a clear title to assert his rights under that settlement against any construction which she may have given it upon another point in a deed long subsequent to which he was not a party. It is said that, if she made a mistake of construction in his favour as to Dr. Davis's funds in 1813 and 1819 with respect to the minority interest, those who claim under the settlement of 1826 have a right to take what she there gives them at his expense by an opposite mistake of law against him. But independently of the consideration that the mistake in his favour was clearly one of construction and that the mistake against him respecting the capacity in which she took the bond for 31,500 pagodas much more resembles a mistake of fact, it is to be observed that supposing the two cases were exactly parallel, and that she had first paid him money through error in law and had afterwards, also through error in law, paid away money which belonged to him, nothing can be more clear than his right to recover the latter money, without being called upon to refund the former. She, or those who represent her, cannot set off a payment made to him against his demand

of what is his right, unless she or they could recover from him what had been so overpaid. I am of opinion, upon all principle and all authority that the payment made to him in respect of minority interest could not have been recovered by her.

I do not feel it necessary to argue upon the present question the distinction between payment made in error of law and in error of fact. The distinction, it may be observed, is somewhat more easy to lay down in general terms than to follow out in particular cases, even as regards the application of the rule, admitting it to be a correct one, and I think I could, without much difficulty, put cases in which a court of justice, but especially a court of equity, would find it an extremely hard matter to hold by the rule and refuse to relieve against an error of law. At any rate there can be no reason to find fault with the cases where equity has relieved notwithstanding the distinction, for in truth they lie on the very border of the two kinds of error and are rather to be classed among instances of error in fact than in law even where there are no circumstances of circumvention or fraud, as there clearly were in some of them. Thus, *Pusey* v. *Desbouvrie* (4) was a release to her brother by a sister of her orphanage part according to the custom of London for a fourth of its value, and it was strongly argued that she had not been informed of the amount she was giving up. *Broderick* v. *Broderick* (5) was a case of plain fraud, a release by an heir-at-law to a devisee of all his rights for 100 guineas on a recital that a will had been duly attested when it was not, the court expressly deciding on the ground of suppressio veri from the heir, and suggestio falsi in the recital. *Cocking* v. *Pratt* (6) was a mixed case of influence and mistake, the influence being that of which this court is peculiarly jealous, where a parent takes advantage of a child just come of age. *Ramsden* v. *Hylton* (7) consisted much rather of mistake or ignorance of material fact than error in law, and *Bingham* v. *Bingham* (8) was a case of certainly a very startling nature, for a person had sold another an estate which, in truth, belonged to the purchaser.

But the present case does not call for any such argument. It is to be regarded as an acting for a long course of years upon a given construction of a clause in a settlement, the clause admitting of two interpretations, and far from absolutely clear and certain in its import, the party putting the construction being the maker of the settlement, the other parties the members of the settlor's family, and the transactions in the course of which the construction was acted upon being domestic arrangements entirely. It is unnecessary to cite authorities to show how strongly the court always leans in support of family arrangements, and how reluctantly it will disturb them. Nor is it necessary to go so far as was done in *Cory* v. *Cory* (9), where a compromise made under the influence of intoxication was supported by LORD HARDWICKE as tending to settle family differences, or in the older cases where parental influence, directly exerted, was held insufficient to set aside what was done under such pressure. The more moderate view of the subject, taken in later instances, such as *Stockley* v. *Stockley* (10), is enough to bear out the only proposition I have any occasion here to maintain—that a construction far from being plainly and grossly erroneous, imposed upon a clause in a family settlement, ought not, it acted on by the makers of that settlement, to be disturbed by this court after their decease.

Nothing can tend more strongly than Lady Cockburn's will to show that she acted throughout upon one view of Mr. Clifton's rights, and that, had she entertained a different view, her course in disposing of her property might have been different. She says that she leaves him nothing, because she had provided for him in her lifetime. This was upon the supposition that he was to have the minority interest with its accumulations. If she had known that he was, by the more accurate construction, to have so much less, say £10,000 or £12,000 less, how can we tell that she would not have said: "He shall have it notwithstanding? True, it was not received while he was on our hands, true that we struggled to maintain him when we had no help from this source of supply; but now that the struggle is over, he shall have it nevertheless." How can any one undertake to say that, but for her

firmly believing it was his by settlement, she would not have made it his by her will—that, if she had known it was her own by right she would not have disposed of it in his favour? Who shall say that, if the erroneous or doubtful construction on which she had acted had been explained to her, she would not immediately have set all right by another instrument giving him what she now found he was not entitled to?

This view of the subject appears to have struck the Master of the Rolls very forcibly—a circumstance which I mention the rather because it shows that his Honour had well considered the case in both its branches, and that he was quite prepared to decide it upon the second ground, had he not conceived that the construction which he put upon the settlement precluded the necessity of going further into the argument.

If it be said that Mr. Clifton in this case is a volunteer, and that in the deeds of 1813 and 1819 he was not a party taking an interest under a misconception of rights, for a valuable consideration inasmuch as the settlement of 1791 was voluntary as regarded him, it must at once be admitted to be so. The consideration of marriage in that settlement certainly did not extend to him, the child of a former marriage. He took under that and under the subsequent and consequential deeds as a volunteer, unless in so far as his agreeing to the postponement and his giving the bond of indemnity constituted a consideration. But he was no more a volunteer than those with whom he is now in conflict. They too take from the bounty of Lady Cockburn, the same settlor, and she might have executed the power of appointment which she reserved under the settlement in favour of Mr. Clifton, as well as of Sir William Cockburn, or the children of the third marriage, or to the exclusion of all her children of the first as well as of the last. In this respect the parties stand upon the self-same footing, and they who now contest his right with Mr. Clifton are, as his Honour observed, not Lady Cockburn or any one representing her, but the other objects of her benevolence. That she contemplated throughout the possibility of his having much more than a distributive share of her property is manifest. By the settlement she gives him his sister's share in the event which has actually happened of her predecease, and she thus provided for a case in which he should have as much of the capital as herself, her husband, and all the issue of her contemplated marriage together could possibly ever take. I have no hesitation in affirming the decree of the Master of the Rolls.

Appeal dismissed.

WELLESLEY *v.* WELLESLEY

[House of Lords (Lord Lyndhurst, L.C., Lord Redesdale and Lord Manners), July 4, 1828]

[Reported 2 Bli. N.S. 124; 1 Dow. & Cl. 152; 4 E.R. 1078]

Infant—Custody—Rights of father—Father improper person to have care of child—Jurisdiction of Chancery Court to appoint proper guardian—Exercise of right of Crown as parens patriae.

The care of his children is a trust reposed in a parent, "of all trusts the most sacred," and if the parent abuses that trust and shows himself an improper person to have care of the child, the Court of Chancery will act under a jurisdiction which has been reposed in it for centuries and will exercise the right which devolves on the Crown as parens patriae to see that the child is placed for its protection, education, and maintenance under the guardianship of suitable and proper persons who will have the sole control of the child. If the child has property of his own, the court will apply that property in the way most beneficial for the child's support and education.

Where the father of three children was living in a state of adultery, and had encouraged his children in swearing and keeping low company,

Held: a fit case for the court to exercise its power to exclude him from their guardianship.

Notes. Considered: *Warde* v. *Warde* (1849), 2 Ph. 786. Referred to: *Ex parte M'Clellan* (1831), 1 Dowl. 81; *Johnstone* v. *Beattie*, [1843–60] All E.R. Rep. 576; *Re Spence* (1847), 2 Ph. 247; *Re Flynn* (1848), 2 De G. & Sm. 457; *Re Hakewill* (1852), 12 C.B. 223; *Swift* v. *Swift* (1865), 34 Beav. 266; *Re Meade* (1871), 19 W.R. 313; *Re Goldsworthy* (1876), 2 Q.B.D. 75; *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles* (1878), 10 Ch.D. 49; *Re A.B.*, (1885), 1 T.L.R. 657; *R.* v. *Barnardo*, *Jones's Case*, [1891] 1 Q.B. 194; *Smart* v. *Smart*, [1892] A.C. 425; *Official Solicitor* v. *K.*, [1963] 3 All E.R. 191.

As to the rights of the Crown as parens patriae and the guardianship of infants, see 7 Halsbury's Laws (3rd Edn.) 225, 226, and ibid., vol. 21, pp. 203 et seq. For cases see 11 Digest (Repl.) 640; 28 Digest (Repl.) 618 et seq.

Cases referred to in argument:

Duke of Beaufort v. *Berty* (1721), 1 P. Wms. 703; 2 Dick. 791; 24 E.R. 579, L.C.; 28 Digest (Repl.) 650, *1436*.

Earl of Shaftsbury v. *Shaftsbury* (1725), Gilb. Ch. 172; 25 E.R. 121; sub nom. *Eyre* v. *Countess of Shaftsbury*, 2 P. Wms. 102; 2 Eq. Cas. Abr. 710, 755; 28 Digest (Repl.) 484, *14*.

Ex parte Hopkins (1732), 3 P. Wms. 152; 24 E.R. 1009, L.C.; 28 Digest (Repl.) 629, *1309*.

Butler v. *Freeman* (1756), Amb. 301; 27 E.R. 204, L.C.; 28 Digest (Repl.) 714, *2238*.

Powel v. *Cleaver* (1789), 2 Bro. C.C. 499; 29 E.R. 274, L.C.; 28 Digest (Repl.) 650, *1431*.

Creuze v. *Hunter* (1790), 2 Cox, Eq. Cas. 242; 30 E.R. 113; sub nom. *Cruise* v. *Hunter*, 2 Bro. C.C. 500, n., L.C.; 28 Digest (Repl.) 712, *2208*.

Skinner v. *Warner* (1792), 2 Dick. 779; 21 E.R. 473; 28 Digest (Repl.) 649, *1422*.

Wilcox v. *Drake* (1784), 2 Dick. 631; 21 E.R. 416, L.C.; 28 Digest (Repl.) 622, *1253*.

De Manneville v. *De Manneville* (1804), 10 Ves. 52; 32 E.R. 762, L.C.; 28 Digest (Repl.) 711, *2195*.

Whitfield v. *Hales* (1806), 12 Ves. 492; 33 E.R. 186, L.C.; 28 Digest (Repl.) 578, *912*.

Lyons v. *Blenkin* (1821), Jac. 245; 37 E.R. 842; 28 Digest (Repl.) 611, *1187*.

Earl of Westmeath v. *Countess of Westmeath* (1818), cited in Jac. 251, n.
Shelley v. *Westbrooke* (1817), Jac. 266; 37 E.R. 850; 28 Digest (Repl.) 620, *1235*.

Appeal from an order of LORD ELDON, L.C., reported 2 Russ. 1, directing that it should be referred to the Master to inquire and report to what person or persons the custody, maintenance, and education of certain infants, the children of the appellant, should be committed.

In 1812 the first appellant, W. R. P. Tylney Long Wellesley, married Catherine Pole Tylney Long. By the settlement made upon the marriage, £13,000 a year was settled upon her as pin-money, and, subject to that annuity, her lands in fee-simple were settled upon the appellant for life. The lands to which she was entitled in fee-tail, under the will of Sir James Long, were settled upon the appellant during the joint lives of himself and his wife. Out of these lands portions for the younger children were to be raised under an appointment made by Mrs. Wellesley according to a power vested in her by the will. Subject to these portions the lands vested in the eldest son, as tenant in tail upon the death of Mrs. Wellesley. In 1821 the appellant accompanied by his wife and family, went abroad, to avoid his creditors, and there he formed an adulterous connection with Mrs. Helena Bligh which caused a separation between him and his wife. He continued to reside and cohabit with Mrs. Bligh at Paris. In 1824 Mrs. Wellesley returned to England, taking with her, by his permission, a daughter and two sons, the issue of the marriage. In 1825 proceedings for a divorce were commenced by Mrs. Wellesley in the ecclesiastical court, and a bill in Chancery was also filed by her direction, to make her infant children wards of court with a view to prevent their abduction by force or stratagem on the part of the appellant.

In September, 1825, Mrs. Wellesley died, having committed her children to the care of her sisters, the Misses Long, with a death-bed request that they would not permit the appellant to get possession of them. On Sept. 30 a bill was filed in the name of the infants by their next friend against the persons having the legal estate in property which they held in trust for the infants, praying the usual accounts, that the portions of the younger children might be raised, and that a proper person might be appointed to have the care of the persons of the three infants, during their minorities, with an allowance for their maintenance. After the death of Mrs. Wellesley, the appellant requested the Misses Long to deliver the children to his custody, which they refused. In October, 1825, he procured a writ of habeas corpora from the Court of King's Bench which was served on the solicitor of the Misses Long. On Nov. 3, before the return of the writ, a petition was presented to the Lord Chancellor in the names of the infants for an order restraining the appellant from prosecuting the writ, and, in consequence of an opinion expressed by the Lord Chancellor that he could not have the custody of the infants while he was abroad, he desisted from prosecuting the writ.

In November, 1825, the appellant, being still abroad, presented a petition praying a reference to one of the Masters of the court to approve of a plan for the education of the infants and a suitable establishment for their residence. On Nov. 9 the Lord Chancellor made an order of reference as to a plan of education and an establishment for residence, and that the Master should approve of a proper person to act as guardian to the infants, and

> "state to the court what relations, other than their father, the infants had . . . and that the appellant should be restrained from interfering with the infants . . ."

On Dec. 14 the appellant presented a petition stating his intention to reside in England where he then was, and claiming, as their father and natural guardian, the custody of the infants, and the management of their education. The petition prayed that the order of Nov. 9, 1825, might be rescinded, and that the Misses Long might on a day to be named deliver over the infants to their father. The adulterous intercourse between the appellant and Mrs. Bligh continued, and

damages were recovered in an action for crim. con. by her husband against the appellant.

In January, 1827, the petition again came on for hearing. The case made against the appellant on the evidence was general ill treatment of his wife, an adulterous connection continuing to the time of making the order, and the encouragement of the children in habits of swearing and keeping low company. Letters were produced, written by the appellant to his sons, in one of which in the midst of much good moral advice, he says: "If the fellow be a sportsman who told you . . . damn his infernal soul to hell." In another:

> "Study hard, but as soon as you have completed your tasks, go out, in all weathers, and play hell and Tommy . . . chase cats, dogs and women, old and young, but spare my game."

In another letter, written to the tutor of his sons, in which he complained of the interference of Mrs. Wellesley and her sisters, whom he suspected of being fanatical, or over-religious, he said:

> "There are certain things which ought to be let alone, a man and his children ought to be allowed to go to the devil their own way, if he pleases."

On Feb. 1, the Lord Chancellor made an order, by which he ordered that it should be referred to the Master to inquire and report to what person or persons (other than the appellant) the custody of the infants and the care of their maintenance and education should be committed, and that the appellant and all other persons should be restrained from removing, or attempting to remove, the infants, or any of them, from the care and custody of the Misses Long. Against this order the appellant appealed.

Horne, *Brougham* and *Beames* for the appellant.

The Attorney-General (*Sir Charles Wetherell*) and *Pepys* for the respondent.

LORD REDESDALE.—I have given to this case all the attention which it is possible for me to give, and I have not the slightest hesitation in saying that I think the order which has been pronounced in the court below ought to be affirmed, supposing that court had authority to make the order. I am also of opinion that according to all the principles that have been acted upon from the earliest period down to the present time, the court is authorised to make such an order.

What is the ground on which the opposition is made to this order? The opposition is founded on the right of the father to have the care and custody of his children. That right is not disputed by the order, but the question is whether the father, having that right, is to be at liberty to abuse that right. That is the real question. Why is the parent entrusted with the care of his children? Because it is generally supposed he will best execute the trust reposed in him, for that it is a trust, of all trusts the most sacred, none of your Lordships can doubt. If a guardian is appointed under the statute which enables the father to appoint a guardian the counsel at the Bar have not disputed that that is a trust. It is a delegated trust; a trust, which the law has enabled the father, when he ceases to live, to give to others for the benefit of his children, but if the father abuses that trust, if he appoints improper persons to be the guardians of his children, is it doubted that a court of justice can interfere, and can prevent that misapplication of the power which is given to the father? If, on the contrary, the father meant well to execute the trust, but has been deceived, and has appointed for the purpose a person improper to be entrusted with the care of the children, is it questioned that the court has a right to interfere, and to control the conduct of the person so delegated by the will of the father?

I apprehend, it is impossible to say that the father has that absolute right which is contended for at the Bar. What are the grounds on which the custody of the children is given to the father? First, protection, then care and education. Is it not clear that, if the father does not give that protection, does not maintain

the child, the law interferes to compel the maintenance of that child? Is it not clear that, if the father cruelly treats the child in any manner, a court of criminal jurisdiction will interfere to prevent that treatment? Is it to be said, then, that there is no jurisdiction whatsoever in this country that can control the conduct of the father in the education of his children? If a stranger was to enter into this House and hear what was argued on that subject, would it not strike him with astonishment that the law of this country should not have provided for such a case?

We find that for a hundred and fifty years the Court of Chancery has assumed an authority with respect to the care of infants, and it has assumed that authority, to the extent in which it was assumed, for this reason. As long as the feudal tenures remained, generally speaking, infants who had lost their parents were under the protection of the law which then existed with respect to the treatment and the care of the children. When that was at an end, it was thought fit by statute to enable the father to make an appointment of a guardian for his children, giving to him the power to select proper persons for that purpose. As I observed before, if he makes an improper selection, if the person whom he has so selected, misconduct himself, it is perfectly clear, that a power has been assumed to control that conduct.

On what does LORD SOMERS [1693–1700], on what does LORD NOTTINGHAM [1673–1682], on what does LORD HARDWICKE [1737–1756], on what ground does every Chancellor who has been sitting on the Bench in the Court of Chancery since that time place the jurisdiction? They all say, that it is a right which devolves to the Crown, as parens patriæ, and that it is the duty of the Crown to see that the child is properly taken care of.

We all know that many jurisdictions are given to the Crown, many powers are given to the Crown, but those powers are all to be exercised by responsible Ministers. It is not the king who takes on himself to determine who is to be a proper guardian of the children, but he is to delegate to different Ministers the different kinds of powers which belong to him, that there may be, according to the language of our law, persons responsible to the king and the people for their good conduct in the administration of their trust. I, therefore, have no doubt in the world that it must be taken to be a jurisdiction rightly assumed, and for a hundred and fifty years past unquestionably assumed by the chancellors sitting in the Court of Chancery.

LORD SOMERS resembled the jurisdiction over infants to the care which the court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way. [Provisions for the care and treatment of mentally disordered persons are now contained in the Mental Health Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 961): and see 29 HALSBURY'S LAWS (3rd Edn.), 399 et seq.]

I think there can be no doubt, therefore, that the law of this country has reserved to the king the prerogative for the protection of infants, to be executed in such a manner as the constitution requires him to execute all his prerogatives. If we look to this case with respect to the father, why is the conduct of the father not to be considered as a trust as well as the conduct of a person appointed as guardian? It is true that the law has not authorised the compelling a father to furnish means of maintenance beyond actual maintenance. You cannot say that the father, whatever his property may be, shall allow to the child so much or so much for the maintenance and education of the child. The law compels him to maintain that child. If he refuses, he may be compelled to maintain him, but the law can do no more than compel bare maintenance. If the child has property of his own, then there is a right to apply that property which belongs to the child most beneficially for the purposes of the child's support and education.

In this case the children who are the objects of your Lordships' attention have property, and, through the medium of that property a maintenance may be

applied for them. The children were, at the time of the death of their mother, under her care. If they had had no property whatsoever, it would have been extremely difficult, unquestionably, for the Court of Chancery to have found the means of maintaining them according to their rank and situation, because they have no power to compel Mr. Wellesley to do more than to afford them bare maintenance, and that in another mode of proceeding. But, as they have property, it was thought fit, on the death of their mother and on Mr. Wellesley proposing to take the children under his immediate care, to file a bill in the Court of Chancery against the persons who were in possession of that property to compel those persons to apply the income of that property for the benefit of the children. Those persons had no unquestionable right to make that application of the property without the intervention of the court, because, the children having a father, and he being bound to maintain them, it would not have been allowed to those trustees to expend money in their maintenance without the authority of the court for that purpose.

Upon what ground is the court required to maintain these children out of their own property and not at the expense of the father? It is because that father is an improper person to have the care of these children. He may refuse to afford them more than will supply them with their bare maintenance, which the law of the country would require from every person who had the means to maintain his children, and it is for that reason that the court is to take upon itself, out of the property that the children have, to apply a part of it for their maintenance and education instead of accumulating the income of the property for their benefit till they should be capable of taking possession of it themselves. This bill being filed, an application is made to the court to appoint a proper person to act, for the purpose of taking care of those children, and applying this fund for their maintenance. That the court has jurisdiction with respect to the maintenance is unquestionable. It is a jurisdiction with respect to the income of the property, to take care of it for the benefit of the children, to apply it for the benefit of the children, as far as it may be beneficial for them that it should be so applied, and to accumulate any surplus, if any surplus there should be. The right, therefore, to act upon this subject is unquestionably independent of any other part of the case.

If Mr. Wellesley had not been of the description which is attributed to him by these proceedings, had he been a person not objectionable in himself, but in extreme poverty, and unable, therefore, to maintain his children, which has been the case in some instances which have come under the consideration of the court, the court, as in those instances, might have thought fit to allow, out of the income belonging to the infants, a sum of money for the purpose of the maintenance and education of those children, but, in all those cases, the court has always thought fit to take on itself, and it was bound to take on itself, the mode in which that allowance should be applied for their benefit, and, therefore, has put it under some control. Whether it has entrusted the father with the application, or whether it has thought fit to appoint other persons to see to the application, it has always been put under some sort of control.

It is said that there is nothing from which this jurisdiction can be inferred as belonging to the court, except the dicta that may be found in books, and the actual exercise of it for one hundred and fifty years by persons who have sat in the Court of Chancery. If we look back to the constitution of the government of this country, there are many things which we cannot ascertain. Will any of your Lordships tell me how there comes to be a House of Commons and a House of Lords? I cannot tell. I have taken much pains to investigate that subject, and I believe it is impossible to say whence it happened that that which, from early records and early history was a general council of barons, came to be divided into two Houses of Parliament, a House of Lords and a House of Commons, the House of Commons elected and not summoned on any other ground. We know

that it arose at a certain period, but how it then took place we do not know. It is so with respect to many other jurisdictions. As to much of the jurisdiction of the Court of King's Bench or the Court of Exchequer your Lordships would be extremely puzzled to say how it originated. With respect to this jurisdiction of the Court of Chancery, I have had some experience on the subject in the character of one of the justices of Wales and at one time Chancellor of the bishopric of Durham. With respect to Wales, all the jurisdiction originated by an Act of Henry VIII. That Act gives jurisdiction to the Chancellor, and as incident to their Courts of Chancery, all the justices of Wales have constantly exercised this jurisdiction with respect to wards in their court. I cannot tell whence the Chancery of Durham originated, but as Chancellor of Durham I have exercised this jurisdiction, and nobody doubted the right to the jurisdiction.

These instances prove distinctly that it is considered in the constitution of the government of this country that all powers in the administration of justice which are necessary in themselves are vested in the Crown to be exercised by those Ministers of the Crown to whom the jurisdiction has usually been delegated, and this jurisdiction must be taken to be delegated to the Court of Chancery whenever there is a suit respecting property in that court. If there was a suit respecting property in the Court of Exchequer, that court, as a court of equity, would exercise its jurisdiction to take care of the property belonging to an infant, that is, it would take care that the property which was to be administered under its direction should be properly so administered. It would be a very extraordinary decision to hold, as it has been argued, that, until this House, as a court of superior jurisdiction, had positively decided on the jurisdiction, that jurisdiction should be considered as not existing. It must previously exist from the supposition of the general administration of justice before this court could entertain any judgment on the subject. It may be said that, if the Court of Chancery exercised jurisdiction where it had none, this court might pronounce that it had no jurisdiction, but this court cannot pronounce that it has jurisdiction, but because it has previously the jurisdiction. If it were necessary to go back into times long past to examine the grounds on which every law is administered in this country before it could be considered as legally administered, we should be involved in very great difficulties. But what has been the practice for a great number of years has been held, not in this country alone, but in all countries, to be a ground for supposing that it was rightly done, on the supposition that, if it had been wrongfully done, it would not have been permitted to continue.

Having said thus much on the question of jurisdiction, I will say very little on the rest of the case. The jurisdiction, I conceive, extends to the case of the person as far as is necessary for protection and education. The care of the person to protect from violence belongs to the Court of King's Bench, but the care of the person with respect to education does not belong to the Court of King's Bench, and the Court of King's Bench disclaim any such right. Therefore, as to the care and protection for the purpose of education, it belongs to this court which has exercised the jurisdiction. The Chancellor, perhaps, might have exercised it independently of the cause which has been instituted, but as incident to the cause that has been instituted I apprehend there can be no doubt of the right to exercise the jurisdiction. If jurisdiction exists for the court to interfere with the right of a father to manage his children, I would only refer to one passage in a letter, which Mr. Wellesley wrote to Mr. Pitman, the tutor of these children, and I would ask then whether any one of your Lordships can doubt the necessity of some control over the management of Mr. Wellesley with respect to his children. It is in a letter to Mr. Pitman, dated Nov. 16, 1824, in which he says:

> "There are certain things which ought to be let alone, a man and his children ought to be allowed to go to the devil their own way, if he pleases."

A man who can so write to a person of the description of Mr. Pitman (for it is

not a loosely written letter to a loose person to whom he might have expressed himself carelessly, but it is a letter written to Mr. Pitman, the tutor of his children) has, independently of any other consideration, declared himself to be an improper person to have the sole control and education of his children.

The order that has been made does not absolutely exclude him, because if Mr. Wellesley found that improper persons were proposed to have the care of his children he might, with great propriety, interpose, and the court would attend to any objection he might make on that subject.

LORD LYNDHURST, L.C. He has proposed his own tutor, and that tutor has been appointed.

LORD REDESDALE.—I was not aware of that. With respect, then, to the immediate care, he has proposed a proper person, and that person has been appointed. He may control the conduct of any person who may be appointed to have the care of the children, and he has a right to apply to the court if there should be any misconduct on their part. I have no doubt the court would pay every attention to any such representation. . . .

With respect to Mrs. Bligh being a person in the situation in which she stands, I cannot think that great reliance can be placed on what she has asserted in her affidavit, and, taking the whole evidence together, I think there can be no doubt that the order which has been made, if there was authority to make it, is justified by that evidence. Can any of your Lordships who has read the evidence, and read it with the utmost candour towards Mr. Wellesley and Mrs. Bligh, doubt that there ought to be some restraint? It has been asserted at the Bar that Mrs. Bligh has been carefully kept separate from these children? Can you doubt whether the separation has not been owing to the very circumstance of Mr. Wellesley's apprehensions from these proceedings? Can you doubt, from the influence which it appears from these affidavits, Mrs. Bligh has over Mr. Wellesley, that, if there was no control exercised by the court upon this subject, Mrs. Bligh would be the person to have the care of the children, or at least to influence the manner in which they would be disposed of. I feel for Mr. Wellesley because I see that he is in chains—I see that he has unfortunately made a connection which he is unable to dissolve, and which I believe, from many passages in the affidavits, at one time he would have been very happy to have been able to dissolve. As it is, he has put himself in a situation in which, in my humble opinion, he cannot be considered as a free man.

Under these impressions, I approve of the order which has been made, having no doubt whatever of the authority to make that order, and conceiving that, if your Lordships were to hold that there was not authority, you would do the greatest possible mischief to the country—a mischief which must instantly be remedied by the legislature, for it never could be endured that the country should be in such a situation that children such as these are, particularly, should be in the power of the father to treat as he might think proper with respect to their education, the eldest child in this case being likely to be a peer of the realm. Only consider to what extent this might go. It might happen that a person might form an improvident marriage. A lady who had high expectations, might marry a person of the lowest, and most profligate description, and her son might, after her death, be entitled to great property, and might also be a peer, the father being a person of the most abandoned description, of the worst education, the most improper person to have any care or direction of the management of that son; and is the doctrine to be endured that there does not exist in this country a jurisdiction to control the power of the father in such circumstances? I deny that the law ever considered that he has such power, it has always considered it as a trust. Look at all the elementary writings on the subject. They say that a father is entrusted with the care of the children; that he is entrusted with it because, it is to be supposed, his natural affection would make him the most proper person

to discharge that trust. Under this impression I humbly move your Lordships to affirm the judgment of the court below.

LORD MANNERS. The argument of the noble and learned Lord who has discussed this case (concurring entirely, as I do, with all which he has stated) has rendered it unnecessary for me to enter into much discussion on any of the points that occur in this case.

This is an appeal against an order of the late Lord Chancellor, LORD ELDON, by which he declined to comply with the petition of the appellant, Mr. Wellesley which required, among other things, to have the children in his custody, instead of which the noble and learned Lord directed a reference to the Master to report as to a proper person, with the exception of the appellant, to have the care and the superintendence of the education of these children. The order of the noble and learned Lord is objected to by the appellant, on two grounds: (i) that the Chancellor has not a jurisdiction in the Court of Chancery to separate the children, the wards of the court, from their parent, while he is residing in this country; (ii) if there be such a jurisdiction, that, in the present instance, it has been improperly exercised.

With respect to the first question, I acknowledge I have not attempted to explore the origin or to ascertain the commencement of the jurisdiction. If I had so done, I should have been anticipated in everything which might have been said usefully upon the subject by my noble and learned friend, for it seems to me, indeed, abundantly sufficient for the purpose of this case that this jurisdiction has been uniformly asserted and repeatedly exercised by successive Chancellors for a period of more than a century. I have looked into the cases referred to on the subject to discover if any Chancellor hesitated or has entertained a doubt as to this jurisdiction. I do not find, from the time of LORD NOTTINGHAM to the present day, that any doubt has been stated by the court with respect to the existence of such a jurisdiction. It has, then, become the established jurisdiction of the court. It has become the practice of the court, and, as such, a part of the law of the land. Indeed, it is a strong confirmation of this jurisdiction that, on a writ of habeas corpus being applied for by the father in the Court of King's Bench to have the children restored to him, that court enquires whether the children are wards of the Court of Chancery and whether there are any proceedings in that court respecting them. If the Court of King's Bench finds there are such proceedings, it declines to grant the writ. This would be a dereliction of their duty if no jurisdiction in the Court of Chancery existed. This seems to be a strong judicial recognition of the existence of the jurisdiction to be exercised by the Chancellor in the Court of Chancery.

On that ground, therefore, I can entertain no doubt. There was an observation of counsel for the appellant that the jurisdiction could not exist because you could not ascertain the limits of it. The objection applies to every case where there is a discretion in the judge where the result of the facts is not a question of law, but a question of discretion. It is, therefore, impossible to say what are the limits of that jurisdiction; every case must depend upon its own circumstances. With respect to the jurisdiction, I should agree that it is too well established to be open to question.

Then it is contended that in the present case this jurisdiction has been improperly exercised. I admit that in some respects it is impossible to reconcile the affidavits, but, in my opinion, there is abundantly sufficient independently of the disputed facts, to warrant the order that was pronounced by the noble Lord below. It is perfectly clear, for instance, that Mr. Wellesley was, at the time of the death of his wife, living in a state of adultery with Mrs. Bligh, and from all that appears in the cause that intercourse still continues. If so, to restore this little girl and her brothers to the care and custody of the parent would be, in fact, to deliver them over to this abandoned woman. It is perfectly clear that Mrs. Wellesley had

intended to institute proceedings in the ecclesiastical court to dissolve the marriage.

I state this, not for the purpose of insisting (for the case does not require such an opinion,) that the mere act of adultery, or the living in a state of adultery, on the part of the father, is sufficient to warrant the separation of the children from their parent. I do not state such to be the case. If that case should arise, then it will be time enough to give an opinion upon it. This is only one circumstance in the case, and I rely upon it principally to show the reprobate character and vicious habits of the appellant. His unfeeling and cruel behaviour towards his wife are also circumstances which tend strongly to disqualify him from being the guardian of his children. But I principally rely upon those facts which corroborate the other charges in the case, which are much more pointed and much more particularly applicable to the question now in dispute, namely, whether these children ought or ought not to be restored to the father. The charge is that he instructed or encouraged them in the habit of profane swearing, perhaps the only vicious habit which at the time when the order was pronounced these children were capable of contracting—a most vicious habit which the appellant chooses at all times to represent as venial, and, if a boy is in a passion, such as is perfectly allowable. . . . Those facts stand perfectly clear in themselves, and are so established in point of proof, that it is impossible to entertain a doubt about them.

HIS LORDSHIP referred to the facts, and concluded: I do not understand, in looking at the office of guardian, how to distinguish between the testamentary guardian and the parent. The testamentary guardian deriving his title from the right of the parent, it is a continuation of the same trust, and whether that trust is exercised by the parent or by the person delegated by him, it is under the same control and liable to the same jurisdiction. The court certainly would regard the feelings of the parent; the court would be anxious that the affection of the children should not be estranged from their parent; it is a most important duty imposed on the person who may have the care of the children to impress that on their minds; but inasmuch as the court cannot correct the vices of the parent, the court is bound to protect the children against them. On that ground the noble Lord acted, and, I think, properly acted. If there be a jurisdiction, of which I entertain no doubt, I cannot suggest to myself a case which more imperiously calls on the Chancellor to interfere and exercise that jurisdiction than the present—to take the children away from a person who has a total disregard for their moral and religious principles and is setting a dangerous and mischievous example to these young children.

LORD LYNDHURST, L.C.—It is not necessary for me, after what has been said by the two noble and learned Lords, to say more than that I perfectly concur in their opinion on both the points, and in the conclusions which they have drawn.

Appeal dismissed.

WELLESLEY AND OTHERS *v.* DUKE OF BEAUFORT. LONG WELLESLEY'S APPLICATION

[Lord Chancellor's Court (Lord Brougham, L.C.), July 28, 1831]

[Reported 2 Russ. & M. 639; 2 State Tr. N.S. 911; 39 E.R. 538]

Parliament—House of Commons—Privilege Contempt of court Criminal contempt—Abduction of ward of court—Attachment of member.

The breach of an order which is substantially of a civil description and in a civil matter, i.e., a matter touching the rights of real and personal property, does not entitle the court to attach the person of a party having privilege of Parliament. But, while the privilege protects against all civil process, it does not protect against a contempt which is in its nature and by its incidents criminal. Privilege never extends to protect from punishment for obstructing the administration of justice, and it does not extend to protect even from civil process where the object of the process is the delivery up of a person who has been wrongfully detained.

If a court forms the opinion that a member of either House has privilege of Parliament, that court is bound to give him the benefit of his privilege with all its incidents, even though the House to which he belongs has rejected his claim to the privilege. On the other hand, if the House has supported the claim by a unanimous resolution in its favour and the court takes a contrary view, the court will give effect to its decision.

The removal of a ward of court from the custody of the person with whom the ward has been residing under the authority of the court is in its nature a criminal contempt.

A member of the House of Commons, whom the court regarded as an unfit person to have custody of his infant daughter, a ward of the court, carried her off from the house of the ladies under whose care she had been placed by the guardians appointed by the court. On being brought before the court he admitted the fact and refused to state the daughter's whereabouts. The court having ordered that he be committed to prison for his contempt, he moved to discharge the order on the ground that he was protected from liability to attachment by his privilege as a member of Parliament.

Held: privilege of Parliament afforded him no protection against attachment for such a criminal contempt.

Notes. Considered: *Re Ludlow Charities, Charlton's Case* (1837), 2 My. & Cr. 316; *Re Anglo-French Co-operative Society* (1880), 49 L.J.Ch. 388. Applied: *Re Freston*, [1881–5] All E.R. Rep. 889; *Re Gent, Gent-Davis* v. *Harris* (1888), 40 Ch.D. 190. Considered: *Re Armstrong, Ex parte Lindsay*, [1892] 1 Q.B. 327; *Stourton* v. *Stourton*, [1963] 1 All E.R. 606. Referred to: *Stockdale* v. *Hansard*, (1839), 9 Ad. & El. 1; *Re Martin, Ex parte Van Sandau* (1846), De G. 303; *Gosset* v. *Howard* (1847), 11 Jur. 750; *Re Charity Comrs. of England, Ex parte Tamworth School* (1868), 18 L.T. 233; *R.* v. *Castro, Onslow's and Whalley's Case* (1873), L.R. 9 Q.B. 219; *Seldon* v. *Wilde*, [1911] 1 K.B. 701.

As to privilege from arrest for contempt of court and privilege of Parliament, see 8 Halsbury's Laws (3rd Edn.) 45, 46, and ibid., vol. 28, pp. 454 et seq. For cases see 16 Digest (Repl.) 94; 36 Digest (Repl.) 392 et seq.

Cases referred to:

(1) *Lord Wenman's Case* (1721), 2 Eq. Cas. Abr. 584; 1 P. Wms. 701; 22 E.R. 491, L.C.; 37 Digest (Repl.) 37, *96*.

(2) *Eyre* v. *Countess of Shaftsbury* (1724), 2 P. Wms. 103; 2 Eq. Cas. Abr. 710; 24 E.R. 659; sub nom. *Earl of Shaftsbury* v. *Shaftsbury*, Gilb. Ch. 172, L.C.; 37 Digest (Repl.) 39, *149*.

(3) *Bradshaw* v. *Bradshaw* (1826), 1 Russ. 528; 38 E.R. 203; 28 Digest (Repl.) 658, *1539*.

(4) *R.* v. *Paty* (1705), 2 Salk. 503; 2 Ld. Raym. 1105; Holt, K.B. 526; 91 E.R. 431; 36 Digest (Repl.) 398, *464*.

(5) *R.* v. *Wilkes* (1763), 2 Wils. 151; 19 State Tr. 982; 95 E.R. 737; 36 Digest (Repl.) 395, *424*.

(6) *Skewys* v. *Chamond* (1544), 1 Dyer, 59 b; 73 E.R. 131; sub nom. *Trewynnard's Case*, Hatsell's Cases of Privilege of Parliament, 59; 36 Digest (Repl.) 394, *405*.

(7) *Anon.* (1676), 2 Cas. in Ch. 224; 22 E.R. 920, L.C.; 37 Digest (Repl.) 38, *105*.

(8) *Pery's Case* (1669), Freem. Ch. 132; 22 E.R. 1108; sub nom. *Pary* v. *Juxon*, 3 Rep. Ch. 38; 19 Digest (Repl.) 385, *1840*.

(9) *Anon.* (1666), 3 Rep. Ch. 21; 21 E.R. 716; 36 Digest (Repl.) 396, *446*.

(10) *Anon.* (1685), 1 Vern. 329.

(11) *Annesley* v. *Annesley* (prior to 1724), cited in 2 P. Wms. 112; Gilb. Ch. 173.

(12) *Ex parte Hopkins* (1732), 3 P. Wms. 152; 24 E.R. 1009, L.C.; 28 Digest (Repl.) 629, *1309*.

(13) *Lord Clifford's Case* (1726), 2 P. Wms. 385; 24 E.R. 778; 21 Digest (Repl.) 687, *1817*.

(14) *Anon.* (1719), 1 P. Wms. 535.

(15) *Admiral Griffin's Fishery Case* (1759), 28 Commons Journals, 545; 36 Digest (Repl.) 399, *485*.

(16) *Burdett* v. *Abbot*, *Burdett* v. *Colman* (1817), 5 Dow, 165; 3 E.R. 1289; affirming (1812), 4 Taunt. 401, Ex. Ch.; (1811), 14 East, 163; 36 Digest (Repl.) 397, *455*.

(17) *Shirley* v. *Earl Ferrers* (1831), unreported.

(18) *Earl of Shaftesbury's Case* (1677), 1 Mod. Rep. 144; Freem. K.B. 453; 3 Keb. 792; 6 State Tr. 1270; 86 E.R. 792; 36 Digest (Repl.) 398, *462*.

(19) *Catmur* v. *Knatchbull* (1797), 7 Term Rep. 448; 101 E.R. 1069; 36 Digest (Repl.) 395, *433*.

(20) *Walker* v. *Earl of Grosvenor* (1797), 7 Term Rep. 171; 101 E.R. 915; 36 Digest (Repl.) 395, *432*.

(21) *R.* v. *Lord Preston* (1691), 1 Salk. 278.

(22) *R.* v. *Earl Ferrers* (1758), 1 Burr. 631; 97 E.R. 483; 16 Digest (Repl.) 283, *524*.

(23) *Phipps* v. *Earl of Anglesea* (1721), 1 P. Wms. 696; 24 E.R. 576, L.C.; 28 Digest (Repl.) 715, *2260*.

(24) *Kiffin* v. *Kiffin* (prior to 1721), cited in 1 P. Wms. at pp. 697, 705; 28 Digest (Repl.) 539, *528*.

(25) *Dr. Yalden's Case* (prior to 1721), cited in 1 P. Wms. at p. 697.

(26) *Herbert's Case* (1731), 3 P. Wms. 116; 2 Eq. Cas. Abr. 222, pl. 7; 24 E.R. 992; 28 Digest (Repl.) 714, *2254*.

(27) *Moor* v. *Moor* (1741), Barn.Ch. 404; 27 E.R. 697, L.C.; sub nom. *More* v. *More*, 2 Atk. 157; 28 Digest (Repl.) 714, *2248*.

(28) *Anon.* (1741), 2 Atk. 173; 26 E.R. 508; 3 Digest (Repl.) 363, *127*.

(29) *Smith* v. *Smith* (1745), 3 Atk. 304; 26 E.R. 977, L.C.; 28 Digest (Repl.) 485, *15*.

(30) *Butler* v. *Freeman* (1756), Amb. 301; 27 E.R. 204, L.C.; 28 Digest (Repl.) 714, *2238*.

(31) *Brandon* v. *Knight* (1752), 1 Dick. 160.

(32) *Stevens* v. *Savage* (1790), 1 Ves. 154; 30 E.R. 277, L.C.; 28 Digest (Repl.) 715, *2267*.

(33) *Priestley* v. *Lamb* (1801), 6 Ves. 421; 31 E.R. 1124, L.C.; 28 Digest (Repl.) 714, *2249*.

(34) *Millet* v. *Rowse* (1802), 7 Ves. 419; 32 E.R. 169, L.C.; 28 Digest (Repl.) 715, *2273*.

(35) *Bathurst* v. *Murray* (1802), 8 Ves. 74; 32 E.R. 279, L.C.; 28 Digest (Repl.) 715, *2264*.

(36) *Warter* v. *Yorke* (1815), 19 Ves. 451; 34 E.R. 584, L.C.; 28 Digest (Repl.) 713, *2235*.

(37) *Wilkinson* v. *Boulton* (1665), 1 Lev. 162.

(38) *R.* v. *Redman* (prior to 1400), cited in Y.B. 11 Hen. 4 at p. 15; 37 Digest (Repl.) 39, *146*.

Also referred to in argument:

Holliday v. *Pitt* (1734), Fortes. Rep. 342; 92 E.R. 882; sub nom. *Holiday* v. *Pit*, Lee temp. Hard. 28, 37; 2 Stra. 985; sub nom. *Pitt's Case*, Fortes. Rep. 159; 7 Mod. Rep. 225; Ridg. temp. H. 91; 2 Com. 444; 36 Digest (Repl.) 393, *390*.

Hodges v. *Moor* (1626), Noy, 83; Benl. 184; Let. 48; Poph. 164; 74 E.R. 1050; 36 Digest (Repl.) 396, *441*.

Thorpe's Case (1454), 1 Hatsell's Precedents, 28; 36 Digest (Repl.) 393, *391*.

Motion on behalf of Mr. Long Wellesley, the father of the infant plaintiffs and a prisoner in the custody of the serjeant-at-arms for a contempt, that the order for his commitment might be discharged on the ground that, as a member of the House of Commons, he was protected from attachment by the privilege of Parliament.

The order in question which was dated July 16, 1831, recited that by an order of Nov. 9, 1825, it was ordered that the master should approve of a plan for the education and residence of the infant plaintiffs, and that Mr. Long Wellesley, their father, should be restrained from interfering with them, and that by another order of Feb. 1, 1827, the master was directed to inquire and report to what persons, other than Mr. Long Wellesley, the custody of the infant plaintiffs and the care of their maintenance and education should be committed. It was ordered that Mr. Long Wellesley should be restrained from removing the infants, or any of them, from the care or custody of the Misses Long, and that order had, on appeal to the House of Lords, been affirmed. By another order, dated Aug. 21, 1829, it was ordered that the custody of the infant plaintiffs and the care of their maintenance and education should be committed to the Duchess of Wellington and one William Courtenay as their guardians, with full discretion as to the course and system of the infants' education, the persons with whom they should reside, the persons to whom the immediate superintendence of their education should be committed, and the place of their residence. The order went on to state that the female infant plaintiff was, accordingly, placed by her guardians under the care of the Misses Long, her maternal aunts, and it then set out the affidavit of Henry Bicknell, the house steward of the Misses Long, from which it in substance appeared that while the female infant plaintiff was residing with the Misses Long at Unsted Wood, near Godalming, in Surrey, her father Mr. Long Wellesley, accompanied by other persons, came to their residence in the evening of July 15, 1831, and in the absence of the Misses Long conducted the infant plaintiff to the carriage of the infant plaintiff, his eldest son, in which, after some opposition on the part of the Misses Long's servants, he drove off with her, and proceeded to London. The order next recited that, it having been, therefore, prayed by Sir E. Sugden, of counsel, that Mr. Long Wellesley might be forthwith committed to the Fleet, and the female plaintiff delivered up, it was ordered that the serjeant-at-arms should instanter proceed to the residence of Mr. Long Wellesley, and demand the infant plaintiff, and bring her to the Bar of the court, and that the rest of the motion should stand over until the return of the serjeant-at-arms and the attendance of Mr. Long Wellesley in court, either by counsel or in person. After reciting that the serjeant-at-arms had returned and informed the Lord Chancellor that he had been to Mr. Long Wellesley's house and had seen him, and that he (Mr. Long Wellesley) had

stated that the female infant was not there, nor would he say where she was, the order proceeded thus:

> "Whereupon Sir E. Sugden renewing his application for the committal of the said William P. T. Long Wellesley, and the said William P. T. Long Wellesley being now present in court, and . . . being in person examined by the Lord Chancellor on his attestation of honour, the Lord Chancellor by special courtesy, waiving to examine him upon oath in the usual manner, and the said William P. T. Long Wellesley, answering upon his honour 'that he does not know where the said infant at this moment of time is,' but admitting at the same time that he has removed the said infant from the house of the said Misses Long, and stating that he has given directions to his servants or agents to remove the said infant out of the jurisdiction of this court, and further stating, that he never would bring the said infant again within the jurisdiction of this court, His Lordship does declare the conduct of the said William P. T. Long Wellesley, in removing the said infant plaintiff and in concealing the present residence of the said infant, to be a contempt of this court; and his Lordship doth further declare the conduct of the said William P. T. Long Wellesley, in forcibly and without consent removing the infant ward of this court, the king's subject, beyond the realm, and his refusal now in person coram judice to inform the Lord Chancellor where the said infant is to be found, to be a gross and aggravated contempt of this court; and the said William P. T. Long Wellesley, notwithstanding, still persisting in such his contempt, his Lordship doth order that the said William P. T. Long Wellesley be committed to His Majesty's Prison of the Fleet, until he shall clear his contempt, and this court make other order to the contrary."

On the same day that this order was pronounced, the fact of Mr. Wellesley's commitment was brought to the knowledge of the House of Commons by a letter which the Lord Chancellor addressed to the Speaker, and two days afterwards a similar communication was made to the Speaker by Mr. Wellesley, who submitted that the order was an infringement of the privileges of Parliament and claimed to be set at liberty by the interposition of the House. The measure was referred by the House of Commons to a committee of privileges. That committee, after hearing evidence for several days with respect to the facts of the case, and examining into the precedents on the subject, made their report to the House on July 26, 1831. The report of the committee, after adverting briefly to the facts of the case, and referring to the evidence, set forth in detail the different precedents which a search into the Journals had furnished touching breaches of privilege by the arrest of members of Parliament, and took notice of the several statutes which had been passed to restrain the privilege of Parliament. It then stated that the committee, after every inquiry, had been unable to find any case in which the right of the Court of Chancery to commit for contempt had been enforced against persons entitled to privilege of Parliament. The cases of Lady Wenman (*Lord Wenman's Case* (1)) and Lord Roscommon (before Lord Lyndhurst in 1830), which had been mentioned, the committee did not consider to be conclusive, the former being that of an Irish peeress who in 1720 was committed for a contempt by the then Lord Chancellor, and was at that time entitled to no privilege in England, while the latter was that of an Irish peer in 1829 who, under the Act of Union, was clearly entitled to privilege of peerage, but, as the order for his commitment for a contempt, though made by the Lord Chancellor, had never been executed or even taken out of the registrar's office, no opportunity occurred for questioning it in the House of Lords, the only tribunal which could decide on the extent of that privilege. The report proceeded as follows:

> "The case of *Eyre* v. *Countess of Shaftsbury* (2), in some respects resembles the present case. The court there directed a sequestration, but did not attempt to commit a peeress who had contrived and effected the marriage of her son, an

infant of the age of fourteen years, without the consent of his gudian. Your committee, having failed to discover any instance in which a member of either House of Parliament had been imprisoned for a contempt, except by the authority of the House to which he belonged since the early cases above referred to, which are imperfectly reported, have proceeded to consider this case on the grounds of analogy and of intrinsic merits. The same principle, on which it has been resolved by the House of Lords that privilege shall not prevent the courts of law from enforcing obedience to a writ of habeas corpus seems to require by analogy that the Lord Chancellor should possess equal powers for the protection of the wards of the Crown committed to his charge, and should be enabled to exercise the most prompt and effectual means to prevent them from being withdrawn out of his jurisdiction. The committee find the right of courts of law to commit privileged persons for some highly criminal contempts strongly asserted by different writers, particularly by BLACKSTONE and HAWKINS. Attachment for criminal contempt has been described as a judgment and execution, the conviction of an offender by a court of competent jurisdiction, and the award of a sentence for his offence. Your committee, therefore, conceive that the present case falls within the principle under which persons committing indicable offences have been considered not to be entitled to privilege. Under all the circumstances of the case, the committee have resolved that Mr. Long Wellesley's claim to be discharged from imprisonment by reason of privilege of Parliament, ought not to be admitted."

The motion to discharge the order of July 16 now came on in the Court of Chancery, and Mr. Wellesley's leading counsel, Sir William Horne, having declined to argue the case after the report of the committee of the House of Commons, his junior, Mr. Beames, was heard by the indulgence of the court, as amicus curiæ, in support of the application. It appeared that at the time when the abduction of the infant plaintiff took place she was, strictly speaking, without any guardians appointed by the court, for the Duchess of Wellington had died about three months previously and no new appointment had been made, and, as the office of joint guardian did not survive (*Bradshaw* v. *Bradshaw* (3)), the guardianship of Mr. Courtenay was also determined. It was, however, assumed throughout the discussion that, as the young lady had been placed under the care of the Misses Long by the authority of the court, and as the order by which Mr. Wellesley was restrained from removing her from the care and custody of those ladies was still in force, this accidental circumstance did not affect the question respecting the contempt.

Beames for the applicant. –There is no jurisdiction in this court to commit Mr. Wellesley for a contempt inasmuch as he is a member of Parliament. In discussing the question it may be convenient to consider how the matter stands, first, at common law, next upon the statute law, and lastly with reference to the cases in this court.

Innumerable cases occur in the old books, especially the Year Books, all establishing the position that a member of Parliament is not liable to be arrested or imprisoned save in three cases only, namely, felony, treason, and breach of the peace. It will be sufficient to come at once to the authority of LORD COKE, who, in his Fourth Institute, 24, 25, takes notice of this as an undoubted privilege of a member of Parliament, and lays down the doctrine in the words already stated – that a member of Parliament cannot be arrested or imprisoned but in the three cases of treason, felony, and breach of the peace. LORD COKE expressly says that the same rule applies to courts of equity; and he observes that the privilege is not confined to the member of Parliament, but extends equally to his servants. Indeed, he goes further, for he also says with reference to the goods and chattels of a member of Parliament, that they are not to be distrained, as he expresses it, "during his privilege." LORD COKE in a previous part of his work had occasion to consider

what is always spoken of as the lex parliamenti; and in his First Institute, 11 b, in enumerating the different laws which prevail, he mentions it by that name. Nor do these passages stand unsupported and alone. They have been recognised in the celebrated case of *R.* v. *Paty* (4), in which though HOLT, C.J., differed from the other judges on some points, he expressly refers to the passages cited from LORD COKE as establishing that the lex parliamenti forms part of the law of this land, and that the privilege of members of Parliament prevails in all but the three cases of treason, felony, and breach of the peace.

The comparatively recent case of John Wilkes (*R.* v. *Wilkes* (5)), in which under a warrant issued by the Secretary of State Wilkes was committed to the Tower and afterwards brought up before the Court of Common Pleas, furnishes an illustration of the same general doctrine. In that case two objections taken to the form of the warrant were overruled by the court, but a third objection—that Wilkes was a member of Parliament—had its effect, and he was discharged. LORD CAMDEN, who at that time presided in the Court of Common Pleas, in giving judgment expressly refers (2 Wils. at p. 159) to the passage in the Fourth Institute; and he lays it down broadly that in every case except treason, felony, and breach of the peace, the privilege prevails—in other words that courts of law are bound to suspend the exercise of their jurisdiction in every case in which a member of Parliament is concerned, except in the three cases of treason, felony, and breach of the peace. It may, therefore, be assumed, without citing a multitude of other cases which were expressly recognised by HOLT, C.J., in *R.* v. *Paty* (4), and which are brought down to modern times by the decision in *R.* v. *Wilkes* (5), that the law corresponds with the doctrine laid down by LORD COKE. HOLT, C.J., in delivering judgment in *R.* v. *Paty* (4), very emphatically expressed his opinion with respect to Parliamentary privilege—a circumstance the more important because his Lordship does not appear in that judgment to have been by any means favourable to such privilege as was supposed to exist in that case in favour of members of the House of Commons. His language is (2 Ld. Raym. at pp. 1113, 1114):

> "The privileges of the House of Commons are well-known; and are founded upon the law of the land; and are nothing but the law. . . . When a matter of privilege comes in question in Westminster Hall, the judges must determine it. We must take notice of the lex parliamenti. LORD COKE, in his First Institute, 11 b, enumerates [it] as the law of the land."

In another case of frequent reference, *Skewys* v. *Chamond* (6), the question was whether a member of Parliament was privileged from an arrest, and in the discussion that took place the court pointed out the principles upon which the privilege is grounded. The court considers the attendance of a member of Parliament in his place as of great importance to the State, for the State has an interest in the due discharge of the duties of every member of Parliament in his place in Parliament, and that interest is paramount to every other, and only gives way in the three excepted cases of treason, felony, and breach of the peace. In those particular instances in which the privilege is made to yield to the criminal law it is a choice of evils, the law probably considering that a person who has committed a crime is not a fit person to be the representative of others, or, perhaps, that the State itself could not exist if crime were not to be reached in any individual. But upon whatever notion the exception is founded, it is certainly understood that in those three particular cases, and in no others, the privilege gives way to the law. Upon the authorities it is submitted that at common law the privilege is clear: that all the cases establish the proposition that there is no jurisdiction in civil matters in any of the courts of law or equity against a member of Parliament so as to enable a judge to commit him, and that there is jurisdiction in criminal matters only in the three cases put of treason, felony, and breach of the peace.

Adverting next to the manner in which the privilege has been dealt with by statutes, it is sufficient to observe of all of them (the Privilege of Parliament Acts,

1603 and 1700 (the latter repealed), and the Parliamentary Privilege Acts, 1737 and 1770), what the whole frame and language of their several provisions evidently show, that they were passed for the purpose, not of enlarging, but of restricting the common law privilege, and that the immunity from arrest of persons entitled to the privilege of Parliament is distinctly recognised and reserved in every one of them. These statutes apply to courts of equity as well as to courts of law.

The cases in equity upon the subject are not so numerous as at law. But all the books of practice concur in laying down the proposition that, in the case of a peer or a member of Parliament, the person cannot be touched. The court, however, has not left the party aggrieved altogether without a remedy; it has given him a remedy of a different and peculiar kind; it does not permit him to impound, so to speak, the person of a refractory member of Parliament, but it enables him to compel obedience to the decree of the court by means of a sequestration. The high authority of GILBERT, C.B., distinctly recognises this doctrine in his FORUM ROMANUM, p. 67, where he states the practice as applicable to a peer and member of Parliament to be by sequestration. The general orders of this court make some curious distinctions upon the subject of beating the person serving the process of this court how far the contempt is sufficiently evidenced by one witness, in what cases the evidence of two is required, and other similar questions which GILBERT, C.B., discusses elaborately (p. 212); and in the course of his discussion he puts the case of a peer abusing (which is a very high contempt of this court) the officer who serves its process. In that particular instance he says the peer cannot be committed. The words of GILBERT, C.B., which are general and may apply either to opprobrious language or to personal violence, are as follows:

> "But a nobleman or peer of this realm may abuse the party who serves the process upon him, toties quoties, for his person being sacred, the court cannot come at him as they do in the case of a commoner, quod est durum."

If that, however, be the law, the hardship cannot affect the question. In another passage, putting the case of a breach of decree, he says, that for breaking a decree or non-appearance, or want of an answer, you may sequester the real and personal estate of the party as is used and practised where the defendant is a peer of the realm, but shall not arrest or imprison the body of any of the knights, citizens, or burgesses, or other privileged persons during the continuance of privilege of Parliament.

In the older Chancery reports there are a few authorities, not perhaps very explicit, but still amounting to a recognition of the rule in equity that the person of a member of Parliament cannot be touched, except in treason, felony, and breach of the peace. Of these one of the earliest is an anonymous case in 1676 (*Anon.* (7)), which lays it down broadly that the widows of peers are exempt from arrest. The inference is that as they were exempt, their husbands must have been exempt likewise. The marginal note of *Parr* v. *Jaron* (8), a case in 1669, states that a member of convocation had the same privilege as a member of Parliament, without specifying what that was; an acknowledgment, however, that there was some privilege enjoyed by the latter. In 1666 (*Anon.* (9)) a motion was made before LORD KEEPER BRIDGEMAN against a member of Parliament for an injunction for want of an answer. The injunction was granted, but the court ordered that an attachment should not be entered against the defendant, he being a member of Parliament. In 1685 it was laid down in an anonymous case (*Anon.* 10)) that the court will not proceed against a member that has privilege of Parliament, yet if he sue at law the court will enjoin him until he answer. These cases establish the proposition that, as against a member of Parliament, the old practice of the court was never to issue any process which touched the person.

The next is a case frequently referred to, *Eyre* v. *Countess of Shaftsbury* (2), in which a sequestration was issued against the Countess of Shaftesbury. The offence of that lady was of a much higher nature than the offence of Mr. Wellesley. Mr.

Wellesley, it may be assumed, is in a situation to put himself rectus in curia by restoring his daughter to the court, and when he has restored her he will have cleared his contempt and will be no longer considered a fit object of punishment. But the Countess of Shaftesbury never could restore the parties to their original condition. She had committed one of the gravest offences which a person can commit against a court of equity. She had actually married, or connived at, or assisted in, or procured the marriage of a ward of court. She was, therefore, in a situation infinitely more penal, so to speak, than Mr. Wellesley, because, she was no longer capable of undoing the mischief she had done. Yet, even in that state of circumstances, the court did not commit her, but was satisfied with merely issuing a sequestration. The sequestration could not be used there, as it might be used most beneficially in the present instance, in order to prevent a mischief, and to restore the parties to the same situation in which they were before the particular offence was committed. The object, therefore, was simply punishment, and although there was every motive for punishing Lady Shaftesbury with the utmost severity, that the example might strike terror into the minds of others and deter them from the commission of a similar offence, the court never attempted to commit her person, but contented itself with sequestrating her property. That case is reported by Gilbert, C.B., as well as by Peere Williams, and the reports differ in no essential respect, except as to *Annesley* v. *Annesley* (11), to which they both refer. From the statement of Peere Williams the inference would be, that Lord Annesley was committed, but from Gilbert's report it is plain that the fact was otherwise, and that the court had only recourse to its usual proceeding of a sequestration. There also it must have been inflicted in the way of punishment. It may be remarked, too, that Lord Macclesfield, who decided *Eyre* v. *Countess of Shaftesbury* (2), was a judge on all occasions disposed not only to exercise his jurisdiction, but to carry it to its utmost verge, for he conceived that the jurisdiction was most salutary, and that its usefulness was only to be proved by his exercising it rigorously and effectively.

The proceedings in *Ex parte Hopkins* (12) were subsequent to *Eyre* v. *Countess of Shaftsbury* (2), and after Lord Macclesfield had presided in this court for a considerable period. In that case a merchant had left his fortune, which was considerable, to two nieces, whom he had brought up in his house, and he appointed certain persons to be his executors. The nieces were living with one of the executors, a relation of the name of Hopkins, and the father, who was a very poor man and probably thought his paternal power might in that instance be very usefully exerted for the purpose of getting a sum of money to induce him to suspend it, became, or represented that he was anxious to obtain possession of his children and to remove them from the executor, in whose custody they were. Lord Macclesfield felt very great doubt whether he could entertain the question upon petition, but he so far acknowledged the paternal power as to say—and it is with that view the case is referred to—that the father was justified in taking his daughters how he could, having an undoubted right to the guardianship of them provided he did not commit an actual breach of the peace in such an attempt. It may, perhaps, be said that in the present case a breach of the peace was committed, but after the opinion intimated by the court that the exception with respect to privilege, as laid down by Lord Coke, has reference only to such breaches of the peace as may become the subject of legal proceedings before a tribunal which can regularly take cognisance of them, it is needless to pursue that topic further. A fourth head of argument might have been found in the decisions of the House of Commons itself upon questions where its own privileges have been concerned, and as to which it has always reserved to itself a right to judge, but after the recent resolution of the committee in this very case, it becomes unnecessary to enter upon that discussion.

LORD BROUGHAM, L.C. If a court of law or of equity, upon due deliberation, entertains an opinion that a member of either House of Parliament has privilege of

Parliament, that court is, in my judgment, bound to give him the benefit of his privilege, and to give it him with all its incidents, even although the House to which he belongs abandons it as a claim of right, for a court knows nothing judicially of what takes place in Parliament till what is there done becomes an act of the legislature.

Beames. –The only other point to be adverted to relates to the contempt itself. Considering the subject in the abstract, and laying the particular facts entirely out of view, the first observation is that the court makes no distinction between civil contempts and criminal contempts. The court makes a considerable distinction between what are, in its own language, termed aggravated contempts, and those not of an aggravated description. In the case of a party setting the power of the court at defiance and refusing to do an act of justice which he has been required to do, to his opponent, which is an aggravated contempt, the court has gone a great length. Even in the time of LORD BACON the court has put the party so acting into strict confinement. Nothing, however, can be found in the orders of the court to justify a distinction between civil and criminal contempts. Indeed the very exposition which today has been given of the rule, as laid down by LORD COKE, would render it impossible, consistently with that doctrine, to make any difference between them, or to hold that, without the intervention of a jury, without that fair mode of trial which a person charged in a criminal sense is legally entitled to, a party, possibly a very poor and helpless individual, may be exposed to a contest single-handed against all the powers of the Great Seal. The only distinction taken has been between simple disobedience and disobedience of an aggravated kind; and the court attaches terms and a penalty to the latter, which it does not do to the former. But the object in every case is the same—to effect a compliance with the orders of the court, and when that object has been attained, on payment of costs and submitting himself to the power of the court, the party is generally set at liberty. This is illustrated by the course adopted in the instance of a person marrying a ward of court. The officer is there sent to take the party into custody; the party is committed; but the moment the settlement is signed, he is set at liberty on paying the costs. The court, therefore, uses the power of committing for a contempt, not as a means of punishing a criminal act, but only for the purpose of enforcing obedience to its rules, orders, and decrees.

LORD BROUGHAM, L.C.—I am exceedingly well pleased that I took the course which I thought the interests of justice prescribed without any deviation from the strictest rules in force here as well as in all other courts with respect to the hearing of counsel. In conformity with those rules I suffered Mr. Beames to address the court as amicus curiae, upon a question so grave in itself and so nearly touching the liberty of the subject. This practice has been frequently adopted in matters resembling the subject of the present discussion. It is not unusual in the Court of King's Bench, which, in the exercise of its high criminal jurisdiction, is wont to let in the light to be obtained from such arguments so that a failure of justice may be prevented. I am the better satisfied with having taken that course in this case because Mr. Beames has, in an exemplary manner, abstained from abusing the indulgence which I gave him. He has confined himself most rigidly to the question which he endeavoured to illustrate; he has abstained from all that did not come strictly within the scope of that permission; he has stated the argument with his usual distinctness and acuteness, and with very great succinctness indeed, considering the extent of the field over which he had to travel, and the variety of learning, more or less bearing on the subject, which he must have gone through in his own researches. In a word, he has exercised the delicate office of amicus curiae with great correctness and precision.

If, upon hearing Mr. Beames, I had found he threw any new light upon the question which may now be said to be under consideration after a fortnight's discussion, elsewhere as well as here; if he had imported into the consideration of it any

fresh authorities, or any hitherto uncited cases, I should undoubtedly have paused to give the party on whose behalf substantially he has addressed me the benefit even of possibilities and doubts. But it is no disparagement of Mr. Beames's learning or industry to say that he has failed to bring novelty into a discussion of so long standing that it may well be termed vexata—that he has failed to add anything new only because such an addition would inevitably have been departing from the matter which was appropriate to the discussion; only because it had been exhausted by his predecessors, and because no man could hope to be original in it without also being erroneous. Therefore, although leaning, as I ought to do, towards the gentleman on whose behalf it has been attempted to raise a doubt, I yet feel no obligation on my part to delay the expression of my opinion upon the legal and constitutional point now made.

The old authorities upon the subject of Parliamentary privilege are to be taken with very ample allowance, for they all refer to times, and exist in circumstances, wherein the claim of privilege by members of Parliament was infinitely larger than anything upon which both Houses now are content to rest. One can hardly open a book under the head of Parliamentary privilege without being satisfied of the truth of this proposition. In the very volume of Peere Williams, from which *Eyre v. Countess of Shaftsbury* (2) has been quoted, it is laid down in *Lord Clifford's Case* (13) that the first process against a peer of the realm or against a person having privilege of the lower House as a knight of the shire, or as a citizen or burgess, is sequestration. But in *Anon.* (14), which is without a name and equally without authority in these days, it is stated that the same exemption extends to the menial servants of peers, and that the first process in their case also for any contempt of court (for no exception is made) is not by arrest of the body but by sequestration. This, too, was so ruled after the Privilege of Parliament Act, 1700 (12 & 13 Will. 3, c. 3) in restraint of privilege, and the right must indeed have existed after that Act, if the privilege ever existed in those menial servants, just as it did before the Act, for the statute saves the rights of all persons then having privilege, and makes no difference in its enactments between the case of the master and that of the servant.

To bring authorities either from the records of Parliament, or indeed from the records of courts in times when privilege was so much larger than is now contended or even thought of by the stoutest champion of Parliamentary rights—so much more extensive that it might be said to be a different, rather than the same, claim—is manifestly of no use in disposing of the practical question now before us. But if any one wishes to see how far the pretensions of the Houses of Parliament have formerly been carried, to know how incumbent it is upon the courts of law to defend their high and sacred duty of guarding the lives, the liberties, and the properties of the subject, and protecting the respectability and the very existence of the Houses of Parliament themselves against wild, extravagant, groundless, and inconsistent notions of privilege, it would be sufficient to refer, not to the times of the Plantagenets, of the Tudors, or of the Stuarts, the records of which abound in extravagant dicta of the courts and yet more extravagant pretensions of the two Houses, but to a much later and more rational period of Parliamentary history—to the days of the family under whom happily all classes in these realms have so long enjoyed, each in its sphere, the rights of freemen.

In 1759 an action of trespass for breaking and entering a fishery (*Admiral Griffin's Fishery Case* (15)) was tried in the House of Commons to the lasting opprobrium of Parliamentary privilege, to the scandal and disgrace of the House of Parliament that tried it, and to the astonishment and alarm of all good men, whether lawyers or laymen. Admiral Griffin made complaint to the House, whereof he was a member, that three men, whose names were stated, had broken into and entered his fishery near Plymouth, had taken the fish therefrom, and destroyed the nets therein, and the House forthwith, instead of indignantly and in mockery of such a pretension dismissing the charge and censuring him who made

it, ordered the defendants in the trespass, for so they must be called, to be committed into the custody of the serjeant-at-arms. They were committed into that custody accordingly; they were brought to the Bar of the House of Commons, and there, on their knees, they confessed their fault; they promised never again to offend the admiral by intertering with his alleged right of fishery; and upon this confession and promise they were discharged on paying their fees. So that by way of privilege, a trespass was actually tried by the plaintiff himself sitting in judgment against his adversary the defendant, and the judge (for in this case the House and the complaining party must be considered as identical) was pleased to decide in his own favour. This is enough to warn courts of justice how they accede to claims of privilege the instant they hear that once magical word pronounced. Even in the event of the House of Parliament, by their committee's report and by their votes, having decided in favour of so monstrous a pretension, I should still have deemed it my duty, if the facts of the case authorised me, to act as I am now prepared to act, or rather to continue acting. If, instead of a just, temperate, and wise abandonment of this monstrous claim, I had found an unanimous resolution of the House in its favour, I should still (and it was this which made me interpose to assure the counsel that I needed not the resolution of the House of Commons in favour of the Court of Chancery) have steadily pursued my own course, and persisted in acting according to what I knew to be the law.

Having disposed, generally speaking, of the authorities of those early days by these observations, I must, however, remark further that I can find no cases in the books to justify the assertion of privilege now made. I speak not of the records of Parliament, but confine my proposition to judicial authority. This distinction I feel myself, after mature deliberation, authorised and bound to take. For let not anyone imagine that when I at once and without argument ordered Mr. Wellesley to be committed to the Fleet, well knowing at the time that he was a member of the House of Commons, I was taken unprepared, or expressed a rash or unadvised opinion. The case was familiar to my mind. I had seen it in every form; I had heard it discussed in every shape; I had seen it in the court of Parliament; I had encountered it in the courts of law. In all those courts I had borne a share in the discussion, having myself argued *Burdett* v. *Abbot*, *Burdett* v. *Colman* (16), the greatest of all the cases when it came by writ of error from the Courts of King's Bench and Exchequer Chamber before the highest judicature of the realm, the House of Lords, sitting as a court of law. The result of that deliberation and attention has been confirmed in my mind by more recent inquiry and again going over the ground I had so often previously trodden, and the conclusion I have come to is that there is no ground whatever to maintain the claim of privilege now set up.

To those who argue on the other side I at once make a present of almost all that Mr. Beames urged this morning as to commitments for refusing to put in an answer, for refusing to pay money ordered to be paid, for resisting a decree to perform any specific act, for cutting down timber as in *Shirley* v. *Earl Ferrers* (17),* or doing any other act in the face of an injunction, and in the face of any other order of this court. The breach of any order, substantially of a civil description and in a civil matter, that is, a matter touching the rights of real or personal property, will not entitle the court, the Court of King's Bench, the Common Pleas, the Exchequer of the King, nay, not even the House of Lords itself, judging in the last resort, to attach the person of the party having privilege of Parliament, and disobeying such an order. I leave for further observation that ingenious and acute part of Mr. Beames's argument where he takes the ground of denying the distinction between a civil and a criminal contempt, the only

* Lincoln's Inn Hall, July 15, 1831. The Lord Chancellor affirmed an order, by which it was directed that a sequestration should issue against the defendant, Earl Ferrers, for cutting down timber in breach of an injunction, and that an agent of his Lordship who had been a party to the same contempt, should be committed to the Fleet.

part of his argument in which I think he may be said to have thrown any new light upon the subject. I had, however, previously considered the question in this point of view. I had frequently heard it discussed in the course of the former controversies, and it was not, therefore, now presented to my mind in this light for the first time.

Accordingly the ground on which I rest my denial of Parliamentary privilege in the present case is not that taken by my Lord Coke, and by the oftentimes repeated resolutions of the House of Commons—the proposition which makes the exception, but confines it to treason, felony, and surety of the peace, and maintains privilege in every other case. I have already, in the course of the argument, stated one reason why I cannot so restrict the privilege, why I draw my line in another direction or higher up upon the scale. If the only ground of commitment by a court of competent jurisdiction to try the case was that a breach of the peace had been committed, the breach of the peace not being the main offence, but only incidental to it and accidentally mixed up with it, if that were the only ground, no court could commit for a contempt unaccompanied by a breach of the peace, however aggravated the criminality of that contempt might have been. A second consequence would also follow, that this or any other court which had not jurisdiction of a breach of the peace could not commit at all. A justice of the peace could commit, the Court of King's Bench could commit, but the Court of Chancery, the Common Pleas, or the Exchequer, could not commit, because they have no jurisdiction, no cognisance of the peace. There are, however, many offences—and this is the other ground of my denying that to be the right distinction—offences for which no man can doubt the right of the Courts of Common Pleas, of Exchequer, and of Chancery, to commit, offences for which till now their right to commit has never been disputed, offences involving no breach of the peace, and for which, by every day's practice, parties are committed by those courts, and by the Court of King's Bench, not sitting as a criminal court.

If the line is to be assumed which has been drawn by Lord Coke in the First Institute, and followed by the Houses of Parliament without, as it appears to me, duly weighing the subject-matter, will it be said that a member of Parliament can commit perjury without punishment? That is no treason, or felony, or breach of the peace: it is not even such an offence as for which you can have "surety of the peace," the expression used in some of the Parliamentary resolutions. It may be said, indeed, that a member of Parliament is liable to an indictment for perjury in any court that has competent jurisdiction, and will, on conviction, be punished in his person by imprisonment. But upon this two material observations arise: First, if breach of the peace, treason, and felony, alone give to any court a right to take the body of a person having privilege of Parliament, where is that qualification of Lord Coke's rule, or of the resolutions of the Commons, to be found, which entitles a court after trial and conviction to touch the person of the privileged man? From the beginning to the end of the Parliamentary discussions on the subject, there is no distinction taken between mesne process and the execution of a sentence. Yet, if the limit of the rule of privilege is to be taken from the text of Lord Coke, or from the resolutions of the Houses of Parliament, no member of Parliament could be imprisoned even upon a conviction for perjury by virtue of a judicial sentence legally pronounced. But the second observation renders the accuracy of the first immaterial. What shall be said of a crime nearly equal to perjury as to its effects in defeating the ends of justice, a crime which, though not in a technical sense equal, is yet in all other respects the same with perjury, I mean prevarication upon oath? If the prevarication amounts to all that moral perjury can reach, either in mischief or in guilt, if a man has twenty times over in his cross-examination told a falsehood, and his next breath has operated his own conviction of that falsehood, unless it be upon a point material to the issue to be tried, it is not perjury in law. What do the courts, when that foul crime is committed in their face? They do not order the party to be indicted for

perjury as he would be if he had sworn falsely to a thing material to the issue because they know that he must then escape upon a trial, but they order him to stand committed for his prevarication. In what form, and under what name? For a contempt of the court by prevaricating on his oath. If in the Court of King's Bench a member of Parliament should so far forget his honour as a representative, and his duty as a man as to prevaricate grossly on his oath, was it ever dreamt he would be at liberty to say: "True, I have prevaricated, but I am a knight of the shire, I am a citizen, or I am a burgess in Parliament. True it is, I have done that which degrades and disgraces me, that which is the most flagrant attempt that can be made to defeat the administration of justice; true it is, I have done that for committing which any other man would have been hurried from hence to a dungeon, but I am a member of the House of Commons, I have privilege of Parliament, and my person is as sacred as the oath which I have taken and broken." Were any man so ill advised as to offer such an insult to the court, far from operating to his protection under this privilege, it is my firm belief, it is my fervent hope, that it would make him cease to be a member of Parliament by expulsion. But it is also my belief that it would, in the first instance, be visited with condign punishment by the court whose dignity had been outraged, and that, long before the House which he had disgraced had thrust him forth, the court would vindicate its insulted honour, and reject with scorn the plea of privilege by which he had aggravated his offence.

The line, then, which I draw is this. Against all civil process privilege protects, but against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not. He who has privilege of Parliament in all civil matters, matters which, whatever be the form, are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege. Members of Parliament are privileged against commitment, qua process, to compel them to do an act, against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of punishment, but rather in the nature of process to compel a performance. In all such matters members of Parliament are protected, but they are no more protected than the rest of the king's subjects from commitment in execution of a sentence where the sentence is that of a court of competent jurisdiction and has been duly and regularly pronounced. Convictions, and the sentences that follow upon them, are of two sorts, either formally upon trial by indictment or information and verdict, with the consequent judgment, or summarily, but as legally as formally, by a commitment for contempt where there is no other punishment provided and no other mode of trying the offence.

In the case of the Earl of Shaftesbury (*Earl of Shaftesbury's Case* (18)), who, when committed by the Lords' House of Parliament of which he was a member, brought his writ of habeas corpus, RAINSFORD, C.J., in delivering the judgment of the court, held that the court had no right to consider the validity or the form of the warrant upon which the earl had been committed. It was enough for that court that a contempt was alleged and an order of commitment made upon which the warrant proceeded, and the Chief Justice observed that, if a party guilty of contempt could not be committed to prison, there was then no punishment at all with which he could be visited for his offence. So, if the party here guilty of the contempt cannot be committed to prison, he must escape punishment altogether, for a breach of the peace is not necessarily incident to the contempt. Yet I should have committed just as much, had there been no breach of the peace, as if the offence of contemning the court had been aggravated by the additional offence of an assault committed upon one of His Majesty's subjects. There are cases indeed which go a good deal further and justify me in denying that what, in common parlance, may be called criminal contempt must have been committed in order to oust the privilege. If the contempt savours of criminality,

A and the sentence is penal, that according to the books appears to be enough.

With respect to the distinction between civil and criminal contempts, denied by Mr. Beames, I agree that there may often be a difficulty in finding, first, authority for deciding where the line is to be drawn, and, secondly, instances in practice for drawing it. Yet that line has been recognised by the Court of King's Bench in *Catmur* v. *Knatchbull* (19) and in *Walker* v. *Lord Grosvenor* (20). The B former was the case of non-performance of an award, which had been made a rule of court, for non-performance, being a disobedience, was a contempt of the court and so might be regarded as technically speaking and in form an offence. But the court held that as it related simply to a civil matter and was rather in the nature of process to compel the performance of a specific act, the matter was in substance not criminal, but civil, and it refused to commit the defendant, a member of C Parliament, for his disobedience. The same doctrine was laid down in the other case, where the non-compliance was by a peer. But suppose the matter to have been criminal, though without breach of the peace. Suppose, for instance, an interruption or obstruction of the court's business by a man having privilege of Parliament getting up and stopping the court by a long harangue, by ribaldry, by invective, by slander, or by any other indecency which human wit may fancy D or human folly may practice, is it possible to doubt that the court would order its officer to seize him forthwith and remove and commit him to confinement as a person who, in the face of the court, had been guilty of a contempt of a criminal, and not of a civil, kind?* Indeed, if he was merely removed from the court, that would be enough for the purpose of my argument, because the act E of the officer and, consequently, of the court itself, the bare act of taking the offender and putting him out of court, would be as much imprisonment, in the contemplation of the law, as if he had been thrown into the King's Bench prison. If the party is privileged from being sent to prison, he is equally privileged from being turned out of court, yet if the judges had not this power, about 1,100 men would have the right to go and interrupt the business of all the courts in the F kingdom. The business of licensing sessions and of quarter sessions in the country might be entirely put a stop to by one or two gentlemen in the county who might happen to take an interest in obstructing the proceedings and to be clothed with Parliamentary privilege.

It is not there only that such interruptions may take place. If these privileged individuals choose to carry their political interference so far, the very business G of the Court of Hustings and of the sheriff at elections, where they are not merely supposed but are almost assumed to take a deep interest, may be put an end to, so that, until we come to Parliament itself, we should have upwards of a thousand persons who would have the absolute right, uncontrolled by any power save that of the Houses to which they belong, of entering, individually or in a body, into those courts, and not only obstructing all election, but interrupting the H administration of all civil and criminal justice.

Nor is the argument ab inconvenienti less applicable to equitable jurisdiction than it is to the other branches of judicature. Who are the persons most likely to be guilty of those very offences which this court is most frequently called upon to visit with punishment in order to protect its wards? If other courts have I a certain proportion of their suitors in Parliament, this court, from the importance of the matters brought before it, has a much larger proportion there, and, if there be any cases in which members of Parliament—young commoners and young lords—are more likely than others to become obnoxious to our jurisdiction, it is

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* A peer refusing to be sworn is guilty of a contempt for which he may be committed and fined: *R.* v. *Lord Preston* (21): "No peer or lord of Parliament hath privilege of peerage or of Parliament against being compelled by process of the courts in Westminster Hall to pay obedience to a writ of habeas corpus directed to him:" 29 Lords' Journals, p. 37; *R. v. Earl Ferrers* (22).

precisely in cases relating to the safety of heiresses and other wards.* That case may still be supposed in real life which in the most finished part of the most excellent of his works the poet has so admirably described in the history of a travelled and accomplished profligate, of whom, when in the depth of his desperate fortunes,

"Stolen from a duel, followed by a nun,"

it is added, as the means of retrieving him:

"But if a borough choose him, not undone."

And such are the men whom this arrogated privilege would suffer to enter within the precincts of this High Court of Judicature, and to revel in the contempt of the most delicate, the most important of the functions with which it is entrusted.

I have already given a reason why the authority of decided cases in favour of privilege goes for little, if drawn from times when the most extravagant notions of its extent were entertained, but in the same proportion must any decision against privilege in those times be held so much the stronger in behalf of the law's authority. I will only refer to a case which seems to me directly in point—a case never contradicted, never overruled, and calculated by decision to make an end of the argument. I allude to *Wilkinson* v. *Boulton* (37), before the Court of King's Bench, when HALE, C.J., presided. To an action for false imprisonment there was pleaded a justification, under the custom of London for the mayor and aldermen to have the custody and guardianship of female orphans till twenty-one or marriage, and for any persons taking such from the guardian appointed by the mayor and aldermen, to be brought up before the court and imprisoned. To this plea there was a demurrer on two grounds, the first of which is only material in so far as it drew from the court a declaration that the matter was criminal for which the party had been imprisoned. The second ground was that the custom as alleged was ill "because it is a custom to commit without exception of peers." This demurrer, therefore, raised the question distinctly whether or not a peer could be committed for such contempt of the Court of Aldermen as consisted in taking an orphan out of the custody by them appointed, and the court held it clear that

"a peer is not privileged in this case for in homine replegiando, where he detains the body, he shall be committed."

There was judgment for the defendant, disallowing the demurrer. The authorities cited by the court are the YEAR BOOK 11 Hen. 4, 15 B, 34, and FITZHERBERT'S NATURA BREVIUM, 68 C. The former was a case of homine replegiando, in which the sheriff had returned that the distress had been eloigned [removed], and one point made was, that the party was a peer of the realm, "issint que capias ne gist pas vers lui." But the court took the distinction I have pursued here and said:

"en breve de dett et trespas capias ne gist my vers un count baron et hujusmodi; per ceo que pur cause de lour estate, il est entend que ils ont assets, &c.; mes en cest case le tort que el fait, de ce que el ne suffre le replevin estre fait, est le cause que son corps sera pris, de quel estate que il soit."

Reference is made to *R.* v. *Redman* (38) in the time of King Richard. The language of FITZHERBERT is equally precise. That writer says (NATURA BREVIUM, 68 C):

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* That interfering with the custody, or secretly encouraging or abetting the marriage of a ward of court, has always been regarded as a contempt in its nature criminal, and punishable as such by commitment during pleasure, see *Phipps* v. *Earl of Anglesea* (23), and *Kiffin* v. *Kiffin* (24), and *Dr. Yalden's Case* (25) there cited; *Herbert's Case* (26); *More* v. *More* (27); *Anon.* (28); *Smith* v. *Smith* (29); *Butler* v. *Freeman* (30), and the cases referred to in the notes: *Brandon* v. *Knight* (31); *Stevens* v. *Savage* (32); *Priestley* v. *Lamb* (33); *Millet* v. *Rowse* (34); *Bathurst* v. *Murray* (35); *Warter* v. *Yorke* (36). In the PRACTICAL REGISTER IN CHANCERY (p. 154, WYATT'S ed.) a distinction is taken between direct and positive contempts, for which the party may be punished by being committed to the Fleet during pleasure, and ordinary contempts, where the commitment is only till the order of the court be obeyed.

A "If there be an eloignment [removal] returned by the sheriff, the plaintiff shall have a capias in withernam to take the defendant's body, and keep the same quousque, &c., whether he be a peer of the realm or other common person."

But I am content to rely on *Wilkinson* v. *Boulton* (37) decided by Hale, C.J., and in the same age to which we owe the Habeas Corpus Act. It is a case peculiarly in point with the present. The authority with which privilege of peerage was assumed by the demurrer to come in conflict was that of a city court; the contempt for which it was alleged that privileged persons could not be arrested was taking away a ward of that court. The Court of King's Bench held that the peerage and its privileges afforded no protection in such a case, and to make the authority more applicable, the court illustrated the decision by referring to the writ of homine replegiando against which, if a peer was refractory, it was held to be clear that he must be committed, that is, if he eloigned the body of the villein or person sought to be replevied. Mr. Long Wellesley has here taken away and detained the ward of this court; he has eloigned that ward. Is it saying too much to add that a privilege which could not protect a peer in the time of Charles II against the authority of the mayor's court is still less capable in the present day of protecting a commoner against the authority of the Great Seal?

I have, therefore, the sanction of *Wilkinson* v. *Boulton* (37); I have the authority of the Year Book in the time of Henry IV; I have the great authority of Fitzherbert that a peer of the realm as well as any other person shall be committed for obstruction and contempt in the nature of obstruction to the process of the King's Courts. You will find moreover that the Star Chamber—I refer to the authority of the Star Chamber reluctantly, but it was a regular court, and one little likely to err against privilege—that that court committed a peer of the realm. The peer had disputed its authority. He was committed for an offence in the nature of a contempt, and by a process such as we should use to compel the performance of an act.

Upon the authority, therefore, of all these cases; upon the authority, still higher in my own judgment, of the principle, and upon the reason of the whole matter, the absolute necessity of applying the laws equally to all classes, and the intolerable nuisance which would be suffered, were 1,000 or 1,100 persons to exist in this country placed by privilege of Parliament above the law and enabled to defy the jurisdiction of all the King's Courts—upon all these grounds, I have no doubt whatever that the distinction here is soundly taken. This is not the distinction laid down by Lord Coke of treason, felony, and breach of the peace, on the one side, and offences, on the other, where no treason, felony, or breach of the peace has been committed—a distinction inconsistent with itself, fruitful of bad consequences, and incapable of being pursued through the authorities. The true grounds upon which to rest the case are these two: first, that privilege never extends to protect from punishment though it may extend to protect from civil process; and, next, that privilege never extends to protect even from civil process where the object of the process is the delivery up of a person wrongfully detained by a party. All the principle, all the authorities, all the reasoning are in favour of this ground, and it is upon this, and this ground only, that the jurisdiction of all the courts can safely and securely rest.

Motion dismissed.

HODGSON *v.* ANDERSON

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Hilary Term, 1825]

[Reported 3 B. & C. 842; 5 Dow. & Ry.K.B. 735; 107 E.R. 945]

Debt—Payment—Direction by creditor to debtor to pay debt to third party—Undertaking by debtor to make payment as directed—Withdrawal of instructions by creditor—Need of debtor's undertaking to be in writing.

A creditor has a right to insist on payment of the debt either to himself or to such third person as he thinks fit. If he adopts the latter course and directs the debtor to pay the debt to a specified person and the debtor undertakes to make the payment in accordance with the creditor's instructions, the creditor cannot withdraw the authority. An undertaking by the debtor to make the payment is not a promise to answer for the debt of another within s. 4 of the Statute of Frauds (4 HALSBURY'S STATUTES (2nd Edn.) 658), and so is not required to be in writing.

Notes. Followed: *Crowfoot* v. *Gurney* (1832), 9 Bing. 372. Applied: *Hutchinson* v. *Heywerth* (1838), 9 Ad. & El. 375. Explained: *Walker* v. *Rostron* (1842), 9 M. & S. 411. Followed: *Hamilton* v. *Spottiswoode* (1849), 4 Exch. 200.

Case referred to:

(1) *Tatlock* v. *Harris* (1789), 3 Term Rep. 174; 100 E.R. 517; 12 Digest (Repl.) 680, *5248*.

Also referred to in argument:

Mouldsdale v. *Birchall* (1772), 2 Wm. Bl. 820.

Walsh v. *Whitcomb* (1797), 2 Esp. 565; 1 Digest (Repl.) 790, *3187*.

Watson v. *King* (1815), 4 Camp. 272; 1 Stark. 121; 1 Digest (Repl.) 798, *3251*.

Drinkwater v. *Goodwin* (1775), 1 Cowp. 251; 98 E.R. 1070; 1 Digest (Repl.) 640, *2173*.

Fisher v. *Miller* (1823), 1 Bing. 150; 7 Moore, C.P. 527; 130 E.R. 61; 5 Digest (Repl.) 763, *6543*.

Rule Nisi for new trial of an action of assumpsit for £443 17s. 11d., being the balance of an account between the plaintiff and the defendant, and interest thereon, from Oct. 1, 1819. The defendant paid £300 into court and pleaded a set-off of the sum of £203 5s. 10d., paid on April 11, 1822, by the agents of the defendant to the Commercial Banking Co. of Scotland at the request and on the order in writing of the plaintiff and in pursuance of an undertaking to pay the same to the banking company for the plaintiff. At the trial before ABBOTT, C.J., at the London sittings after Hilary Term, 1823, the jury found a verdict for the plaintiff for the sum of £209 15s. A rule nisi for a new trial having been granted in Easter Term, 1823, the court directed a Special Case to be stated for their opinion.

The defendant resided for many years in Trinidad until August, 1821. Prior to the year 1816 he became indebted to the plaintiff in a larger amount than the sum set off by him in this action. The plaintiff was a shareholder in the Commercial Banking Co. of Scotland, and that company discounted bills for him. Early in 1816 the company discounted for the plaintiff a bill drawn by him for £270, and accepted by one Dickson. On Mar. 19, 1816, the plaintiff was informed by the secretary to the company that the bill had been dishonoured. On Mar. 22 the plaintiff wrote to the secretary in answer that both he and Mr. Dickson required time to meet their engagements, that they could not retire the bill, and that he, the plaintiff, had mentioned his situation to Mr. Robert Anderson of Edinburgh, the defendant's brother, and a director of the company, and added:

"I also mentioned to my friend Mr. Robert Anderson, that as his brother in Trinidad was indebted to me nearly £400, I would, if he pleased, give him a receipt for the returned bill with charges on his brother's account, which would secure the payment as that gentleman had considerable property in

Edinburgh, and as he a few months back referred me to Mr. Anderson and Mr. Rhind, his attorneys, for a settlement of my demand. I trust the company will be induced to accede to our proposal, or that Mr. Anderson will take the bill as a payment from his brother to me."

To this proposal Mr. Anderson did not accede, and by a letter of Nov. 4, 1816, the secretary again pressed the plaintiff for payment of the bill. On Nov. 8 the plaintiff returned the following answer:

"I propose to grant you my promissory note, at seven months from this date, including interest and charges, you holding Mr. Dickson's acceptance till this is paid, and my commercial bank share receipt also, as a collateral security, which I will send you as soon as I have your permission and know the amount of the charges. I had flattered myself my very old friend, Robert Anderson, one of your company, would have assumed the amount of Mr. Dickson's acceptance on account of a debt, nearly £150 more than this bill, due me by his brother, but this I fear is not agreeable. But, if the company wish, I will make an assignment of this debt to them in addition, should it be required."

On Nov. 19 the secretary wrote to the plaintiff as follows:

"I am directed to acquaint you that the proposal made in your letter of the 8th instant is acceded to. You will please, therefore, immediately hand in your promissory note at seven months, dated the 8th instant, for £291 19s., being the amount of the former bill, interest, and expenses, as noted on the other side. As your share of stock is assigned to us by the contract of copartnery in security of debts you need not send us the receipt. Mr. Anderson says the debt you mention as due by his brother is as you state, but there is no money of his forthcoming at present to meet it, and that he shall, if necessary, pay to us, when he has funds, on your order. You will please, therefore, hand us a letter addressed to Mr. Anderson and Mr. Rhind, desiring them to pay us the sum due as soon as they are in funds."

On Nov. 23, 1816, the plaintiff wrote to the secretary to the company, and enclosed in the letter his own promissory note for £291 19s. at seven months, and the following note addressed to Anderson and Rhind:

"As soon as you may have funds belonging to James Anderson of Trinidad, I will thank you to pay, on my account, to the Commercial Banking Co. in your city, £291 19s., being the amount of my promissory note, in favour of E. Robertson, Esquire, or any part of the same, advising me the amount, and I will credit Mr. J. Anderson, having received his order to this effect, as he is indebted to me more than this order."

This note was delivered to Messrs. Anderson and Rhind, and they verbally promised the banking company to pay them according to the terms of the order as they should have funds of the defendant in hand. This promise was never retracted.

On Jan. 29, 1820, the plaintiff wrote a letter to A. Hill, of Trinidad, enclosing an abstract of his account with the defendant, balanced to Oct. 1, 1819. The amount of this balance was £443 17s. 11d. In this letter was also enclosed a power of attorney to enable Hill to recover the same, and he then informed Hill that, as Loughnan & Co. had a considerable demand against him, he had agreed that Hill should remit Loughnan & Co. the amount he should recover from that debt, and the plaintiff accordingly begged that Hill would comply therewith, and remit Loughnan & Co. whatever sums he might recover. The plaintiff executed no other assignment to Loughnan & Co. of the debt owing by the defendant than this letter. On the same day Loughnan & Co. wrote to one Lockhart, requesting him to direct Hill to recover the amount from Dr. Anderson the defendant.

Hill applied to the defendant in Trinidad, and he and his son entered into the following obligation:

"We do hereby promise to pay, or cause to be paid, unto H. S. Hill, or to his order, as attorney of A. Loughnan & Co., London, being a debt assigned to them by John Hodgson of London, and due by the undersigned James Anderson, the sum of £488 6s. 3d. sterling, with interest on the sum of £443 17s. 11d. sterling from this date, on or before Mar. 1, 1822, and for assuring the due payment thereof we bind ourselves and each of us, our heirs, executors and assigns, each in solidum unto the said H. S. Hill or his order, to and for the use of the said A. Loughnan & Co. And whereas it hath been alleged that a payment of £300 has been made on account of this debt by some person to John Hodgson on account of James Anderson, it is, therefore, hereby declared that should such payment be proved by the said J. Anderson to have been made to the said John Hodgson by some person on account of the said J. Anderson on or before Mar. 1, 1822, that then the said £300 and interest thereon shall be deducted."

On June 15 the secretary to the company wrote to the plaintiff and informed him that the promissory note which was due the 6th instant had been returned under protest from London, and informing the plaintiff that the company declined renewing it without some additional security. The plaintiff replied that he could not procure such security, nor pay the note, and directed his share in the bank to be sold for the benefit of the company. According to these instructions the plaintiff's share in the bank was sold, and purchased by the company at the price of £140. The company also received the dividends due to the plaintiff in respect of his share, and thus the debt due from the plaintiff to the company, which had increased to £346 19s. 1d. was reduced to £193 1s. 9d.

On May 10, 1821, the secretary, by letter to the plaintiff, acknowledged the receipt of Mr. G. Rolfe's acceptance for £196 7s. 6d. The defendant arrived in Edinburgh in August, 1821, and Loughnan & Co. then wrote to him, demanding payment of the debt due from him to the plaintiff which had been assigned to them as above mentioned. This produced the following letter from the defendant to Loughnan & Co., dated Aug. 24, 1821.

"I had the honour of receiving yours of the 17th inst., and have made the necessary inquiries into the business alluded to in your letter. The case is this, the Commercial Bank of Edinburgh hold a bill of Mr. John Hodgson's for £196 sterling on Mr. G. Rolfe's acceptance, due in November next, which my brother and father-in-law (Anderson and Rhind) as my attorneys, are security for to the bank for the above sum on account of the debt I owe Mr. John Hodgson. If Mr. Hodgson, as I suppose he will, pays the bill when due in November, I shall then of course owe you the full amount of my account transferred by Mr. Hodgson to your house. If, however, the Commercial Bank come upon me for it, it will then, of course, be deducted from the amount due to Mr. Hodgson by me, and transferred to you by him."

The bill drawn upon and accepted by Rolfe was not paid when due. On Mar. 27, 1822, the defendant wrote to Loughnan & Co., stating that £203 1s. 7d. was due from the plaintiff to the bank and that he the defendant must pay that sum to the company. On Mar. 30 Loughnan & Co. wrote to the defendant giving him notice not to pay to the banking company the debt due from him to the plaintiff. On April 11 the defendant's agents paid the debt due to the banking company under an indemnity from the company. No engagement was entered into by the defendant's agents with the company beyond the verbal assurance given by them on the plaintiff's order being communicated to them.

Kaye for the plaintiff, showed cause against the rule.

Cameron for the defendant, supported the rule.

Cur. adv. vult.

Hilary Term, 1825. **BAYLEY, J.,** delivered the following judgment of the court. This is an action to recover the balance of an account, and the only question is whether a payment by a debtor to a third person in pursuance of an order given by the creditor was good so as to operate as a payment to the creditor.

It appeared that in March, 1816, the plaintiff and one Dickson were indebted to the Commercial Banking Co. of Scotland on a bill of exchange of which the plaintiff was the drawer, and Dickson the acceptor. After the bill had become due a proposal was made by the plaintiff to the company that a debt, due to him from the defendant, a brother of one of the directors of the company, to a larger amount should be taken by the banking company and the debt due from the defendant to the plaintiff should be liquidated pro tanto. That proposal was not acceded to at that time, but it was renewed by the plaintiff in November, 1816, and he then offered to make a regular assignment of the debt to the company. They were disposed to accede to this proposal, and on Nov. 23, 1816, the plaintiff sent the banking company an order on Anderson and Rhind, who were agents for the defendant, directing them, as soon as they should have funds belonging to the defendant, to pay on account of the plaintiff to the Commercial Banking Co. £291 19s. or any part of the same, and the plaintiff says that "he will credit the defendant for the amount, having received his order to that effect." That was a distinct authority from the plaintiff to Anderson and Rhind to apply the debt due to him from James Anderson, the defendant, in discharge of the £291 19s. That order was communicated to Anderson and Rhind, the defendant's agents, and they verbally promised the company to pay them according to the terms of the order as soon as they should have funds in their hands belonging to the defendant. That promise was never retracted. There was, therefore, an order by the plaintiff that the money due to him from the defendant should be applied in discharge of £291 19s., and there was an assent to that order by the agents of the defendant.

There can be no doubt that a creditor has a right to insist on payment to himself or to such person as he thinks fit. Whether he can retract an order once given, it is not necessary to decide, but I am of opinion that a creditor is not at liberty to withdraw the authority provided there is a pledge by the person to whom the authority is given that he will make the payment according to the authority. The question, therefore, arises whether there was a legal obligation on the agents to pay this money to the Commercial Banking Co. as soon as it came into their hands. There was a verbal promise by the agents of the defendant, but it may be said that that would not bind the defendant. It was insisted for the defendant that the expression in the plaintiff's letter of Nov. 23, 1816, addressed to Anderson and Rhind: "I will credit Mr. J. Anderson, having received his order to that effect," was evidence of J. Anderson's assent to the order. For the plaintiff it was said that it was no more than a direction to pay if he should receive an order, but I think the fair import of that expression is that he (the plaintiff) had before that time received an order from the defendant. Ample time had elapsed since the original proposal was made to have enabled him to procure such an order, and the grammatical construction imports that he had received such an order. If he had not received such an order, then it would only be a conditional security, and, indeed, no security at all, until the defendant Anderson assented to it. And if it had not then been understood by the Commercial Banking Co. that the order had been given, they would have required the assent of the defendant and the proffered assignment.

It appears to me, therefore, that the defendant had made himself liable to the company because there was evidence of an express assent on his part to the assignment, but, if that were not so, there would still be sufficient to imply the assent of the defendant to the arrangement. It appears from the correspondence that the plaintiff authorised a Mr. Hill to collect the money and remit it to Alexander Loughman & Co., and when that was received in June, 1821, upon a communication

between Mr. Hill and the defendant the latter undertook to pay the debt before Mar. 1, 1822, but there was a reserve or qualification applying to the transaction in question and to the security given by the plaintiff and the assent of the defendant. There is a memorandum that, as it had been alleged that a payment of £300 had been made on account of this debt by some person to the plaintiff on account of the defendant, it was declared that, should such payment be proved by the defendant to have been made to the plaintiff by some person on account of the defendant on or before Mar. 1, 1822, then the said sum of £300 should be deducted. There is nothing stated in the Case to which that can apply but the transaction in question, and, if it does apply to that, then the implication necessarily arises that the defendant had assented that that part of the debt due from him to the plaintiff should be applied in discharge of the debt due from the plaintiff to the banking company. If he did so assent, then he was legally bound to pay it. In *Tatlock v. Harris* (1), BULLER, J., lays it down that if A. owes B. £100 and B. owes C. £100, and the three meet, and it is agreed between them that A. shall pay C. the £100, B.'s debt is extinguished, and C. may recover the sum against A. So in this case upon payment by Anderson to the company, the plaintiff's debt would be discharged pro tanto. We are of opinion that a promise in writing, in order to make it obligatory on Anderson so to apply the money, was not necessary, because this was not an agreement to pay money which a party by law was not obliged to pay, but there was a full and adequate consideration for the payment. The debt existed and it was the debt of the defendant, and the only question was to whom it was to be paid. There was also a consideration moving from the bank, viz., their forbearing to sue the plaintiff. We are, therefore, of opinion that the defendant assented to the order, that when he assented to it he was legally bound to pay the money in pursuance of it, and that that payment was a discharge of the debt in question, notwithstanding the subsequent order in favour of Loughnan & Co. They were not injured, for there was a qualification in the agreement to pay them that in the event of its being proved before March, 1822, that part of the money had been already applied to a different destination, there should be a deduction pro tanto. Before that time Loughnan & Co. were informed of the obligation to pay the banking company. They were, therefore, promptly apprised of the real situation in which they stood. This was a good payment in point of law to the plaintiff, and binding upon him. I am, therefore, of opinion, that the rule for a new trial must be made absolute.

Rule absolute.

EARL OF WATERFORD'S CLAIM

[House of Lords, Committee of Privileges (Lord Brougham, L.C., and Lord Plunket), September 1, 6, 1831, February 17, March 9, 1832]

[Reported 6 Cl. & Fin. 133; 3 State Tr. N.S. App. 1261; 7 E.R. 648]

Peerage—Claim—Presentation of petition to Crown—Reference to House of Lords—Report of Committee of Privileges—Evidence—Irish peerage—Decision of Irish House of Lords before Union.

A question of law having arisen on the petition of an Irish peer presented to the House of Lords claiming to be admitted to vote at the election of Irish representative peers, the House, with a view to a more solemn adjudication, recommended a petition claiming the peerage to be presented to the Crown in order that it might be referred by the Crown to the House with the report of the Law Officers of the Crown annexed, and then the House, acting on the report of its Committee of Privileges, would adjudicate the right and report the same to the Crown.

In such a case a prior decision of the Irish House of Lords before the Union was as binding on the Imperial House of Lords since the Union as would be a decision of the English House before the Union touching an English peerage. But a resolution of either House, affirming a report of its committee, and recognising a right or privilege of peerage, is not equivalent to an adjudication upon a reference from the Crown.

Statute—Construction—Words to be given ordinary meaning—Exception to rule—Judicial decisions imposing construction different from plain meaning of words.

Per Lord Brougham, L.C.: It cannot be denied that in some cases the plain meaning of an Act of Parliament has been changed by a course of judicial decisions, each going a little further, so that at length the courts have adopted a construction widely different from that which would, but for such interpretations, have been put on the plain intent of the words. In all such cases you are to take into consideration, not merely the words of the Act of Parliament, but the decisions on them which may be said to have been all but imported into the words of the Act, so that the Act is to be construed with reference to such decisions. But I am not aware of any case in which a single decision, even of a court of competent jurisdiction having before it properly and judicially the matter on which it was pronouncing a judicial decision, has been held to operate so upon the plain meaning of a statute.

Notes. Referred to: *Wensleydale (Peerage) Case* (1856), 8 State Tr. N.S. 479.

As to claims to peerages, see 29 Halsbury's Laws (3rd Edn.) 256–263; and for cases see 37 Digest (Repl.) 43–49. As to the construction of statutes, see 36 Halsbury's Laws (3rd Edn.) 391 et seq.; and for cases see 44 Digest (Repl.) 203 et seq.

Case referred to:

(1) *Earl of Shrewsbury's Case* (1612), 12 Co. Rep. 106; 2 State Tr. 741; 77 E.R. 1383, P.C.; 37 Digest (Repl.) 41, *173*.

Also referred to in argument:

Nevil's Case (1604), 7 Co. Rep. 33 a; Cruise on Dignities, 195; 77 E.R. 460; 37 Digest (Repl.) 41, *187*.

Purbeck's Case (1678), Collin's Baronies by Writ, 293; Cruise on Dignities, 113; sub nom. *R. v. Viscount Purbeck*, Show. Parl. Cas. 1; 1 E.R. 1, H.L.; 37 Digest (Repl.) 41, *180*.

Petition to the House by John, Earl of Shrewsbury in England and Earl of Waterford in Ireland, claiming the right to vote at the elections of representative peers of Ireland to sit in the United Kingdom Parliament.

The petition set forth that his ancestor, John, the first Earl of Shrewsbury and Wexford, Lord Talbot, Furnival, and Strange, was created by King Henry VI,

Earl of Waterford of the dominion of Ireland, with remainder to the heirs male of his body lawfully begotten. The petition stated the descent of the dignities, and that the petitioner claimed, as Earl of Waterford, the right to vote at the elections of representative temporal peers of Ireland to sit in the Parliament of the United Kingdom. The petition was referred by the Lords to their Committee for Privileges to consider and report thereon. The committee met on Sept. 1 and 6, 1831, when

Lynch appeared for the petitioner.

The Attorney-General (Sir Thomas Denman) and the *Solicitor-General for Ireland (Crampton)* for the Crown.

LORD BROUGHAM, L.C. This case raises a question of considerable importance, which has been ably argued by the learned counsel at your Bar. It is fit that I should state how the point arose, and of what importance the point was deemed that as such we should have it preliminarily disposed of. The counsel for the claimant read certain reports of Committees of Privileges and resolutions of the Irish House of Peers consequent upon those reports, contending that they had the force of a judicial determination by the only tribunal competent to the decision of those matters whose determination was binding here, and that among other persons bound by it was the House of Lords of the United Kingdom inasmuch as the decision of those matters had been the province of the Irish House of Lords, and is now that of the Imperial Parliament representing, not succeeding, but equally composed of, the peerage of the several parts of the United Kingdom, the Scottish and the Irish forming parts, and, consequently, that which now sits being not the Scottish, the English, or the Irish Parliament, but a new Parliament identically constituted of each, and which, therefore, must be taken, with reference to the preceding devolutions, to stand in the place of the parliaments of these three portions of the empire.

I was rather surprised the last time we met here at the suggestion of a doubt entertained on the part of the learned counsel for the Crown respecting the strict applicability of the decisions made in the several independent Parliaments now united in one, for it appears to me it would have been as reasonable to say that this United Parliament had no right to consider the evidence adduced and the determinations that were come to on proceedings had in respect of English peerages before the English Parliament as it would be to say you have no right to listen to determinations and decisions made and evidence taken in the Irish Parliament, you being now the United Parliament. If the suggestion of the learned counsel is well grounded, you have exceeded your jurisdiction in many cases in which that has been done, for there is now no more an English Parliament, though locally the seat of your decisions is in England, and you happen to sit under the same roof—not in the same hall—as your predecessors sat while only the English Parliament. The English Parliament is as much succeeded by that now constituted and as much merged in the united parliament as the Irish Parliament; consequently, there is no one conceivable argument which would go to shut out the judicial determinations of the Irish Parliament from being authorities to bind you in the United Parliament which would not apply to shut out similar determinations of the English Parliament as applicable to matters coming within their jurisdiction. However, I find that that argument is no longer urged. I do not know that it was ever meant to be seriously urged; if it was, that is now given up, and it is explicitly admitted that the decision of the Irish House of Lords is binding upon your Lordships as much as a judgment of this House as now constituted or a decision of the English House of Lords touching an English peerage.

But, my Lords, it is said (and that is the material question) that this resolution read from the IRISH JOURNALS is not a judicial decision, and consequently, would not bind the Irish Parliament, if that were still in existence. It is conceded

A that, if the Irish Parliament would, if in existence, be bound by it, so would your Lordships, but it is contended that it has not that binding force which would have given it that effect in the Irish House of Lords, and, consequently, that it cannot bind us here. It is impossible to deny that there is a considerable difference between an entry in the Journals, which, in virtue of a general report of a committee touching the right to vote by proxy, recognises the proxy of an individual peer B and allows it to be read as assigned to a peer present,—there is a considerable difference between that and what is, strictly speaking, a judicial decision in foro contentioso upon a claim, first presented to the Crown, then referred for the advice of the Law Officers of the Crown, and then to the House of Lords, and by that House, according to the usual course of its proceedings, referred to the Committee of Privileges, followed by a report, made not alone by that committee, C but also sanctioned by a resolution of the whole House, and, upon that resolution, to make the decision more complete, a writ issuing, and the party sitting under it. That is the most perfect form of judicial determination in favour of a peerage, and that is here nearly altogether wanting. What you have here is that (without any contention, without any evidence, which could have called upon a committee, or the House, sanctioning the committee's report, to pronounce a decision, without D any such strictly judicial proceeding) there is found an entry which is said, on the one hand, to be only a statement of facts, and, on the other, to have the effect of a decision on the right. Probably it is more accurate to say that it is neither, but that it is evidence of the fact and does not amount to an establishment of the right.

This being the state in which this matter now comes before your Lordships, E the advice I should humbly tender, arising out of the opinion I have formed, would be to regard it, not as immaterial to the claim, but, on the contrary, to regard it as highly material. Not to regard it, however, as such a judicial decision as would have bound the Irish House of Lords; if binding that House, it must necessarily bind your Lordships. But you cannot help seeing the great difference there is in point of authority between the one kind of entry, and the other kind of F deliberative judgment. Where a person is entered as having a right to vote, as actually exercising that right, which is a recognition of that right, that is, undoubtedly, a strong fact in favour of the party's having that right because he has actually enjoyed it and has been suffered to enjoy it by the proper authority to contest it, if he had it not, but it is different from, and inferior in point of G authority to, the binding force of an actual adjudication of that right by the proper tribunal, having had it contested before it, and coming to a determination judicially upon it.

Consider how different it would be in the case of a right of property, and you will at once see the way clearly to that view which I think your Lordships ought to take of this case. If a man has been in the course of doing that which, but H for the constant user with permission of the party having an interest and a right to obstruct him if he chose, would be a trespass, but with that user would seem to be correct, as if a man has been in the constant habit of using a certain way across his neighbour's close, for instance, it is the fact of that enjoyment adverse to his neighbour, that neighbour having an interest to obstruct him if he had not a right to pass, it is that adverse enjoyment which constitutes evidence of the right, I and there cannot be better evidence except that of a direct grant of the easement. It is a very different thing, however, when that has come into contestation in a court of justice and when upon the result of that contest a competent court has adjudicated for the right, for that proceeding has the force of res judicata and stops the parties who were privies to that recorded judgment. There is precisely the same difference in this case with the distinguishing circumstance that in the case I have supposed the adverse party who is, as it were, concluded by force of the evidence of his acquiescence and the inevitable conclusion arising from it, is a different party from the forum that adjudicates the right. In that case, the

individual who passes sentence, to speak in popular language, against himself by acquiescing in the adverse enjoyment, is not the party which, judicially and technically speaking, passes sentence, but the court of justice before whom both those parties come, the one to seek a certain right and the other to deny it, who refer that dispute to the adjudication of that tribunal. In this case the distinction is plain, the party who is the adverse party acquiescing in the adverse possession of the right, is the party who adjudicates when the other comes to claim the right before him. It is the Irish House of Lords that acquiesces in the Earl of Waterford's proxy being used by Lord Clanricarde; it is the Irish House of Lords, who would have had to adjudicate upon the right if there had been a judicial proceeding ending in a judicial determination.

That is the difference between the cases. It is material to remark it, and this distinction appears to me to be favourable to the claimant. When it is attended to it makes the adverse acquiescence stronger in favour of the claimant than it would otherwise have been if the acquiescing party and adjudicating party had been different persons. It makes it stronger in favour of the claimant, because he is adversely enjoying the right with the acquiescence of the opposite party interested in rejecting his claim, that very party being the tribunal before whom the claim must have come for adjudication, if it had been a judicial determination, and not the mere fact of adverse enjoyment. I think I should remind your Lordships and the learned counsel of this distinction that exists in the case, for it is very important in estimating the weight, on the one hand, due to this fact of acquiescence, and, on the other, keeping distinct and separate the two forms in which the matter has been presented, on the one hand, a judicial proceeding binding, and, on the other hand, as I think it may be more justly represented that it is to be taken, only as evidence of the enjoyment.

Your Lordships may observe a great distinction also in substance between the manner in which the two cases occur, I mean the difference between a judicial proceeding and a mere entry -that the right is admitted sub silentio, there is no dispute, but it is uncontested. No doubt, it goes a great way, and it goes the further because the party admitting it would have had a right to adjudicate, and to stop the party from ever setting it up again, but it is of far inferior force to actual judicial decision, when the whole case is adversely contested on the one side and on the other at the Bar of your Lordships, and when you have come to a judicial decision that would have operated to prevent any party ever afterwards questioning it. Upon these grounds, and I may add a third in favour of the recommendation which I shall submit to your Lordships presently, even if I thought the entry was more in the nature of a judicial decision than I do; as we are not bound to consider it so, I think the more satisfactory mode of arriving at a decision will be to go into the rest of the case, and to have the whole merits of it before us, as well as this preliminary point of res judicata. I think, therefore, it will be the better course for your Lordships to throw out to the parties the propriety of putting the whole case into the course of a regular judicial decision, which may easily be done by presenting a supplemental petition to the Crown, claiming the peerage, there being already a petition before your Lordships claiming the right to vote. It will not delay the claimant to present a petition to the Crown, praying to have the peerage allowed. That will be referred to the Law Officers of the Crown, a mere matter of course in this case. It will be attended to immediately and will come back as early as is convenient to the parties, and then it may be gone into on the merits of which the greatest part is over, a good deal of discussion having been already had on all points in the case. The weight of these entries as evidence not being denied, I think there is quite sufficient to throw the burden upon the resisting party, the Crown, to dispute the claimant's case, and that it will be for them to do so by going at once to the Act of Henry 8. the Irish "Act of Absentees," 28 Hen. 8, c. 3 and the decision of the judges on it in 1612 [in the *Earl of Shrewsbury's Case* (1)]. That will be by far the most convenient course. The claimant

will have what is much more valuable to him than the repetition of that which happened in Ireland. He will not have merely a determination that the United Parliament has given him leave to vote in the election of Irish peers as the Irish House of Peers gave Lord Clanricarde leave to hold his ancestor's proxy, but the decision will for ever establish his right to his peerage. I, therefore, humbly move your Lordships, that the further proceedings on this claim be postponed in order that a petition may be presented to the Crown.

The claimant, accordingly, presented a petition to the King submitting

> "that he is entitled, as heir male of the body of John, Earl of Shrewsbury, created Earl of Waterford, to the dignity of Earl of Waterford, and, his pedigree and descent being acknowledged, he prays your most excellent Majesty that the said title, dignity and peerage of Earl of Waterford may be declared and adjudged to belong to and to be now vested in your petitioner."

This petition was referred by the King, first to the Attorney-General, and afterwards, with his report annexed, to the House of Lords, and by the House to the Committee of Privileges.

Lynch (with him *William Russell*) for the claimant.—The right of the claimant to be Earl of Waterford could not have been questioned were it not for the construction put upon the Irish Act, 28 Hen. 8, by Sir Edward Coke and the other chief judges of England, in 1612 in the *Earl of Shrewsbury's Case* (1). That Act, called "The Act of Absentees," recites the mischiefs caused by the absence from Ireland of persons who had lands there, and who, after the gift or descent to them of such lands and possessions, left Ireland and dwelt in England, not regarding the preservation of the towns, etc., appertaining to them, but allowing them to fall into ruin, and the English inhabitants thereof, in default of defence and justice, to be exiled by the Irish, to the great loss of the King's dominion and revenues, and to the elevation of his enemies (the Irish) into power and strength. In answer to a question put to Sir Edward Coke and the two other chief judges on a case submitted to them by the Privy Council, viz., whether by this Act the dignity of the Earl of Waterford be taken from the earl, as well as the manors, lands, etc., in the Act specified, they resolved (12 Co. Rep. at p. 107) that the said Act

> "did not only take away the possessions . . ., but also the dignity itself; for, although one may have a dignity without any possession ad sustinendum nomen et onus, yet it is very inconvenient that a dignity should be clothed with poverty, . . . [and], therefore, the Act 28 Henry 8 shall be expounded to take away all inconvenience; and, therefore, by the general words of the Act, viz., of honours and hereditaments, the dignity itself, with the lands given for maintenance of it, are given to the King, and the dignity is extinct in the Crown."

This extraordinary opinion states also an Act of Parliament of 17 Edward 4, and the reasons for depriving George Nevill, Duke of Bedford, of his title (ibid. at p. 108):

> "In which Act these things are to be observed: 1. That although the duke had not any possessions to support his dignity, yet his dignity cannot be taken away from him without an Act of Parliament. 2. The inconveniences do appear where a great state of dignity is, and no livelihood to maintain it. 3. It is good reason to take away such dignity by Act of Parliament. And, therefore, the said Act of the 28 Henry 8 shall be expounded to take away such inconvenience; and although the said Earl of Shrewsbury be not only of great honour and virtue, but also of great possessions in England, yet it was not the intention of the Act to continue him earl in Ireland, when his possessions in Ireland were taken away from him . . ."

The first observation to be made on this opinion is that it was extra-judicial, being given by judges who had no jurisdiction over the subject, and, therefore, it can

be only considered as advice—an advice which was rejected by the Crown, and also by the House of Peers in Ireland, then the only competent tribunal to determine a question of Irish Peerage. The construction put by these judges upon the Act was erroneous, and founded on statements which were untrue.

The Attorney-General and *the Solicitor-General for Ireland* for the Crown.

LORD BROUGHAM, L.C.—It has been admitted by the counsel for the Crown that, if this were now the first time that an interpretation was to be put upon this Act of [the Irish] Parliament [28 Hen. 8, c. 3], there could be no doubt entertained as to what should be the construction. But our attention has been called to the venerable authority of SIR EDWARD COKE and two other chief judges of England who had a reference made to them from the Privy Council and appear to have considered this matter and to have stated that

> "having heard the case argued by counsel in behalf of the earl, they, having taken great consideration and advisement, and after they had read the preamble and all the Act of the 28th Hen. 8, had unanimously resolved"

upon the construction which has been made the subject of argument at your Lordships' Bar. It is impossible to deny that their opinion thus expressed throws a great difficulty in the way of that construction which we should otherwise at once put upon this Act.

It cannot be denied that in some cases the plain meaning of an Act of Parliament has been changed by a course of judicial decisions, each going a little further, so that at length the courts have adopted a construction widely different from that which would, but for such interpretations, have been put upon the plain intent of the words. In all such cases you are to take into consideration, not merely the words of the Act of Parliament, but the decisions on them which may be said to have been all but imported into the words of the Act, so that the Act is to be construed with reference to such decisions. But I am not aware of any case in which a single decision, even of a court of competent jurisdiction having before it properly and judicially the matter on which it was pronouncing a judicial decision, has been held to operate so upon the plain meaning of a statute. There has been a course of decisions, and where the decision first made has been adhered to and confirmed by other decisions, that is what is called a current of authorities too strong to be resisted—besides this, that in those cases the decisions were all judicial. A mere obiter dictum is very inferior to the decision of the same judges or the same court where all the matters are brought before them and they are required judicially to decide. But this is not even an obiter dictum, for it is the opinion of those three judges on a point referred to them on which they were called upon to advise His Majesty in Council, not, strictly speaking, in their judicial character deciding this as a question brought regularly before them in which their judgment was to operate on the rights of the parties.

Undoubtedly, with the opinion of so great a lawyer as SIR EDWARD COKE, upon the subject, one cannot help distrusting his own, if it happen to differ from that of so great a judge, but when the reasons for the opinion expressed are also given in the report, it is the bounden duty of those who are called upon to review that opinion to investigate those reasons, and to see how far the opinion is borne out by them, and by any case which is referred to.

I cannot help remarking upon the departure from the fact, which appears in the citation from the *Duke of Bedford's Case*, on which the opinion of the judges is stated to have proceeded upon the like words, whereas in the Act of 17 Edw. 4, there are express words of degradation, it being enacted

> "that from henceforth the same creation and making of the said duke, and all the names of dignity given to the said George, or to John Nevill his father, be from henceforth void and of no effect."

If such words had occurred here, the cases would have been similar. But no such

words are found in this Act. There are only those words which vest whatever is referred to in the Crown. If those words vest this title of honour in the Crown, it may be said it does not signify whether there are words taking it away or not—that what is given to the Crown cannot be holden by the subject—

"that the King, his heirs and assigns, shall have, hold and enjoy, as in the right of the Crown of England, all"

and so forth. Those words "hold and enjoy" clearly do not apply to a dignity, but to that which was the subject of tenure.

It is said that if an honour and dignity be considered to be the subject of this Act, these words are to be taken reddendo singula singulis, that the King was to enjoy those which could be enjoyed, and to hold those which might be held. Nevertheless, the words are that the Crown shall have, hold and enjoy, and one is unable to understand how the Crown, the fountain of honour, could hold and enjoy an honour, supposing that to be the subject of the Act. It appears impossible to understand that the Crown can have, hold and enjoy an honour which has been granted, and has been destroyed by an Act of Parliament, nor is there any light thrown upon that point in the arguments of these learned persons, and upon the other part of the question, they appear to me not to be justified in the conclusion they have drawn. There is not to be found in the enumeration of particulars in the enactment anything to which the character of possessions does not apply or anything which makes it clear that dignities or titles of honour were the subject-matter of enactment. If we found those words, of course, we should be bound to construe the Act in such manner as to give a meaning to them, but it appears to me that the words "honours, castles, etc." are introduced plainly for a different purpose, and with reference to other subjects. The word "honours," as connected with those other words of description, is stated by Comyns, C.B., and other authorities to apply to a collection of manors. This word "honours," being so found in company with manors, castles, seignories, hundreds and franchises, and all and singular other possessions, hereditaments, and all other profits, removes, in my opinion, any doubt which might have been felt as to the construction of the Act.

If this opinion of the judges had been sanctioned by other decisions; if it had been discussed in the proper tribunal in which it had been sought to be acted upon and had been there adopted, I mean in Parliament, then undoubtedly the same principle would apply to it as to a judicial construction upon a legislative enactment, to which it had reference, but it does not appear that that was the case, because it is perfectly clear that the House of Lords in Ireland, the proper tribunal, did not act upon that authority. We are not aware whether this opinion was cited there. In the absence of any evidence to the contrary, we must conclude that it was known to that House at the time that Francis the eleventh earl was admitted to his proxy.

Upon the whole, I am of opinion that the claimant has made out his case, and I am fortified in that opinion by the concurrence of Lord Lyndhurst who attended here on the last day, heard a part of this case, and felt no doubt whatever that this was a miscarriage on the part of those three learned judges, and by the concurrence of my noble and learned friend who is now present.

LORD PLUNKET, who concurred with the Lord Chancellor, said: I confess, even if this [the *Earl of Shrewsbury's Case* (1)] were a decision of a court of justice upon a case coming regularly before it, I do not think that a single decision pronounced by judges of the highest authority would justify this House in countervailing the distinct object of an Act of Parliament. But this no decision on any case judicially pronounced. It is a reference made to a tribunal not competent to decide this question—a reference from the Lords of Council for an extra-judicial opinion of those learned judges, and it does not appear that that opinion was adopted by the Lords of Council, nor is there any trace of anything ever being brought before this House or the Irish House of Lords upon the subject, or of any act being done by either House in furtherance of that opinion. I, therefore, think

we are bound to revert to the terms of the Act of Parliament, and it is very candidly conceded by the counsel for the Crown that, taking the words of the Act of Parliament itself into consideration, we can have no reasonable doubt. . . . I am of opinion that the dignity of peerage was not, nor was intended to be, taken away. I, therefore, concur in the opinion which has been expressed, that this extra-judicial opinion given by SIR EDWARD COKE and the other learned judges upon this subject ought not to weigh with us, and that upon the construction of the Act of Parliament this case is perfectly clear.

The committee resolved that John, Earl of Shrewsbury, had made out his claim to be Earl of Waterford and to be admitted as a temporal peer of Ireland to vote at the election of peers to represent the peerage of Ireland in the Parliament of the United Kingdom. That resolution was reported to the House, and agreed to.

MARSH AND OTHERS *v.* KEATING

[HOUSE OF LORDS (Lord Brougham, L.C., and other judges). June 23, 24, 1833, June 9, 25, 1834]

[Reported 2 Cl. & Fin. 250; 1 Bing. N.C. 198; 8 Bli. N.S. 651; 1 Mont. & A. 592; 1 Scott, 5; 6 E.R. 1149]

Money Had and Received—Money obtained from plaintiff by fraud—Stock sold under forged power of attorney—Right of stockholder to abandon claim to stock and recover money produced by its sale.

The respondent was the holder of certain government stock which was transferable at the Bank of England on the signature of the transferor or his duly authorised agent. In December, 1919, part of this stock was transferred in the books of the Bank of England to a transferee under a power of attorney which had been forged by a partner in the banking firm of which the respondent was a customer, the proceeds of the sale being traced into the hands of the firm.

Held: the respondent was entitled to abandon all claim to the stock formerly standing in her name, and, in an action for money had and received, to recover the money produced by the sale of the stock from the other members of the banking firm.

Notes. Considered: *Re Jermyn, Ex parte Elliott* (1837), 3 Mont. & A. 110; *Bonzi* v. *Stewart* (1842), 4 Man. & G. 295. Distinguished: *Sadler* v. *Lee* (1843), 6 Beav. 324. Followed: *White* v. *Spettigue* (1845), 13 M. & W. 603. Distinguished: *Vaughan* v. *Matthews* (1849), 13 Q.B. 187; *Bishop* v. *Jersey* (1854), 22 L.T.O.S. 326. Followed: *Wickham* v. *Gatrill* (1854), 2 Sm. & G. 353; *Lee* v. *Bayes* (1856), 18 C.B. 599; *Dudley and West Bromwich Banking Co.* v. *Spittle* (1860), 1 John. & H. 14; *Chowne* v. *Baylis* (1862), 31 Beav. 351. Considered: *Bailey* v. *Johnson* (1871), L.R. 6 Exch. 279. Followed: *Reid* v. *Rigby*, [1894] 2 Q.B. 40. Applied: *Jacobs* v. *Morris*, [1902] 1 Ch. 816. Considered: *Covell* v. *Scamell* (1910), 103 L.T. 535. Referred to: *Bank of Ireland* v. *Evans' Trustees* (1855), 25 L.T.O.S. 272; *Re Shepherd, Ex parte Ball* (1879), 10 Ch. D. 667; *De Witte* v. *Addison* (1899), 80 L.T. 207; *Oliver* v. *Bank of England*, [1902] 1 Ch. 610; *Curtice* v. *London City and Midland Bank* (1907), 77 L.J.K.B. 341; *Burdett* v. *Horne* (1911), 27 T.L.R. 402; *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20.

As to the action for money had and received, see 8 HALSBURY'S LAWS (3rd Edn.) 235 et seq.; and for cases see 12 DIGEST (Repl.) 605 et seq.

Cases referred to:

(1) *Davis* v. *Bank of England* (1824), 2 Bing. 393; 9 Moore, C.P. 747; 3 L.J.O.S. C.P. 4; 130 E.R. 357; on appeal sub nom. *Bank of England* v. *Davis* (1826), 5 B. & C. 185; 7 Dow. & Ry. K.B. 828; 4 L.J.O.S. K.B. 145; 108 E.R. 69; 3 Digest (Repl.) 131, *22*.

(2) *Dawkes* v. *Covencigh* (1652), Sty. 346; 82 E.R. 765; 1 Digest (Repl.) 74, *554.*
(3) *Crosby* v. *Leng* (1810), 12 East, 409; 104 E.R. 160; 1 Digest (Repl.) 78, *583.*
(4) *Stone* v. *Marsh* (1827), 6 B. & C. 551; 9 Dow. & Ry. K.B. 643; 5 L.J.O.S. K.B. 201; 108 E.R. 554; 3 Digest (Repl.) 191, *363.*

Also referred to in argument:

Hildyard v. *South Sea Co.* (1722), 1 P. Wms. 76.
Monk v. *Graham* (1721), 8 Mod. Rep. 9.
Harrison v. *Harrison* (1740), 2 Atk. 121; 26 E.R. 476; sub nom. *Harrison* v. *Pryse*, Barn. Ch. 321, L.C.; 43 Digest 968, *4082.*
Ashby v. *Blackwell* (1765), Amb. 503; 2 Eden, 299; 27 E.R. 326, L.C.; 9 Digest (Repl.) 405, *2594.*
Hume v. *Bolland* (1832), 1 Cr. & M. 130; 2 Tyr. 575; 149 E.R. 343; 3 Digest (Repl.) 231, *584.*
Stracy v. *Bank of England* (1830), 6 Bing. 754; L. & Welsb. 357; 4 Moo. & P. 639; 8 L.J.O.S. C.P. 234; 130 E.R. 1471; 3 Digest (Repl.) 132, *25.*
Re Marsh, Ex parte Bolland (1828), Mont. & M. 315; 1 Digest (Repl.) 454, *1054.*
Jones d. Cowper v. *Verney* (1739), Willes, 169; 125 E.R. 1115; 40 Digest (Repl.) 775, *2594.*
Doe d. Simpson v. *Butcher* (1778), 1 Doug. K.B. 50; 99 E.R. 36; 40 Digest (Repl.) 829, *3053.*
Jenkins d. Yate v. *Church* (1776), 2 Cowp. 482; 98 E.R. 1199; 40 Digest (Repl.) 829, *3052.*
Doe d. Martin v. *Watts* (1797), 7 Term Rep. 83; 101 E.R. 866; 30 Digest (Repl.) 492, *1367.*
Taylor v. *Plumer* (1815), 3 M. & S. 562; 2 Rose, 457; 105 E.R. 721; 1 Digest (Repl.) 653, *2267.*
Horwood v. *Smith* (1788), 2 Term Rep. 750; 100 E.R. 404; 14 Digest (Repl.) 595, *5925.*
Brewer and Gregory v. *Sparrow* (1827), 7 B. & C. 310; 1 Man. & Ry. K.B. 2; 6 L.J.O.S. K.B. 1; 108 E.R. 739; 1 Digest (Repl.) 480, *1236.*
Wilson v. *Poulter* (1730), 2 Stra. 859; 1 Barn. K.B. 118, 284; 93 E.R. 898; 1 Digest (Repl.) 470, *1164.*
Clarke v. *Shee and Johnson* (1774), 1 Cowp. 197; 98 E.R. 1041; sub nom. *Clarke* v. *Johnson & Co.*, Lofft, 756; 12 Digest (Repl.) 633, *4893.*
Pinto v. *Santos* (1814), 1 Marsh. 132; 5 Taunt. 447; 128 E.R. 763; 1 Digest (Repl.) 448, *1011.*
Re Allen, Ex parte Apsey (1791), 3 Bro. C.C. 265; 29 E.R. 528, L.C.; 4 Digest (Repl.) 460, *4027.*
Re Moxon, Ex parte Heaton (1819), Buck, 386; 4 Digest (Repl.) 468, *4104.*
Ex parte Watson (1814), 2 Ves. & B. 414; 2 Rose, 259; 35 E.R. 378, L.C.; 4 Digest (Repl.) 480, *4222.*
Hunter v. *Prinsep* (1808), 10 East, 378; 103 E.R. 818; 12 Digest (Repl.) 636, *4923.*
Young v. *Marshall* (1831), 8 Bing. 43; 1 Moo. & S. 110; 1 L.J.C.P. 15; 131 E.R. 316; 12 Digest (Repl.) 636, *4921.*
Taylor d. Atkyns v. *Horde* (1757), 1 Burr. 60; 1 Keny. 143; 97 E.R. 190; affirmed (1758), 6 Bro. Parl. Cas. 633, H.L.; 38 Digest (Repl.) 931, *1221.*

Appeal by the defendants from an order of the Court of Exchequer Chamber, reported 1 Mont. & A. 582.

By an order of the Lord Chancellor it was directed that an action should be brought by or in the name of the respondent, Ann Keating, against the appellants, William Marsh, Josias Henry Stracey, and George Edward Graham, trading under the name of Marsh & Co., in the Court of King's Bench for money had and received by the appellants to and for the use of the respondent, that a special verdict should be taken in such action by consent on a statement of facts to be settled in manner

therein mentioned—and that the appellants should consent to judgment being entered up in the Court of King's Bench for the respondent for the purpose of the same being carried by writ of error before the House of Lords. The question raised was the right of Mrs. Keating to prove against the bankrupt estate of Marsh & Co., for a sum of money received by them on the sale of stock belonging to her, which stock was transferred by Henry Fauntleroy, a partner in the firm, under a forged power of attorney.

By the special verdict it was found that on Oct. 10, 1819, there was standing in the books of the Bank of England, in the name of the respondent the sum of £12,000 interest or share in the joint stock called reduced 3 per cent. annuities transferable at the Bank of England. The accounts of the proprietors of the stock were kept in certain books of the bank called ledgers; the accounts were entered in the form of debtor and creditor accounts in the ledgers of the whole amount of the stock, in which accounts the sums either subscribed or transferred to individuals were stated as items to their credit on the one side of the account, and on the other side of the account they were debited with all sums transferred from their names. In other books of the bank there were entered transfers of the stock, purporting to be signed by the parties transferring the same or their attorney lawfully authorised. On Dec. 29, 1819, an entry was made in one of the transfer books of the Bank of England purporting to be a transfer under a power of attorney purporting to be granted by the respondent to William Marsh, Josias Henry Stracey, George Edward Graham, and Henry Fauntleroy, the persons who at that date composed the firm of Marsh & Co., of £9,000 of the respondent's interest or share in the said stock to William Brackstone Tarbutt, of the Stock Exchange. This power of attorney was not executed by the respondent, but the signature to it purporting to be the respondent's signature was forged by H. Fauntleroy who had no authority from the respondent to make any such transfer. In consequence of the entry in the transfer book an entry was made in one of the ledgers of the Bank of England debiting the respondent with the sum of £9,000 reduced 3 per cent. annuities, and credit was given to W. B. Tarbutt for the £9,000 stock. From that time the respondent ceased to have credit for the said sum of reduced 3 per cent. annuities in the ledger. At no time did she have any knowledge of the above entry having been made in the books of the Bank of England. On Sept. 10, 1824, H. Fauntleroy was apprehended on a charge of forging letters of attorney for the transfer of certain other annuities in the Bank of England, and the governor and company of the Bank of England undertook to prosecute him. The respondent informed the bank of the forgery committed in her case as soon as it came to her knowledge. The governor and company caused several indictments to be prepared against Fauntleroy for forging letters of attorney for transfer of parts of the annuities transferable at the Bank of England, and Fauntleroy was tried and convicted upon one of those indictments on Oct. 30, 1824, and executed on Nov. 30 in the same year. Neither the respondent nor the bank preferred any indictment against Fauntleroy in respect of forgery of the respondent's power of attorney. On Sept. 13, 1824, in consequence of the discovery of Fauntleroy's forgeries William Marsh, Josias Henry Stracey, and George Edward Graham, became bankrupt. On Oct. 26 following, Fauntleroy also became bankrupt. Subsequently, the respondent brought an action against the appellants claiming that, the stock in question having been sold by order of one of the partners of Marsh & Co., who were her bankers and agents in regard to the stock, and the produce having been paid to that firm, the appellants were liable in an action for money had and received to account to her for the sum so received. In 1832 judgment was entered for the respondent in the Court of King's Bench without argument, and that judgment, also without argument was affirmed by the Court of Exchequer Chamber. The appellants appealed to the House of Lords.

June 23, 24, 1833. The following judges attended the House during the arguments: TINDAL, C.J., PARK, J., BAYLEY, B., BOSANQUET, GASELEE, LITTLEDALE, TAUNTON, VAUGHAN, PARKE and PATTESON, JJ., and BOLLAND and GURNEY, BB.

Sir Edward Sugden and *F. Kelly* for the appellants.
Serjeant Taddy and *Sir James Scarlett* for the respondent.

LORD BROUGHAM, L.C., at the conclusion of the argument, proposed questions for the consideration of the judges which are stated in the subjoined opinion.

PARK, J., delivered the opinion of the judges as follows.—The question which your Lordships have been pleased to propose for the opinion of His Majesty's judges amounts in substance to this—whether the produce of stock formerly standing in the name of Mrs. Ann Keating, the respondent, but transferred out of her name on Dec. 29, 1819, without her authority and under a power of attorney which had been forged by one of the partners of the appellants, the bankers of Mrs. Keating, which partner has been since convicted and executed for another forgery, can, under the circumstances stated in the special verdict, be considered as money had and received by the surviving partners to the use of the respondent and be recovered by her in that form of action. After hearing the argument at your Lordship's Bar, and consideration of the facts stated in the special verdict, all the judges who were present at the argument, including the Lord Chief Justice of the Common Pleas [TINDAL, C.J.], who is absent at nisi prius, and BAYLEY, B., who has resigned his office since the argument, agree in opinion that that question is to be answered in the affirmative.

The first objection raised against the respondent's right to recover, and upon which great reliance has been placed at your Lordships' Bar, is an objection which, if allowed to prevail, would be equally strong against the respondent's right to recover damages in any form of action and against any person. It is objected that the respondent has not sustained any damage by the alleged transfer of the stock for that the power of transferring stock is a power given by statute and the exercise of such power is expressly restrained by the statute [Lotteries (Ireland) Act, 1780] to one mode only, viz., "by entries in the transfer-books kept at the bank," which entry, it is enacted, "shall be signed by the parties making such transfers, or their attorneys, authorised by writing under their hand and seal," and that no other method of transferring stock shall be good. [The transfer of shares is now regulated by s. 73 et seq., of the Companies Act, 1948.] Inasmuch, therefore, as the supposed transfer of the stock in question has not been exercised by that mode, the entry in the transfer-book kept at the bank not having been signed by the party making the transfer, nor by any attorney authorised by writing under her hand and seal, it is contended that it is altogether inoperative; that the stock is not taken out of Mrs. Keating's name, but still remains hers as fully as if no transfer whatever had been made thereof; and *Davis* v. *Bank of England* (1) is relied upon as an authority directly in point in support of that proposition. But we hold it to be altogether unnecessary, on the present occasion, to discuss the proposition thus advanced or the authority of the case cited in support of it, for, although the proposition may be true to its full extent and the authority of the case cited in support of it may be free from all doubt or difficulty, still, under the circumstances stated in the special verdict, we are of opinion that the respondent is at liberty to abandon and give up all claim to her former stock so standing in her name and to sue for the money produced by the sale of such stock as for her own money which, we think, has been sufficiently traced into the hands of the appellants.

It is unnecessary to enlarge upon the extreme difficulty, or, more properly, impracticability, under which Mrs. Keating would be placed if, as matters now remain, she should elect either to receive the dividends or to sell her stock. It is sufficient to observe that the special verdict finds that

> "when stock is sold, an entry of the transfer is made in the bank books, and the name of the purchaser substituted for that of the seller. The dividend warrants are thenceforth made out in the purchaser's name, who receives the dividend, and the seller's name is no further noticed."

It is obvious that a transfer under a forged power, or by an impostor, has all the appearance, and, unless impeached by the genuine stockholder to the extent to which the same can be impeached, the same consequences, as a genuine transfer. The transferee's name is entered in the bank books as the stockholder; the dividend warrants are made out in his name, and he, as holder of the warrant, has the right to insist upon the payment of the dividends. In this particular case, the special verdict finds:

"It is not possible to distinguish the accounts, to the credit of which the [respondent's] stock, so sold under the power of attorney, now stands."

If the respondent, therefore, were to apply to receive payment of the dividends, or to sell the stock, she would be met with a difficulty, insuperable in fact. Although the stock may, in contemplation of law, still be vested in her, it is certain that she could not either receive the dividend or sell the stock until she had first compelled the bank to purchase de novo in her name an equal quantity of the same stock.

Is she compelled to adopt this circuitous process, or is she at liberty to abandon all further concern with her stock, and to consider the price which was paid by the purchaser for that which was her stock, to be her money, and to follow it into the hands of the appellants? This, as before stated, appears to us to be the question reserved for our consideration, and upon this question we think her at liberty to give up the pursuit of the stock itself and to have recourse to the price received for it unless any of the objections which have been urged at your Lordships' Bar should be allowed to be available under the particular circumstances of this case.

The general proposition that where a party who has been injured has different remedies against different persons, he may elect which of them he will pursue is not called in question. If the goods of A. are wrongfully taken and sold, it is not disputed that the owner may bring trover against the wrongdoer or may elect to consider him as his agent, may adopt the sale, and maintain an action for the price, but it is objected that that general rule will not apply to the present case on various grounds of objection which have been advanced on the part of the appellants. Those objections appear to resolve themselves substantially into four. First, it has been urged that the transfer in this case being an act, not voidable only, but absolutely void, it is incapable of being confirmed by any voluntary election of the party who has made it. Secondly, that at all events in this case such election is taken away upon grounds of public policy, for that, the sale of the stock having been made through the medium of a felony, to allow the maintenance of this action would, in effect, be to affirm a sale completed through a felony and would give the respondent a right of action, arising immediately out of the felony itself. Thirdly, that it does not appear, from the facts found in the special verdict, that the money produced by the sale of the stock came to the hands of the appellants under such circumstances as would constitute it money had and received by them to the use of the respondent. Lastly, that by the subsequent transactions between the respondent and the Bank of England, she has lost any right of action against the appellants if she ever possessed it.

The first objection appears scarcely to apply to the present state of facts. It is urged at the Bar that, a lease under a power being void on account of a non-compliance with the terms of the power, or a lease under the enabling statutes being void on account of the non-observance of the requisites contained in those Acts, such void lease cannot be set up or confirmed by any act of the lessor, but these instances only prove that acts done to confirm the lease are nugatory and that the estate of the lessee remains precisely the same as before such acts of confirmation. Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitu*; it is perfectly indifferent to her whether the right of the transferee to hold the stock

is strengthened or not. She is looking only to the right of recovering the purchase-money, and if, in seeking to recover that, she does not, by her election, make the right of the purchaser weaker, it can be no objection that she does not make it better. In fact, however, the interest of the purchaser of the stock is so far collaterally and incidentally strengthened that, after recovering the price for which it was sold, the respondent would effectually be stopped from seeking any remedy against, or questioning in any manner, the title of the purchaser of the stock.

As to the second objection it may be admitted, that the civil remedy is in all cases suspended by a felony, where the act complained of, which would otherwise have given a right of action to the respondent is a felonious act. Upon this ground Mrs. Keating would have lost any right of action, which she could otherwise have had against Fauntleroy for the wrongful sale of her stock without her authority by reason of the felony committed by him as the means of selling the stock. But this principle does not apply to the present case, upon two grounds. First, none of the appellants had any privity or share whatever in the felonious act. There is, therefore, no felony committed by them in which the civil right arising against them, supposing it to exist, can merge or be suspended. They are innocent third persons. Secondly, Fauntleroy, the person guilty of the forgery, had suffered the extreme penalty of the law before the action was brought, not indeed for the commission of this particular forgery, but of another of the same nature, and, the respondent having given to the bank all the means in her power for prosecuting the felon, it became impossible, without any default in her, that he should be prosecuted and punished for this felony. The case, therefore, falls within the principle laid down by, though not within the precise circumstances of, the two cases that were cited at the Bar: *Dawkes* v. *Covencigh* (2), and *Crosby* v. *Leng* (3). As to the argument, that to affirm this sale is to affirm a felony, that point may be considered to have been decided in *Stone* v. *Marsh* (4), with which decision we entirely concur. LORD TENTERDEN, in giving the judgment of the Court of King's Bench in that case, puts the question in so clear a point of view that it will be better to transcribe his words (6 B. & C. at p. 565):

> "It was contended that the maxim of ratifying a precedent unauthorised act, and taking the benefit of it, cannot apply to a void or felonious act, and that here the plaintiffs were seeking to ratify the felonious act of Fauntleroy, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendant's argument. The assertion is incorrect in fact; the plaintiffs do not seek to ratify the felonious act; they do not make that act the ground of their demand. The ground of their demand is the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, neither was the transfer, nor the receipt of the money. The felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of England to allow the transfer to be made."

We think, therefore, upon the reasons above given, that this second objection falls to the ground.

It is objected, thirdly, that the proceeds of the sale of the stock never came into the hands of the appellants so as to be money received by them to the use of the respondent. The consideration of this objection involves two questions: (i) Did the money actually come into the possession of the appellants? (ii) If it ever was in their possession, had they the means of knowledge, while it remained in their hands, that it was the money of the respondent and not the money of Fauntleroy. As to the first point, the special verdict finds expressly that Simpson, the broker, paid the sum of £6,013 2s. 6d., being the amount of the sum received from Tarbutt (deducting one half of the usual commission), by a cheque payable to Marsh & Co. into the hands of Martin & Co. to the account of Marsh & Co.,

at the precise time of such payment. Therefore, there can be no doubt but that it was as much money under their control as any other money paid in at Martin & Co.'s by any customer under ordinary circumstances. The house of Marsh & Co. might have drawn the whole of the balance into their own hands. If the same money had been paid into Martin & Co.'s as the produce of the respondent's stock, sold under a genuine power of attorney, it would unquestionably have been received by all the appellants to the use of the respondent. It would not the less be money received by the partners of the firm because (as found in the special verdict) it was entered in the account as "Cash per Fauntleroy," or because it never appeared in the house-book, or any other books of Marsh & Co., but only in the pass-book of that firm with Martin & Co., or because it never came into the yearly balancing of the house of Marsh & Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others by preventing the money from being ultimately brought to the account of the house, but as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner Fauntleroy, in the subsequent appropriation of the money, affords no answer after it has once been in their power, and that it was so appears to be stated in the special verdict.

But it is urged that the appellants had no knowledge that the money was the property of the respondent, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale, into their account at Martin & Co.'s. It must be admitted that they were so far imposed upon by the acts of their partner as to be ignorant that the sum above mentioned was the produce of the respondent's stock, but it is equally clear that the appellants might have discovered the payment of the money and the source from which it was derived if they had used the ordinary diligence of men of business. If they had not the actual knowledge, they had all the means of knowledge, and there is no principle of law upon which they can succeed in protecting themselves from responsibility in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires.

As to the last ground of objection to the respondent's right to recover, it is argued that by the agreement into which she entered with the bank and under which she has received from the time of the sale the dividends which would have become due she has disaffirmed the sale with a full knowledge of all the facts, and, therefore, cannot now be allowed to set it up as a valid sale. But it appears to us that it is sufficient to look at the terms of the agreement to give an answer to the objection. The agreement expressly reserves to Mrs. Keating the right to have recourse, either to the bank or the appellants for her remedy, as she may be advised. It, therefore, leaves the question whether the sale is affirmed or not completely in uncertainty until she makes her election to have recourse to the one or the other, and the agreement is one which causes no disadvantage to the rights of the appellants who, if liable, can only be liable once to the payment of the money actually received whether the bank have in the meantime advanced the dividends or not.

On the whole, therefore, we beg to state our opinion to be that, upon the question which has been proposed to us by your Lordships, A. has the right to recover the produce of her stock against the surviving partners of the firm, who received it under the circumstances stated in the special verdict in an action for money had and received to her use. TINDAL, C.J., desires to have it expressly understood that he fully concurs in the opinion now delivered.

Accordingly, on June 25, 1834, on the motion of the LORD CHANCELLOR, the House affirmed the judgment of the court below.

Appeal dismissed.

MILLER *v.* TRAVERS AND OTHERS

[Lord Chancellor's Court (Lord Brougham, L.C., Tindal, C.J., and Lord Lyndhurst, C.B.), January 28, 1832]

[Reported 8 Bing. 244; 1 Moo. & S. 342; 1 L.J.Ch. 157; 131 E.R. 395]

Will—Evidence—Parol evidence to resolve uncertainty—Uncertainty as to subject-matter of devise or as to devisee.

An uncertainty which arises from applying the description contained in a will either to the thing devised or to the person of the devisee may be resolved by parol evidence, but a new subject-matter of devise or a new devisee, where the will is entirely silent on either, cannot be imported into the will by parol evidence. Extrinsic evidence cannot be given to introduce into a will an intention which is not apparent on the face of the will. That is making the will speak on a subject on which it is altogether silent, and would be inconsistent with the rule which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will and that words he has not used cannot be added.

Will—Evidence—Extrinsic evidence to prove intention of testator—Draft of will.

The draft of a will, as a general rule, cannot be given in evidence to prove the intention of the testator.

Notes. Applied: *Richardson* v. *Watson* (1833), 4 B. & Ad. 787; *Doe d. Hiscocks* v. *Hiscocks*, [1835–42] All E.R. Rep. 380; *Dorset* v. *Hawarden* (1842), 1 Notes of Cases, 412. Considered: *Lindgren* v. *Lindgren* (1846), 9 Beav. 358; *Doe d. Shallcross* v. *Palmer*, [1843–60] All E.R. Rep. 139. Approved: *Mostyn* v. *Mostyn* (1854), 5 H.L. Cas. 155. Applied: *Re Clergy Society* (1856), 2 K. & J. 615. Considered: *Grant* v. *Grant*, [1861–73] All E.R. Rep. 308. Applied: *Charter* v. *Charter* (1871), L.R. 2 P. & D. 315. Referred to: *Doe d. Preedy* v. *Holtom* (1835), 4 Ad. & El. 76; *R.* v. *Wickham* (*Inhabitants*) (1835), 2 Ad. & El. 517; *Blundell* v. *Gladstone* (1841), 11 Sim. 467; *Hall* v. *Fisher* (1844), 1 Coll. 47; *Doe d. Hubbard* v. *Hubbard* (1850), 20 L.J.Q.B. 61; *Hart* v. *Tulk* (1852), 2 De G.M. & G. 300; *Stanley* v. *Stanley* (1862), 2 John. & H. 491; *Re Ray, Cant* v. *Johnstone*, [1916] 1 Ch. 461.

As to the construction of wills, see 39 Halsbury's Laws (3rd Edn.) 950 et seq.; and for cases see 44 Digest 530 et seq.

Cases referred to:

(1) *Counden* v. *Clerke* (1612), Hob. 29; 80 E.R. 180; sub nom. *Counden* v. *Clerk*, Moore, K.B. 860; sub nom. *Coronder* v. *Clerk*, 1 Brownl. 129; 44 Digest 871, *7276*.

(2) *Altham's Case* (1610), 8 Co. Rep. 150 b; 77 E.R. 701; 17 Digest (Repl.) 321, *1276*.

(3) *Denne d. Briddon* v. *Page* (1783), 11 East, 603, n.; 1 Bos. & P. 261, n.; 3 Doug. K.B. 294; cited 3 Term Rep. at p. 87 and p. 494; 103 E.R. 1139; 44 Digest 1132, *9798*.

(4) *Lowe* v. *Lord Huntingtower* (1824), 2 L.J.O.S.K.B. 164; 4 Russ. 532, n.; 38 E.R. 910; 44 Digest 627, *4584*.

(5) *Standen* v. *Standen* (1795), 2 Ves. 589, L.C.; affirmed (1797), 6 Bro. Parl. Cas. 193; 2 E.R. 1021, H.L.; 44 Digest 830, *6824*.

(6) *Mosley* v. *Massey* (1806), 8 East, 149; 103 E.R. 300; 44 Digest 672, *5121*.

(7) *Selwood* v. *Mildmay* (1797), 3 Ves. 306; 30 E.R. 1025; 44 Digest 637, *4703*.

(8) *Goodtitle d. Radford* v. *Southern* (1813), 1 M. & S. 299; 105 E.R. 112; 44 Digest 628, *4589*.

(9) *Day* v. *Trig* (1715), 1 P. Wms. 286; 2 Eq. Cas. Abr. 323; 24 E.R. 391; 44 Digest 717, *5667*.

(10) *Hunt* v. *Hort* (1791), 3 Bro. C.C. 311; 29 E.R. 554, L.C.; 44 Digest 639, *4720*.

(11) *Chichester* v. *Oxendon* (1811), 4 Taunt. 176; affirmed sub nom. *Doe d. Oxenden* v. *Chichester* (1816), 4 Dow, 65; 3 E.R. 1091, H.L.; 44 Digest 630, *4612*.

(12) *Newburgh* v. *Newburgh* (1825), Sugden's Law of Property, 367, H.L.; 44 Digest 625, *4555*.

Appeal by a defendant from an order of SHADWELL, V.-C., on a bill filed by the plaintiff to establish a will.

The plaintiff, John Riggs Miller, filed his bill against the defendants for the purpose of establishing the will of Sir John Edward Riggs Miller, Bart., and for carrying into execution the trusts thereof. One of the defendants, Elizabeth Wheatley, was the sister and heiress-at-law of the testator. On the hearing of the cause after the answers of the defendants and the answer of the defendant, Elizabeth Wheatley, had been put in, and witnesses examined, His Honour ordered:

> "That the parties should proceed to a trial at law on the following issue; viz., whether Sir John Edward Riggs Miller, Bart., did devise his estates in the county of Clare, and in the county of Limerick, and in the city and county of the city of Limerick, or either and which of them, to the trustees mentioned in his will, and their heirs."

In this issue the plaintiff in the cause was to be the plaintiff, and the heiress-at-law and her husband defendants. Against this part of the decree the defendant, Elizabeth Wheatley, appealed, and prayed a re-hearing of the cause so far as respected that part. On the hearing of appeal LORD BROUGHAM, L.C., requested the assistance of TINDAL, C.J., of the Common Pleas, and LORD LYNDHURST, C.B., of the Court of Exchequer, in view of the fact that the propriety of directing an issue, at least as to the devise of the estates in the county of Clare, which was the main point in contention between these parties, would depend upon the nature of the evidence to be brought forward by the plaintiff, upon whom the affirmative in such issue would rest.

Sir Charles Wetherell, *Pepys*, *Skirrow* and *Griffith Richards* for the appellant.

Sir William Horne, *Sir Edward Sugden*, *Knight*, *Whitmarsh* and *Jemmett* for the respondents.

TINDAL, C.J., delivered the opinion of himself and **LORD LYNDHURST, C.B.**—The main question between the parties, which has formed the principal subject of argument before us, is whether parol evidence is admissible to show the testator's intention that his real estates in the county of Clare should pass by his will. There is a subordinate question as to the due execution of one sheet of the will to which we shall afterwards advert, and on that question an issue of a different and more limited form than that which has been at present directed, may perhaps properly be granted if the plaintiff thinks fit to insist upon it, but the great contention between the parties is upon the question above proposed as to the admissibility of parol evidence with respect to the estates in Clare.

This question arises upon facts, either admitted or proved in the cause, which are few and simple. The testator by his will, duly executed, devised "all his freehold and real estates whatsoever, situate in the county of Limerick, and in the city of Limerick," to trustees therein named and their heirs. At the time of making his will he had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick, and considerable real estates situate in the county of Clare. The real estate in the city of Limerick is admitted to have passed under the devise, but the plaintiff contends that he is at liberty to shew by parol evidence that the testator intended his estates in Clare also to pass under the same devise.

The general character of the parol evidence which the plaintiff contends he is at liberty to produce in order to establish this intention in the devisor, is, first, that the estate in the city of Limerick is so small and so disproportioned to the nature of the charges laid upon it and the trusts which are declared as to make it manifest there must have been some mistake, and in order to show what that mistake was, the plaintiff proposes to prove that in the copy of the will which had been submitted to the testator for his inspection and had been approved and returned by him, the devise in question stood thus: "All my freehold and real estates whatsoever situate in the counties of Clare, Limerick, and in the city of Limerick;" that the testator directed some alterations to be made in other parts of his will, and that the same copy of the will, accompanied with a statement of the proposed alterations, was sent by the testator's attorney to his conveyancer in order that such alterations might be reduced into proper form; and that upon such occasion the conveyancer, besides making the alterations directed, did by mistake and without any authority strike out the words "counties of Clare," and substitute the words "county of" in lieu thereof so as to leave the devise in question in the same precise form as it now stands in the executed will. The plaintiff further proposes to prove, that a fair copy of the will so altered was sent to the testator, who after having kept it by him for some time, executed the same in the manner required by law, without adverting to the alteration above pointed out.

Without entering more minutely into the detail of the evidence, it may be taken for the purpose of the argument that, if parole evidence was admissible by law, the evidence tendered in this case would be sufficient to establish beyond contradiction the intention of the testator to have been to include his estates in Clare in the devise to the trustees. Upon the fullest consideration, however, it appears to LORD LYNDHURST, C.B., and myself that, admitting it may be shown from the description of the property in the city of Limerick, that some mistake may have arisen, yet, still, as the devise in question has a certain operation and effect, namely, the effect of passing the estate in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare cannot be collected from the will itself, nor without altering or adding to the words used in the will, such intention cannot be supplied by the evidence proposed to be given.

It may be admitted that in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will. This appears to us to be the extent of the maxim "Ambiguitas verborum latens, verificatione suppletur."

The cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is where the description of the thing devised or of the devisee is clear upon the face of the will, but upon the death of the testator it is found that there are more than one estate or subject-matter of devise or more than one person whose description follows out and fills the words used in the will, as where the testator devises his manor of Dale and at his death it is found that he has two manors of that name, South Dale and North Dale: or where a man devises to his son John and he has two sons of that name. In each of these cases parol evidence is admissible to show which manor was intended to pass and which son was intended to take: BACON'S MAXIMS, rule 23; *Counden* v. *Clerke* (1), Hob. at p. 32; *Altham's Case* (2), 8 Co. Rep. at p. 155. The other class of cases is that in which the description contained in the will of the thing intended to be devised or of the person who is intended to take is true in part but not true in every particular. As where an estate is devised called A., and is described as in the occupation of B., and it is found, that though there

is an estate called A., yet the whole is not in B.'s occupation, or where an estate is devised to a person whose surname or Christian name is mistaken, or whose description is imperfect or inaccurate, in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence.

The case now before the court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed, any, description whatever of the estates in Clare. The present case is rather one in which the plaintiff does not endeavour to apply the description contained in the will to the estates in Clare, but in order to make out such intention is compelled to introduce new words and a new description into the body of the will itself. The testator devises all his estates in the county of Limerick and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found, upon inquiry, that he has property in the city of Limerick which answers to the description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, no difficulty in the application of the words of his will to the state of the property as it really exists. The natural and necessary construction of the will is that it passes the estate which he has in the city of Limerick, but passes no estate in the county of Limerick where the testator had no estate to answer that description.

The plaintiff, however, contends, that he has a right to prove, that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in place of or in addition to that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator as it is to be collected from the will itself to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty arising from a defective or mistaken description: it is making the will speak upon a subject on which it is altogether silent, and is the same in effect, as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.

The first objection to the introduction of such evidence is that it is inconsistent with the rule which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added: *Doe d. Briddon* v. *Page* (3) (3 Term Rep. at p. 87). But it is an objection no less strong that the only mode of proving the alleged intention of the testator is by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator, and, therefore, open for his inspection, which copy was afterwards executed by him with all the formalities required by the Statute of Frauds, the presumption is that he must have seen and approved of the alteration rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to introduce new matter of devise, or a new devise, why not to strike out such as are contained in the executed will? The effect of such evidence in either case would be that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death, all the guards

intended to be introduced by the Statute of Frauds would be entirely destroyed, and the statute itself virtually repealed.

On examination of the decided cases on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to—that an uncertainty which arises from applying the description contained in the will either to the thing devised or to the person of the devisee may be helped by parol evidence, but that a new subject-matter of devise or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself. Thus, in *Lowe* v. *Lord Huntingtower* (4), in which it was held that evidence of collateral circumstances was admissible, as of the ages of the several devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will. Such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of his property and family. The evidence is produced to prove facts, which, according to the language of LORD COKE in *Altham's Case* (2) (8 Co. Rep. at p. 155), "stand well with the words of the will." *Standen* v. *Standen* (5) decides no more, than that a devise of all the residue of the testator's real estate, where he has no real estate at all, but has a power of appointment over real estate, shall pass such estate over which he has the power, though the power is not referred to. But, this proceeds upon the principle that the will would be altogether inoperative, unless it is taken that, by the words used in the will, the testator meant to refer to the power of appointment. *Mosley* v. *Massey* (6) does not appear to bear upon the question now under consideration. After the parol evidence had established that the local description of the two estates mentioned in the will had been transposed by mistake, the county of Radnor having been applied to the estate in Monmouth, and vice versa; the court held that it was sufficiently to be collected from the words of the will itself which estate the testator meant to give to the one devisee and which to the other, independent of their local description. All, therefore, that was done was to reject the local description as unnecessary and not to import any new description into the will.

In *Selwood* v. *Mildmay* (7) the testator devised to his wife part of his stock in the 4 per cent. annuities of the Bank of England, and it was shown by parol evidence that at the time he made his will he had no stock in the 4 per cent. annuities, but that he had had some, which he had sold out, and had invested the produce in long annuities. It was held, that the bequest was in substance a bequest of stock, using the words as a denomination, not as the identical corpus of the stock, and as none could be found to answer the description but the long annuities, it was held that such stock should pass rather than the will be altogether inoperative. This case is certainly a very strong one, but the decision appears to us to range itself under the head that "falsa demonstratio non nocet," where enough appears upon the will itself to show the intention after the false description is rejected.

Goodtitle d. Radford v. *Southern* (8) falls more closely within the principle last referred to. A devise "of all that my farm called Trogues Farm, now in the occupation of A. C." Upon looking out for the farm devised, it is found that part of the lands which constituted Trogues Farm are in the occupation of another person. It was held that the thing devised was sufficiently ascertained by the devise of "Trogues Farm," and that the inaccurate part of the devise might be rejected as surplusage. *Day* v. *Trig* (9) ranges itself precisely in the same class. A devise of all "the testator's freehold houses in Aldersgate Street," when in fact he had no freehold, but had leasehold houses there. The devise was held in substance and effect to be a devise of his houses there, and that, as there were no freehold houses there to satisfy the description, the word "freehold" should rather

be rejected than the will be totally void. But neither of these cases afford any authority in favour of the plaintiff. They decide only that where there is a sufficient description in the will to ascertain the thing devised, a part of the description which is inaccurate may be rejected, not that anything may be added to the will, thus following the rule laid down by ANDERSON, C.J., in GODBOLT'S REPORT, 131:

> "An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator."

On the contrary, the cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established that where a complete blank is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator: *Hunt* v. *Hort* (10), and many other cases. The principle must be precisely the same whether it is the person of the devisee or the estate or thing devised which is left altogether in blank. It requires a very nice discrimination to distinguish between the case of a will where the description of the estate is left altogether in blank and the present case, where there is a total omission of the estates in Clare.

In *Doe d. Oxenden* v. *Chichester* (11) it was held by the House of Lords, in affirmance of the judgment below, that in the case of a devise of "my estate of Ashton," no parol evidence was admissible to show that the testator intended to pass, not only his lands in Ashton, but also his lands in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate. The Chief Justice of the Common Pleas [GIBBS, C.J.], in giving the opinion of all the judges, says (4 Dow, at p. 94):

> "If a testator should devise his lands, of or in Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of those counties."

LORD ELDON, L.C. (ibid. at p. 90), had stated in substance the same opinion. The case so put by LORD ELDON and the Chief Justice is the very case now under discussion.

Newburgh v. *Newburgh* (12), decided in the House of Lords on June 16, 1825, appears to be in point with the present case. In that case the appellant contended that the omission of the word "Gloucester" in the will of Lord Newburgh proceeded upon a mere mistake and was contrary to the intention of the testator at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself as from other extrinsic evidence, that the testator intended to devise to her an estate for life as well in the estates in Gloucester, which was not inserted in the will, as in the county of Sussex, which was mentioned therein. The question

> "whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word 'Gloucester' had been inserted in the will"

was submitted to the judges, and ABBOTT, C.J., declared it to be the unanimous opinion of those who had heard the argument, that it could not.

As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to as upon reason and principle we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue, and that it would be useless to grant the issue in the terms directed by the vice-chancellor.

LORD BROUGHAM, L.C., expressed his concurrence in the opinion delivered by TINDAL, C.J., and, after adverting to some of the cases cited, said: The result will be that the issue cannot be granted as ordered by his honour the vice-chancellor, but upon the other point, whether the sheet marked No. 20 formed a part of the will at the time of the execution, the parties, if they think it worth their while, may have an issue.

Order of vice-chancellor reversed.

R. *v.* PATTESON

[Court of King's Bench (Park, Littledale and Taunton, JJ.), November 26, 1832]

[Reported 4 B. & Ad. 9; 1 Nev. & M.K.B. 612; 1 Nev. & M.M.C. 488; 2 L.J.K.B. 33; 110 E.R. 358]

Public Authority Officer—Magistrate—Avoidance of office—Acceptance of incompatible office—Alderman and magistrate appointed treasurer of local authority.

The acceptance of a public office which is incompatible with another public office already held does not in all circumstances absolutely avoid the former office. Such an acceptance, though it may be a ground for the removal of the officer from the former office, does not operate as an absolute avoidance where the officer cannot divest himself of the former office by his own act, but requires the concurrence of the authority employing him in the former office to his resignation or removal, or the authority which can accept the surrender of, or remove the officer from, the old appointment concurs in the new appointment.

Accordingly, where the defendant, an alderman and a justice of the peace, was appointed treasurer of the local authority, it being admitted that the offices of treasurer and justice of the peace were incompatible,

Held: the defendant could not get rid of the office of justice of the peace without the consent of the Crown or of the office of alderman without the consent of the local authority; therefore, while his acceptance of the office of treasurer might be ground for his removal from the former offices, it did not ipso facto absolutely avoid them.

Per Curiam: In laying this down the court does not mean in the slightest degree to trench on the rule that where two offices are incompatible they cannot be held together.

Notes. Considered: *Arkwright* v. *Cantrell* (1837), 7 Ad. & El. 565. Explained: *R.* v. *Cheshire Justices* (1840), 4 J.P. 122. Considered: *Worth* v. *Newton* (1854), 10 Exch. 247. Referred to: *Davis* v. *Pembrokeshire Justices* (1881), 7 Q.B.D. 513; *R.* v. *Douglas* (1897), 46 W.R. 377.

As to appointment of a local government officer and a magistrate to an incompatible office, see 9 Halsbury's Laws (3rd Edn.) 38, and ibid., vol. 25, p. 126. For cases see 13 Digest (Repl.) 230, 231, and 33 Digest (Repl.) 151 et seq.

Cases referred to:

(1) *Milward* v. *Thatcher* (1787), 2 Term Rep. 81; 100 E.R. 45; 13 Digest (Repl.) 231, *539*.

(2) *R.* v. *Tizzard* (1829), 9 B. & C. 418; 4 Man. & Ry.K.B. 400; 2 Man. & Ry.M.C. 335; 7 L.J.O.S.K.B. 275; 109 E.R. 155; 33 Digest (Repl.) 81, *502*.

(3) *R.* v. *Pateman* (1788), 2 Term Rep. 777; 100 E.R. 419; 13 Digest (Repl.) 231, *538*.

(4) *Audley's Case* (1625), Noy, 78; 74 E.R. 1045; sub nom. *Audly's Case*, Lat. 123; sub nom. *Audeley* v. *Joy*, Poph. 176; 13 Digest (Repl.) 232, *564*.

(5) *Middleton's Case* (1574), Dyer, 332 b.

(6) *R.* v. *Gayer* (1757), 1 Burr. 245.

(7) *Gage* v. *Peacock* (1605), Noy, 12; 74 E.R. 983; 31 Digest (Repl.) 583, *7032*.

(8) *R. and Verrier* v. *Sandwich Corpn.* (1666), 2 Keb. 92; 84 E.R. 58; sub nom. *Verrior* v. *Sandwitch* (*Mayor*), 1 Sid. 305; 33 Digest (Repl.) 86, *538*.

(9) *R.* v. *Trelawney* (1765), 3 Burr. 1615; 97 E.R. 1010; 13 Digest (Repl.) 231, *536*.

(10) *R.* v. *Hughes* (1826), 5 B. & C. 886; 8 Dow. & Ry.K.B. 708; 4 Dow. & Ry.M.C. 169; 5 L.J.O.S.M.C. 20; 108 E.R. 329; 13 Digest (Repl.) 231, *540*.

(11) *Dyer's Case* (1558), Dyer, 158 b.

(12) *R.* v. *Blage* (1561), Dyer, 197 b.

(13) *Johnstone* v. *Margetson* (1789), 1 Hy. Bl. 261; 126 E.R. 153; 37 Digest (Repl.) 576, *1539*.
(14) *Sir Charles Howard's Case* (1633), W. Jo. 293.
(15) *R.* v. *Tidderley* (1660), 1 Sid. 14; 82 E.R. 941; 13 Digest (Repl.) 217, *381*.
(16) *Taylor's Case* (1617), Poph. 133; sub nom. *Hazard's Case*, 2 Roll. Rep. 11; 81 E.R. 625.
(17) *Medlicott's Case* (1571), cited in Poph. at p. 134; 2 Roll. Rep. 11.
(18) *R.* v. *Rippon Corpn.* (1700), 1 Ld. Raym. 563; 2 Salk. 433; 1 Com. 86; 91 E.R. 1276; 13 Digest (Repl.) 231, *542*.
(19) *R.* v. *Lane* (1709), 2 Ld. Raym. 1304; 11 Mod. Rep. 270; Fortes. Rep. 275; 92 E.R. 354; 16 Digest (Repl.) 383, *1691*.

Also referred to in argument:

R. v. *Blissel* (1779), 1 Doug. 398, note 22.
Commendam Case, *Colt and Glover* v. *Bishop of Coventry and Lichfield* (1617), Hob. 140; Moore, K.B. 898; 80 E.R. 290; sub nom. *Colt* v. *Glover*, 1 Roll. Rep. 451; sub nom. *Colt's Case*, Jenk. 300, Ex.Ch.; 19 Digest (Repl.) 450, *2682*.
Boston (Town Clerk) Case (prior to 1624), cited in Noy, 78; Poph. 176; 74 E.R. 1045; 13 Digest (Repl.) 232, *561*.
R. v. *Heaven* (1788), 2 Term Rep. 772; 100 E.R. 416; 16 Digest (Repl.) 402, *1966*.

Information in the nature of quo warranto.

The first count of the information charged the defendant with usurping the office of alderman of the city of Norwich; the second, the office of justice of peace within the city; and the third, the offices of alderman and justice of peace. The plea to the first count set out a charter of Charles II whereby he granted "that all the aldermen of the city who had borne the office of mayoralty, so long as they should continue in their public offices, should be justices of peace of the same city," and ordained the mode of electing aldermen. The plea averred that the defendant was, in December, 1781, duly elected alderman of the city, and still was an alderman thereof. To the second count the defendant pleaded the like charter, his election as alderman, and said that in June, 1788, he was duly elected and was mayor for one year next following and thereby became and was made a justice of peace. There was a similar plea to the third count. The replication to the first plea admitted the grant by Charles II, that in 1781 the defendant was elected alderman, and that in 1788 he became mayor and justice of the peace, but it averred that in August, 1827, the defendant, being such alderman and justice, was appointed to be treasurer of the county of the city of Norwich, and then and there took upon himself the office of treasurer, which offices of alderman and treasurer were wholly incompatible with each other, whereby the defendant vacated the office of, and ceased to be, an alderman of the city. To the second plea it was replied that the offices of justice of the peace and treasurer were incompatible. To the third plea it was alleged that the offices of alderman, justice of the peace and treasurer were incompatible. The Crown filed a demurrer, stating for cause that the defendant had attempted to put in issue matter altogether immaterial and not properly issuable, and had not denied, confessed, or avoided the substantial matter in the replication. On this demurrer the defendant joined issue.

Campbell, in support of the demurrer.—The replication is good. It shows an appointment of the defendant to, and acceptance by him, of incompatible offices. It is clear that the offices of alderman and county treasurer are incompatible, for, by the County Rates Act, 1738, s. 6 [repealed], the treasurer is appointed by the justices of the peace, and by s. 7 [repealed] is accountable to them for the moneys he receives, and by s. 11 [repealed] he is to continue in office and be removable at their pleasure; and by the County Rates Act, 1815, s. 17 [repealed], the justices are to fix his salary. The two offices being incompatible, the acceptance of the

second operates as an avoidance of the first: *Milward* v. *Thatcher* (1), *R.* v. *Tizzard* (2), and *R.* v. *Pateman* (3). This rule is not confined to cases where both the offices are corporate. Wherever the offices are of a public nature, and incompatible, and the public are interested in a due performance of the duties, the acceptance of the second office operates as an avoidance of the first.

Coleridge resisted the demurrer.

Cur. adv. vult.

Nov. 26, 1832. **PARK, J.,** delivered the following judgment of the court. - Two questions arose on these pleadings, and were argued at the Bar. The first was whether the rejoinder was sufficient; the second, whether the appointment to and acceptance of the office of treasurer of the county of the city did or did not vacate the offices of alderman and justice of the peace, or either of them.

HIS LORDSHIP dealt with the first question, which was one of pleading in the old form and does not now call for report, and continued: The second question is one of more difficulty and importance. It was admitted on the argument that the offices of treasurer and of justice of the peace are incompatible: it is also admitted on the pleadings that the defendant was appointed to and accepted the office of county treasurer. The question is: What is the effect of that appointment and acceptance? Without acceptance by the person appointed, it is clear that the office of justice of the peace would not be avoided: NOY, 78 [*Audley's Case* (4)]; DYER, 332 b, note in margin [*Middleton's Case* (5)]. After acceptance, is that office become absolutely void, so that the party may be ousted by a proceeding in quo warranto? If we were to hold that the office of justice of the peace is absolutely void in this case, it would be difficult not to come to the same conclusion in every case in which a justice of the peace accepted an office within his district accountable before justices or at sessions—that, for instance, of overseer of the poor, or churchwarden, or surveyor of the highways, and it would be of mischievous consequence to the interests of the public if it were to be decided that a magistrate could not discharge the important duties of those subordinate situations without losing entirely and for ever his superior office.

This very question how far the office of justice of the peace and the office of overseer were compatible, came before the court in *R.* v. *Gayer* (6). The court gave no judicial opinion on it, but from the form of the proceeding, which was an application to quash an order of sessions discharging an order of two justices appointing the defendant, who was an acting justice of the peace for the county, to be an overseer of the poor, it seems to have been considered both by the Bar and by the Bench that, if the two offices were incompatible, the consequence would be that the party should be discharged from that of overseer as having been disqualified or exempted and not from that of justice of the peace as being vacated by the appointment to be overseer. Again, it would be an anomaly in the law, if a public officer who could not directly resign, or be amoved [removed] without the concurrence or privity of a superior authority, should be able to accomplish the same object indirectly by an acceptance of an incompatible office. A sheriff, for instance, who is indictable for not accepting and exercising his office, might relieve himself without the concurrence of the Crown by being elected to the office of coroner. Other instances of the same kind might be put.

These considerations lead us to doubt whether the general proposition can be supported that under all circumstances the acceptance of an incompatible office, by whomsoever the appointment to it is made, absolutely avoids a former office. On reference to the authorities, we think that this proposition is not made out, but that it must be limited and qualified, and that such acceptance (though it may be ground of amotion) does not operate as an absolute avoidance in those cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment.

In the earlier textbooks and authorities, the ground upon which the acceptance of an incompatible office avoids another is not distinctly explained. In the cases, however, of *Gaye* v. *Peacock* (7) and *R. and Verier* v. *Sandwich Corpn.* (8), it appears to have been argued on the ground of an implied surrender, and in some more modern cases, where the first office is clearly avoided, the reason expressly stated is that it operates as an implied surrender of the former office or an amotion from it. In *R.* v. *Trelawney* (9) LORD MANSFIELD puts it on the former ground, and that opinion is adopted by BULLER, J., in *Milward* v. *Thatcher* (1). LORD KENYON, in *R.* v. *Pateman* (3), puts it on the latter: see also the opinion of LITTLEDALE, J., in *R.* v. *Hughes* (10). If this view of the subject be correct, it seems to follow that the acceptance of the second office will not absolutely avoid the first unless it be made by, or with the privity of, that authority which has the power to accept the surrender of the first or to amove from it.

Upon reference to the authorities it will be found that in most, if not in all cases where the office has been held to be absolutely void, a surrender to and acceptance by the same persons who appointed to the second office, or an amotion by them, would be good. A forester by patent for life or warden of a forest made justice in eyre of the same forest pro hac vice: 4 Co. INST. 310; a justice of the Common Pleas made justice of the King's Bench: *Dyer's Case* (11); a remembrancer of the Exchequer for life made a baron of the Exchequer: *R.* v. *Blage* (12); a flag officer appointed to another command: *Johnstone* v. *Margetson* (13), are all instances in which both appointments are made by the Crown. The case of a town-clerk made mayor: *Verrior* v. *Mayor of Sandwitch* (8); a jurat made town-clerk: *Milward* v. *Thatcher* (1); a burgess made alderman: *R.* v. *Hughes* (10), all appear to be cases of appointments by the corporation at large. In *R.* v. *Tizzard* (2) it does not appear by the pleadings in the case whether the mayor, alderman, and bailiffs who appointed to the office of town-clerk had or had not the power of accepting the resignation of that of alderman, and, as this objection was not stated, we do not consider the case as forming an exception to the position now laid down. The cases of a forester appointed by the Crown and elected verderer by the freeholders, *Sir Charles Howard's Case* (14), a coroner made a verderer, COMYNS'S DIGEST, Officer, G. 4, only show that the acceptance of the new appointment is a ground of discharge from the old one by the Crown, and that this is so further appears from the argument of Noy, who said (W. Jo. at p. 295):

> "that he had seen precedents that divers offices had been seized because one had so many, quod eis intendere nequit."

In *Verrior* v. *Mayor of Sandwitch* (8) (1 Sid. 305), where it is said that the Chief Justice cannot be prothonotary in his own court, it is not said that by accepting it the office of Chief Justice would be void.

Upon principle, not conflicting with any of the authorities, it seems that an officer cannot avoid his office by accepting another unless his office be such as he could determine by his own act simply, or unless that authority concurs in the new appointment which could accept the surrender of or amove from the old one.

This defendant is an alderman, and, by virtue of that office, a justice. The office of alderman he could only surrender to the corporation at large, or by charter, prescription, or byelaw, to a select body. That the assent of the corporation to the resignation of an office is necessary appears from the following authorities: In 2 ROLLE'S ABRIDGMENT, 456 [translated 19 VINER'S ABRIDGMENT, 151, pl. 3], it is said:

> "An alderman by the assent of the corporation can resign and relinquish his office to the corporation, for there is no reason why he should be bound to execute and continue in his office for all his life, against his will, and the corporation may take such surrender of right without any power given by the charter to take it."

In *R.* v. *Tidderley* (15) it is laid down that every corporation, as a corporation, has power to take a resignation. In *Taylor's Case* (16) the question was whether an alderman might surrender or not. Coventry, solicitor, said he could not, and cited *Medlicott's Case* (17), where the opinion of the court was that he could not; but, per DODDERIDGE, J., "perhaps they would not accept his surrender." In COMYNS's DIGEST, tit. Franchises, F. 30, it is said, every member or officer of a corporation may resign his place or office. Nothing is mentioned of acceptance, but as it is followed by these words, "and a corporation has power to take such resignation," it seems to be implied that the corporation must accept it in order to render it valid. *R.* v. *Ripon Corpn.* (18), and *R.* v. *Lane* (19), are authorities to the same effect.

If, then, the assent of the corporation at large or a select body be required to make a resignation valid and complete, the defendant could not in this case have effectually got rid of his offices of justice and alderman merely by his own act and the adoption of it by the other justices and aldermen in sessions assembled. If so, there can be no implied surrender of those offices by acceptance of an incompatible appointment from them, assembled and acting in the same character. The offices of justice and alderman, therefore, did not become absolutely void by that acceptance.

It must not, however, be supposed, that in laying this down in the present instance, the court mean in the slightest degree to trench upon the rule that where two offices are incompatible they cannot be held together. This is a rule founded on the plainest principles of public policy, which has obtained from very early times.

It is not, perhaps, necessary for the court to decide more than that the circumstance of the defendant being appointed to and accepting the office of treasurer did not vacate that of alderman and justice. But, as it may be objected that, if so, the two offices may yet be held together, it may be as well to add that the acceptance of the treasurership may, perhaps, be the ground of amotion by the corporate body, and, in addition, that it seems to us that the defendant was not a person capable, under the County Rates Act, 1738, s. 6 [repealed], as long as he was an alderman and a justice, of being nominated and appointed treasurer. Though there be no direct prohibition in the statute of such an appointment, it is clear that it never contemplated the possibility of the justices appointing one of themselves. By s. 6 they are to appoint a person resident in the county, he first giving sufficient security, and he is to pay the money in his hands according to their orders. By s. 7 [repealed] he is to keep books of entries of the sums received and paid by him, and to deliver in accounts, upon oath if required, of such sums, and to lay before the justices at sessions proper vouchers for the same. He is, moreover, by s. 11 [repealed], to be continued in office or to be removed at their pleasure, and to be allowed such sum for his care and pains in the execution of his trust, not exceeding £20 by the year, as they in their discretions shall think fit. All these provisions show that he is intended to be a mere ministerial officer under the justices, and not to be one of their own body. Therefore, if, as we think is the case here, the justices of the county of the city of Norwich and Mr. Patteson could not, for the reasons above given, by their own acts, the justices by appointing to, and Mr. Patteson by accepting, the office of treasurer, vacate his office of alderman and justice, to which under the King's charter he was elected by the citizens duly assembled at a corporate meeting for that purpose, and the offices could not be held together, it follows as a necessary consequence that the defendant was not eligible to that office, and, if he still fill it in conjunction with his character of alderman and justice, may by some legal proceeding be amoved. This conclusion is materially strengthened by the case, before cited, of *R.* v. *Gayer* (6).

For these reasons we are of opinion that the judgment of the court must be for the defendant. This judgment must be considered as that of my brothers LITTLEDALE, J.,

TAUNTON, J., and myself. PATTESON, J., has taken no part in the consideration of the case, for private reasons. LORD TENTERDEN, C.J., I believe, entirely concurred in this judgment.*

Judgment for defendant.

GARNETT *v.* FERRAND

[COURT OF KING'S BENCH (Lord Tenterden, C.J.*, Bayley, Holroyd and Littledale, JJ.), May 28, 1827]

[Reported 6 B. & C. 611; 9 Dow. & Ry. K.B. 657; 4 Dow. & Ry. M.C. 441; 5 L.J.O.S.K.B. 221; 108 E.R. 576]

Coroner—Coroner's court—Court of record—Action against coroner—Act done in exercise of judicial functions.

A coroner's court is a court of record of which the coroner is the judge, and, therefore, no action will lie against a coroner, as a judge of record, for any act done by him in the exercise of his judicial functions.

Coroner—Inquisition—Not conclusive—Traverse by person affected.

A coroner's inquest is a preliminary enquiry which may or may not end in the accusation of an individual of a criminal offence. Nothing that is done will be conclusive upon the person to be affected by it. All is traversable.

Notes. With regard to the admission of the public to a coroner's court, under r. 14 of the Coroners Rules, 1953, an inquest must now be held in public unless the coroner considers that it, or any part of it, should be held in private in the interest of national security. In the event, however, of a person interrupting the proceedings the coroner has an inherent power to order the removal of the person creating the disturbance, and in the event of contempt committed in the face of the court the coroner has power to commit the offender and have him removed.

Distinguished: *Daubney* v. *Cooper* (1829), 5 Man. & Ry. K.B. 314. Considered: *Jewison* v. *Dyson* (1842), 9 M. & W. 540. *Ebon* v. *Neville* (1861), 10 W.R. 6; *Kemp* v. *Neville* (1861), 10 C.B.N.S. 523. Distinguished: *Pease* v. *Chaytor* (1861), 31 L.J.M.C. 1; *Willis* v. *Maclachlan* (1876), 1 Ex. D. 376. Referred to: *Cowdell* v. *Neale* (1856), 1 C.B.N.S. 332; *Tozer* v. *Child* (1857), 7 E. & B. 377; *R.* v. *Herford* (1860), 24 J.P. 628; *Thomas* v. *Churton* (1862), 2 B. & S. 475; *R.* v. *Dover Coroner* (1865), 5 New Rep. 307; *Ryalls* v. *Leader* (1866), 4 H. & C. 555; *Bird* v. *Keep*, [1918] 2 K.B. 692; *R.* v. *Divine, Ex parte Walton*, [1930] All E.R. Rep. 302.

As to the office of coroner and proceedings at inquests, see 8 HALSBURY'S LAWS (3rd Edn.) 460 *et seq.* 492 *et seq.*; and for cases see 13 DIGEST (Repl.) 142, 153-159.

Cases referred to:

(1) *Floyd* v. *Barker* (1607), 12 Co. Rep. 23; 77 E.R. 1305.

(2) *Gwinne* v. *Poole* (1692), 2 Lut. 935, 1560; 125 E.R. 522, 858; 38 Digest (Repl.) 87, *608*.

(3) *Groenvelt* v. *Burnell* (1700), Carth. 491; 1 Com. 76; Holt, K.B. 536; 1 Ld. Raym. 454; 1 Salk. 200, 396; 90 E.R. 492; sub nom. *Grenville* v. *College of Physicians*, 12 Mod. Rep. 386; 16 Digest (Repl.) 16, *89*.

(4) *Hamond* v. *Howell* (1677), 2 Mod. Rep. 218; 86 E.R. 1035; previous proceedings (1674), 1 Mod. Rep. 184; 38 Digest (Repl.) 82, *563*.

Also referred to in argument:

R. v. *Aldenham (Alderman of Rowel)* (1676), 2 Lev. 152; 83 E.R. 494; sub nom. *R. and Alderman*, 3 Keb. 604; 13 Digest (Repl.) 155, *161*.

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* LORD TENTERDEN, during the argument, stated that, on his being appointed a judge of the King's Bench, he surrendered the patent creating him a judge of the Common Pleas.

Ripley's Case (1682), T. Jo. 198; 84 E.R. 1215; sub nom. *R.* v. *Ripley*, 2 Show. 199. Skin. 45; 13 Digest (Repl.) 163, *281.*

R. v. *Parker* (1675), 2 Lev. 140; 1 Freem. K.B. 522; 3 Keb. 489; 83 E.R. 488; 13 Digest (Repl.) 155, *160.*

Anon. (1676), 1 Vent. 239, 278; 86 E.R. 160, 186; 13 Digest (Repl.) 163, *275.*

R. v. *Evett* (1827), 6 B. & C. 247; 9 Dow. & Ry. K.B. 237; 4 Dow. & Ry. M.C. 313; 5 L.J.O.S.M.C. 132; 108 E.R. 444; 13 Digest (Repl.) 157, *210.*

R. v. *Fisher* (1811), 2 Camp. 563; 15 Digest (Repl.) 841, *8040.*

R. v. *Fleet* (1818), 1 B. & Ald. 379; 106 E.R. 140; 13 Digest (Repl.) 157, *178.*

R. v. *Killinghall* (1756), 1 Burr. 17.

R. v. *Eriswell* (1790), 3 Term Rep. 707; 100 E.R. 815; 13 Digest (Repl.) 153, *133.*

Cox v. *Coleridge* (1822), 1 B. & C. 37; 2 Dow. & Ry. K.B. 86; 1 Dow. & Ry. M.C. 142; 107 E.R. 15; 14 Digest (Repl.) 225, *1876.*

Barclees Case (1658), 2 Sid. 101; 82 E.R. 1279; 13 Digest (Repl.) 142, *9.*

R. v. *Scorey* (1748), 1 Leach, 4th Edn., 43; 13 Digest (Repl.) 156, *172.*

R. v. *Hethersal* (1685), 3 Mod. Rep. 80; 87 E.R. 52; 13 Digest (Repl.) 164, *292.*

R. v. *Bickley* (1817), 3 Price, 454; 146 E.R. 319; 16 Digest (Repl.) 251, *141.*

Scott v. *Shearman* (1775), 2 Wm. Bl. 977; 96 E.R. 575; 13 Digest (Repl.) 163, *283.*

R. v. *Carlile* (1819), 3 B. & Ald. 167; 106 E.R. 624; 15 Digest (Repl.) 896, *8643.*

Demurrer to an action of trespass for assaulting the plaintiff, and turning him out of a room.

The defendant was one of the coroners for the county palatine of Lancaster, and the plaintiff alleged that when he entered a room where the defendant was about to hold an inquest the defendant requested him to leave the room and on his refusing to do so had him removed. The defendant demurred to certain replications of the plaintiff.

Follett for the defendant, supported the demurrer.

Parke for the plaintiff.

Cur. adv. vult.

May 28, 1827. **LORD TENTERDEN, C.J.**, delivered the following judgment of the court.—It does not appear that the plaintiff had any interest in the matter of the inquest which the coroner was about to take, or any information to offer which might further the objects of the inquiry. If anything of this kind existed it ought to have been shown on the part of the plaintiff and, not being shown, it must be taken not to have existed. I would not, however, be understood to intimate that, if any such matter had appeared, our judgment would have been different.

The general question arising upon this record is, only, whether a person, in the absence of such matters, can maintain an action of trespass against the coroner for causing him to be put out of the room after his refusal to depart? We are all of opinion that he cannot, and, this being our opinion on the general question, it is not necessary to notice the particular points that were suggested in the argument at the Bar. The court of the coroner is a court of record of which the coroner is the judge, and it is a general rule of very great antiquity that no action will lie against a judge of record for any matter done by him in the exercise of his judicial functions: *Floyd* v. *Barker* (1), *Gwinne* v. *Poole* (2), *Groenvelt* v. *Burwell* (3), *Hamond* v. *Howell* (4).

I shall mention the particulars of the case last cited only. Hamond and other jurymen had been fined and imprisoned by the court at the Old Bailey for acquitting of a riot certain persons whom the evidence showed to be guilty. This was certainly a very strong exercise of authority, calculated to excite, and in fact exciting, great public interest. It was determined by the Court of Common Pleas on a writ of habeas corpus that the fine and imprisonment were contrary to law, and the parties were discharged out of custody. After this, Hamond brought an action of trespass against the recorder of London, one of the judges in the commission, for this

imprisonment. The defendant, by his plea, showed the proceedings before the commissioners, and averred that the jury had pronounced an acquittal against plain evidence and the direction of the court in matter of law. The plaintiff traversed the finding against evidence, and upon these pleadings it was held that the action did not lie, because the defendant was a judge of record. This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public and for the advancement of justice, that, being free from actions, they may be free in thought and independent in judgment as all who are to administer justice ought to be. It is not to be supposed beforehand that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction. In the imperfection of human nature it is better that an individual should occasionally suffer a wrong than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter. So, also, are neglect of duty and misconduct in it. For these, I trust, there is and always will be some due course of punishment by public prosecution.

To come to the particular case now before the court. It is argued on the part of the plaintiff that the court of the coroner is a public court, and that it is and ought to be open to the entrance of all His Majesty's subjects, or at least of so many as the place will contain. It is averred, and not denied on the record, that on the occasion in question there was room for the presence of the plaintiff. The court was assembled for an inquest on the view of the body of a person then lying dead. It is obvious that such an inquiry ought, for the purposes of justice, in some cases to be conducted in secrecy. It is a preliminary inquiry which may or may not end in the accusation of a particular individual; it may be requisite that a suspected person should not in so early a stage be informed of the suspicion that may be entertained against him and of the evidence on which it is founded, lest he should elude justice by flight, tampering with witnesses, or otherwise. Another matter, as that of deodand, may be consequential to the inquiry, but nothing that is done will be conclusive upon the person to be affected by it. All is traversable.

It was admitted in the argument, that secrecy and exclusion may be proper and necessary when charge and accusation begin. It is obvious that this may begin as soon as the evidence begins. Cases also may occur in which privacy may be requisite for the sake of decency; others, in which it may be due to the family of the deceased. Many things must be disclosed to those who are to decide, the publication whereof to the world at large may be productive of mischief without any possibility of good. Who then is to decide whether privacy be necessary or proper? We answer, the coroner, and the coroner alone, and that the propriety of his decision cannot be questioned in an action.

It was properly asked in the argument for the defendant, if every man has a right to be present at such an inquest for whose presence there is room in the place where it is holden, why has he not a right to be present at every part of that place? And if every man has a right to choose his station and to decide for himself whether there be space to contain his person, it is easy to see that much disorder and confusion may often arise. Even in cases where absolute privacy may not be required, the exclusion of particular persons may be necessary or proper. Who then is to decide upon this? We again answer, the coroner, and the coroner alone, and that the reason of his decision cannot be tried in an action. It will be, in many cases, impossible that a proceeding should be conducted with due order and solemnity, and with the effect that justice demands, if the presiding officer, whether he be judge, coroner, justice, or sheriff, has not the control of the proceeding, and the power of admission or exclusion according to his own discretion. It is not to be expected that any person will act at the peril of being harassed by a

multiplicity of actions, and of having his reasons and motives weighed and tried by juries at the suit of individuals who may be dissatisfied with his conduct. There are very few who will not prefer rather to admit disorder and confusion and all the evil consequences that may follow from the indiscriminate admission of those who may choose to intrude than to place themselves in a situation of so great jeopardy. The power of exclusion is necessary to the due administration of justice. There is nothing to show that it has been abused in the present instance, nor are we aware that it has been abused in any other. For these reasons we are of opinion that the judgment should be entered for the defendant.

Judgment for defendant.

DUFFIELD AND ANOTHER *v.* ELWES AND OTHERS

[HOUSE OF LORDS (the Earl of Eldon and other Lords), April 6, 10, June 27, 1827]

[Reported 1 Bli. N.S. 497; 1 Dow. & Cl. 1; 4 E.R. 959]

Gift—Donatio mortis causa—Completion of title of donee—Personal representative of donor trustee for donee—Jurisdiction of court to compel representative to carry donor's intention into effect.

Where the act of the donor of a donatio mortis causa is complete so far as that act itself is concerned, as constituting the delivery of the subject-matter of the gift and showing the intention of the donor, while the interest of the donee is not vested by the gift, he has a right, after the death of the donor, to call on the personal representative of the donor to complete his (the donee's) title. The personal representative is to be considered to be a trustee for the donee of the property comprised in the gift. The donee is, further, entitled to call on the court to compel the personal representative to carry into effect the intention manifested by the donor.

Gift—Donatio mortis causa—Subject-matter of gift—Estate in land—Absolute estate—Conditional estate for security of money—Mortgage.

While an estate in land will not pass as a donatio mortis causa by delivery of title deeds without a conveyance, a mortgage, although constituting an interest in land, can be made the subject of such a gift. A distinction is to be drawn between an absolute estate in fee or for a term of years and a conditional estate for security of money.

Gift—Donatio mortis causa—Jurisdiction of court—Decree to make gift effectual—Gift of mortgages—Evidence of intention to make gift and of delivery to donee.

A testator, having by his will made some provision for his daughter, declared to a friend his purpose to make a further provision for her. Being on his death-bed and unable to write, he was urged by the friend to make a gift to his daughter of certain moneys secured by mortgage and bond, and he expressly assented to that proposal. In the evening of the same day, being then unable to speak, he was reminded by the friend of the transaction of the morning, and, the deeds of mortgage and bond securing the moneys being produced, he was informed that it was necessary for him to confirm the gift by a delivery of the deeds. The friend proposed to hand over the deeds to the daughter, the testator inclined his head, and the friend then handed the deeds across the bed to the daughter on the opposite side. The testator then placed the hand of the daughter upon the deeds and pressed it with his own hand for some minutes, and appeared satisfied with what he had done. The deeds in question consisted of a conveyance in fee of lands to secure £2,927 with the usual covenant for payment of the money lent and bond by way of collateral

security, and an assignment of a mortgage debt of £30,000, and of a judgment for that sum recovered on a bond with a conveyance of the land, and the usual covenant for payment of the money.

Held: this was a valid donatio mortis causa; the property in the deeds and the right to recover the money secured by them passed to the daughter by the delivery followed by the death of the testator; and the personal representatives of the testator were trustees for the daughter to make the gift effectual.

Notes. Considered: *Staniland* v. *Willott* (1852), 3 Mac. & G. 664; *Veal* v. *Veal* (1859), 27 Beav. 303; *Re Richardson, Shillito* v. *Hobson* (1885), 53 L.T. 746; *Re Dillon, Duffin* v. *Duffin*, [1886–90] All E.R. Rep. 407. Explained: *Re Beaumont, Beaumont* v. *Eyebank*, [1900–3] All E.R. Rep. 273. Considered: *Delgoffe* v. *Fader*, [1939] 3 All E.R. 682. Referred to: *Re Patterson, Mitchell* v. *Smith* (1864), 4 New Rep. 131; *Re Mead, Austin* v. *Mead* (1880), 43 L.T. 117; *Re Wasserberg, Union of London and Smiths Bank, Ltd.* v. *Wasserberg*, [1914–15] All E.R. Rep. 217; *Re Lee, Treasury Solicitor* v. *Parrott* (1918), 87 L.J.Ch. 594; *Wilkes* v. *Allington*, [1931] 2 Ch. 104; *Birch* v. *Treasury Solicitor*, [1951] 2 All E.R. 1198; *Re Lillingston, Pembery* v. *Pembery*, [1952] 2 All E.R. 184.

As to donationes mortis causa, see 18 HALSBURY'S LAWS (3rd Edn.) 400–406; and for cases see 25 DIGEST (Repl.) 593 et seq.

Cases referred to:

(1) *Gardner* v. *Parker* (1818), 3 Madd. 184; 56 E.R. 478; 25 Digest (Repl.) 597, *329*.

(2) *Snellgrove* v. *Baily* (1744), 3 Atk. 214; Ridg. temp. H. 202; 26 E.R. 924; sub nom. *Baily* v. *Snelgrove*, 2 Ves. Sen. at pp. 436, 441, L.C.; 25 Digest (Repl.) 597, *328*.

(3) *Hassel* v. *Tynte* (1756), Amb. 318.

(4) *Ward* v. *Turner* (1752), 1 Dick. 170; 2 Ves. Sen. 431; 21 E.R. 234, L.C.; 25 Digest (Repl.) 606, *404*.

(5) *Richards* v. *Syms* (1740), Barn. Ch. 90; 2 Eq. Cas. Abr. 617; 27 E.R. 567, L.C.; 35 Digest (Repl.) 685, *3596*.

(6) *Martin d. Weston* v. *Mowlin* (1760), 2 Burr. 969; 97 E.R. 658; 35 Digest (Repl.) 444, *1379*.

Also referred to in argument:

Duchess of Buccleuch v. *Hoare* (1819), 4 Madd. 467; 56 E.R. 777; 44 Digest 707, *5498*.

Hurst v. *Beach* (1821), 5 Madd. 351; 56 E.R. 929; 25 Digest (Repl.) 601, *362*.

Pawlett v. *A.-G.* (1667), Hard. 465; 145 E.R. 551; 35 Digest (Repl.) 301, *900*.

Thornborough v. *Baker* (1675), 3 Swan. 628; 2 Eq. Cas. Abr. 428; 1 Freem. Ch. 143; 1 Cas. in Ch. 283; 36 E.R. 1000; 35 Digest (Repl.) 443, *1358*.

Noy v. *Besustane* (1677), Cas. temp. Finch 305; 23 E.R. 167; sub nom. *Noy* v. *Ellis*, 2 Cas. in Ch. 220; 35 Digest (Repl.) 443, *1359*.

Ellis v. *Guavas* (1680), 2 Cas. in Ch. 50; 22 E.R. 841.

Cope v. *Cope*, 2 Salk. 449.

Howel v. *Price* (1715), 1 P. Wms. 291.

Chester v. *Chester* (1730), Fitz-G. 150; Mos. 313, 337; 3 P. Wms. 56; 94 E.R. 695; 44 Digest 658, *4974*.

King v. *King* (1735), 3 P. Wms. 358; 24 E.R. 1100; 35 Digest (Repl.) 279, 8.

Galton v. *Hancock* (1745), 2 Atk. 427; 26 E.R. 658; sub nom. *Gorton* v. *Hancock*, Ridg. temp. H. 301, 310, L.C.; 23 Digest (Repl.) 528, *5223*.

Earl of Tankerville v. *Fawcett* (1786), 2 Bro. C.C. 57; 1 Cox, Eq. Cas. 257.

Silberschildt v. *Schiott* (1814), 3 Ves. & B. 45; 35 E.R. 396; 35 Digest (Repl.) 444, *1380*.

Marquis of Cholmondeley v. *Lord Clinton* (1820), 2 Jac. & W. 1; 37 E.R. 527; on appeal (1821), 4 Bli. 1, H.L.; 35 Digest (Repl.) 399, *953*.

Casburne v. *Inglis* (1738), 2 Jac. & W. 194; Lee temp. Hard. 399; 2 Eq. Cas. Abr. 728; 37 E.R. 600; sub nom. *Casborne* v. *Scarfe*, West temp. Hard. 221; 1 Atk. 603, L.C.; 35 Digest (Repl.) 394, *899.*

Hill v. *Carr* (1676), 1 Cas. in Ch. 294; 22 E.R. 807; 17 Digest (Repl.) 397, *2025.*

Clarke v. *Lord Abingdon* (1810), 17 Ves. 106; 34 E.R. 41; 35 Digest (Repl.) 748, *4191.*

Bosvil v. *Brander* (1718), 1 P. Wms. 458; 24 E.R. 470; 5 Digest (Repl.) 731, *6322.*

Miles v. *Williams* (1714), 1 P. Wms. 249; 10 Mod. Rep. 243; 24 E.R. 375; sub nom. *Myles* v. *Williams*, Gilb. 318; 5 Digest (Repl.) 731, *6320.*

Bates v. *Dandy* (1741), 2 Atk. 207.

Hedges v. *Hedges* (1708), Prec. Ch. 269.

Ashton v. *Dawson and Vincent* (1725), 2 Coll. 363, n.; Cas. temp. King, 14; 25 E.R. 196, L.C.; 25 Digest (Repl.) 605, *399.*

Jones v. *Selby* (1710), Prec. Ch. 300; 2 Eq. Cas. Abr. 573; 24 E.R. 143; 25 Digest (Repl.) 606, *406.*

Bunn v. *Markham* (1816), 7 Taunt. 224; 2 Marsh. 532; Holt, N.P. 352; 129 E.R. 90; 25 Digest (Repl.) 604, *394.*

Smith v. *Smith* (1733), 2 Stra. 955; 93 E.R. 965, N.P.; 25 Digest (Repl.) 554, *41.*

Blount v. *Burrow* (1792), 4 Bro. C.C. 72; 1 Ves. 546; 29 E.R. 784; 25 Digest (Repl.) 595, *314.*

Gold v. *Rutland* (1719), 1 Eq. Cas. Abr. 346; 21 E.R. 1092, L.C.; 27 Digest (Repl.) 103, *753.*

Drury v. *Smith* (1717), 1 P. Wms. 404; 2 Eq. Cas. Abr. 575; 24 E.R. 446, L.C.; 25 Digest (Repl.) 610, *437.*

Kelsack v. *Nicholson* (1596), Cro. Eliz. 496; 78 E.R. 746; 24 Digest (Repl.) 667, *6550.*

Holt v. *Bishop of Winchester* (1682), 3 Lev. 47; 3 Salk. 280; 83 E.R. 570; 19 Digest (Repl.) 406, *2113.*

Edwards v. *Countess of Warwick* (1723), 2 P. Wms. 171; 2 Eq. Cas. Abr. 42; 24 E.R. 687, L.C.; affirmed sub nom. *Countess of Warwick v. Edwards*, 1 Bro. Parl. Cas. 207, H.L.; 20 Digest (Repl.) 356, *823.*

Cooper v. *Cooper* (1692), 2 Vern. 265.

Kettle v. *Townsend*, 1 Salk. 187.

Perry v. *Whitehead* (1801), 6 Ves. 544; 31 E.R. 1187, L.C.; 44 Digest 294, *1255.*

Lord Grey v. *Lady Grey* (1677), 1 Cas. in Ch. 296; 2 Swan. 594; Cas. temp. Finch, 338; 22 E.R. 809, L.C.; 25 Digest (Repl.) 558, *75.*

Tate v. *Hilbert* (1793), 2 Ves. 111; 4 Bro. C.C. 286; 30 E.R. 548, L.C.; 25 Digest (Repl.) 600, *346.*

Irons v. *Smallpiece* (1819), 2 B. & Ald. 551; 106 E.R. 467; 25 Digest (Repl.) 548, *3.*

Miller v. *Miller* (1735), 3 P. Wms. 356; 2 Eq. Cas. Abr. 575; 24 E.R. 1099; 25 Digest (Repl.) 610, *439.*

Lawson v. *Lawson* (1718), 1 P. Wms. 441; 24 E.R. 463; 25 Digest (Repl.) 600, *349.*

Whitfield v. *Fausset* (1750), 1 Ves. Sen. 387; 27 E.R. 1097, L.C.; 8 Digest (Repl.) 552, *70.*

Whitlock v. *Walham* (1708), 1 Salk. 157; 91 E.R. 146; 35 Digest (Repl.) 682, *3569.*

Ex parte Mountfort (1808), 14 Ves. 606; 33 E.R. 653, L.C.; 35 Digest (Repl.) 296, *160.*

Appeals by the appellants, Thomas Duffield, and Emily Frances, his wife, against a decision of SIR JOHN LEACH, V.-C., that Mrs. Duffield was not entitled to a donatio mortis causa of certain mortgages.

Emily Frances Duffield was the only child and heir-at-law and sole next of kin of her father, George Elwes deceased. In February, 1810, she, being then about the age of 18 years, married Thomas Duffield, at Gretna in Scotland, without the

knowledge of her father, and on Mar. 11, 1810, she and her husband were re-married in England. Shortly after this re-marriage, George Elwes and the respondent Amelia Maria Elwes, received the appellants into their house to reside with them as part of their family. By his will, dated March 1, 1811, George Elwes, after confirming a jointure of £100 per annum and an annuity of £100 to his wife, bequeathed unto Emily Frances Duffield for her life his leasehold house situate in High Street, Marylebone, London, and also furniture and other property.

George Elwes was entitled to the principal sum of £2,927 and interest thereon due to him from Sir Edwin Bayntun Sandys, secured by the bond of Sir Edwin Bayntun Sandys, executed by him to the testator, bearing date July 12, 1820, and further secured by indentures of lease and release and mortgage, bearing date respectively July 11 and 12, 1820, whereby Sir Edwin Bayntun Sandys released and conveyed to the testator in fee simple, by way of mortgage, certain freehold estates. The deed contained the usual covenant for repayment of the money lent. The testator, George Elwes, was also entitled to the principal sum of £30,000 and interest thereon due to him from Sir Edwin Bayntun Sandys, and secured by certain indentures of lease and release, and assignment of mortgage, bearing date respectively Nov. 2 and 3, 1820. The release recited a loan of £30,000 made by trustees under a marriage settlement to Sir Edwin Bayntun Sandys, a conveyance of lands therein described to secure the repayment, a bond executed for the same purpose, and a judgment recovered upon that bond. It further recited that the mortgagee having called in the money due on the mortgage, George Elwes had advanced to the mortgagee £30,000, in consideration of which the mortagee, etc., by direction of Sir Edwin Bayntun Sandys, assigned to George Elwes the £30,000 due on the mortgage and also the judgment, and conveyed the lands. This deed also contained the usual covenant for payment of the money lent, on a day specified, with a power to sell the lands mortgaged on failure of payment.

Shortly before his death, George Elwes, in conversations held with the respondent William Hicks, frequently declared his purpose to make a further provision for his daughter. He was seized with the illness which ended in his death on Sept. 1, 1821. On the morning of that day William Hicks proposed to him to make a gift mortis causa to his daughter of the moneys secured by the two mortgages mentioned, to which proposal, the nature of the gift having been explained to him by Hicks, George Elwes assented. Of this proposal and assent a formal note was drawn up, and signed by Hicks and two other witnesses. In the evening of the same day, Mr. Hicks, having been informed that an actual delivery of the thing proposed to be given was necessary to the completion of the gift, caused the deeds of mortgage and the bond to be brought from the office of Mr. Law, the solicitor of Mr. Elwes. These deeds were then, in the presence of the same witnesses, produced before the testator and shown to him, and he was informed by Hicks that the same were the mortgage deeds and bond to secure the principal sums of £2,927 and £30,000 and interest due to him from Sir Edwin Bayntun Sandys. He was reminded by Hicks of what had passed in the morning, and informed that the gift would be unavailing, unless he confirmed it by passing the deeds. Hicks then proposed, with his permission, to hand over the deeds to his daughter whereupon he signified his assent by an inclination of his head. The mortgage deeds and bond were then, in the presence and under the eye and observation of George Elwes, handed by Hicks across the bed in which the testator then lay, to Emily Frances Duffield and were received by her in her hands. As soon as she had received the mortgage deeds and bond in her hands, George Elwes took hold of her hands, which then contained the deeds and bond, and with both his hands pressed together the hands so holding the deeds and bond, and shewed evident marks of satisfaction. During the whole of this transaction, George Elwes, according to the depositions in the cause and the judgment of the witnesses, although he was unable to write or speak, was in a state of mind competent to dispose of his property, and was aware of what he was doing and that he

was thereby making a gift to Emily Frances Duffield of the benefit of the bond and mortgages. On Sept. 2, 1821, George Elwes died.

On Oct. 1, 1821, the appellants exhibited an original bill in the Court of Chancery, against the respondents (the testator's widow, executors under his will and a codicil, trustees of a settlement made on the marriage of the testator's widow with the respondent William Hicks, and infant children of Emily Frances Duffield), praying, among other things, that the donatio mortis causa to Emily Frances Duffield of the bond and mortgage securities might be established; that she might be declared entitled to the bond and mortgage deeds and to the moneys secured thereby and to all benefit thereof; and that the respondents Abraham Henry Chambers and William Hicks, as executors and trustees of the testator, might be decreed to execute proper instruments to enable her to receive the moneys due and to become due on the bond and mortgages respectively, and to obtain the full benefit of the securities. The adult defendants (now respondents) to the bill put in their answers supporting the claims of the appellants as to the donatio mortis causa. The infant defendants submitted their rights to the care of the court. Witnesses were examined in support of the allegations of the bill, and the cause, being at issue, was heard before SIR JOHN LEACH, V.-C., on April 17, 1823, when a decree was made, by which it was declared that, the court being of opinion that a mortgage security could not by law be given by way of donatio mortis causa, Emily Frances Duffield was not entitled to the mortgage moneys secured by the indentures of mortgage and the bond. The appellants appealed.

Sugden and *Longley* for the appellants.

Heald and *West* for the respondents, the children of the appellants.

June 29, 1827. **THE EARL OF ELDON**.—In the first of these causes there is an appeal from the judgment of the then vice-chancellor (SIR JOHN LEACH), the present Master of the Rolls, in which he makes this declaration, and from that part of the judgment the present appeal is brought:

> "This court doth declare that this court being of opinion that a mortgage security cannot by law be given by way of donatio mortis causa, the appellant, Emily Frances Duffield, was not entitled to the mortgage moneys secured by the indentures of Nov. 2 and 3, 1820, and the bond of July 12, 1820, and by the indentures of lease and release and mortgage, dated July 11 and 12, 1820."

This judgment, therefore, proceeds upon the expression of an opinion that a mortgage security cannot by law be given by way of donatio mortis causa, and, if it be true that a mortgage security cannot by law be given by way of donatio mortis causa, it certainly then would be unnecessary to inquire whether the mortgage of November, 1820, and the bond of July, 1820, and the indentures of mortgage also of July 11 and 12, 1820, have been given by way of donatio mortis causa, because, if a mortgage cannot be so given, it is quite unnecessary to consider whether, under the circumstances of this case, it can be held that there was a donatio mortis causa.

Before I proceed to state the opinion which I have formed upon this subject, it is my duty to the learned judge from whose judgment this is an appeal to say that probably he has been influenced in the opinion which he has expressed by something which had fallen from me in a conversation with him, in which I had certainly expressed very great doubt whether a mortgage could be made the subject of a donatio mortis causa. I consider it just to state that this is so.

The judgment is commenced by the learned judge in the words I am now about to read.

> "The case of a bond, I consider to be an exception and not a rule; property may pass without writing either as a donatio mortis causa, or by a nuncupative will according to the forms required by the statute. The distinction between a donatio mortis causa and a nuncupative will is that the first is claimed against

the executor and the other from the executor. Where delivery will not execute a complete gift inter vivos, it cannot create a donatio mortis causa, because it will not prevent the property from vesting in the executors, and as a court of equity will not inter vivos compel a party to complete his gift, it will not compel an executor to complete the gift of his testator. The delivery of a mortgage cannot pass the property inter vivos, first, because the action for the money must still be in the name of the donor, and, secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate which can only pass by the deed of the mortgagee, and no court would compel the donor to complete his gift by executing such a deed. As to the case where a bond accompanied the mortgage deed, I was at first inclined to think that as the bond alone, if it had been the only security for the debt, would under the decisions have passed as a donatio mortis causa, so it would draw after it the mortgage as being a collateral security for the same debt, but upon further consideration I think that the delivery of the bond, where there is also a mortgage, cannot be considered as a gift completed. The mortgagor has a right to resist the payment of the bond without a re-conveyance of the estate, and it cannot be maintained that the donor of the bond would be compelled to complete his gift by such re-conveyance."

The principle which is applied in the decision of this case is the principle upon which courts of equity refuse to complete voluntary conveyances. No court of equity will compel a completion of them, and throughout the whole of what I have now read the donor is considered as a party who may refuse to complete the intent he has expressed. I think, however, that that is a misapprehension, because nothing can be more clear than that this donatio mortis causa must be a gift made by a donor in contemplation of the conceived approach of death, that the title is not complete till he is actually dead, and that the question, therefore, never can be what the donor can be compelled to do, but what the donee in the case of a donatio mortis causa can call upon the representatives, real or personal, of that donor to do. The question is whether, the act of the donor being, so far as the act of the donor itself is to be viewed, complete, the persons who represent that donor—in respect of personalty, the executor, and in respect of realty, the heir-at-law—are not bound to complete that which, so far as the act of the donor is concerned in the question, was incomplete. In other words, where it is the gift of a personal chattel or the gift of a deed which is the subject of the donatio mortis causa, the question is whether, after the death of the individual who made that gift, the executor is not to be considered a trustee for the donee, and whether, on the other hand, if it be a gift affecting the real interest—and I distinguish now between a security upon land and the land itself—whether, if it be a gift of such an interest in law, the heir-at-law of the testator is not by virtue of the operation of the trust, which is created, not by indenture, but by a bequest arising from operation of law, a trustee for that donee. I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do, but, if it was a good donatio mortis causa, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor.

With respect to the question of fact whether those mortgages and the bond were or were not given in such a manner as constituted a good donatio mortis causa, if there be no objection to the fact that the subject of the mortgage was an interest in real estate, I do not apprehend that the gentlemen at the Bar, though they criticised very much the nature of the evidence which has been given, meant to ask for any issue to try whether there was or was not a good donatio mortis causa if a mortgage can be the subject of a donatio mortis causa. In some of the cases which I shall have occasion to mention, it will be seen that where there is any doubt whether in point of fact there was that which would constitute a good donatio

mortis causa, if in point of law the subject of it can be made the subject of a donatio mortis causa, it is a very familiar thing to direct an issue or issues to try that fact. That not having been desired, the case is to be considered on its merits. Supposing the testator to have the power, has he fallen into a mistake with respect to the subject which he did intend so to give, and has he attempted to make a good donatio mortis causa of property which he could not so transfer?

It is necessary to state, first, what these two mortgages are, for they differ in their nature. The first is a mortgage for a sum of between £2,000 and £3,000, and there is the usual bond. The other is the case of an interest conveyed by indentures of lease and release and assignment, the contents of which are such as I am about to state. There being property considerably more than £30,000 vested in trustees under a marriage settlement, they have advanced £30,000 to Sir Edwin Bayntun Sandys upon a mortgage of his estates and a bond, and judgment recovered upon that bond. The person who is supposed to have made this gift mortis causa afterwards advanced to the mortgagee that sum of £30,000, the mortgagor joining in the trust assignment of the mortgage. There was first an assignment of the money, the £30,000; secondly, an assignment of the judgment; and, thirdly, it contained a covenant to pay the money secured by the mortgage, which covenant formed a species of debt affecting the inheritance—the subject of the assignment to Mr. Elwes. It appears that Mr. Elwes had been extremely angry with his daughter, who had married Mr. Duffield, but towards the close of life, and particularly when he came very near his death, he became very desirous to make a larger provision for his daughter. Accordingly, in a conversation which he had upon the subject, he mentioned that there were these mortgages, one of two thousand odd hundred pounds, and another of thirty thousand pounds. Nobody, I think, who looks to the evidence can doubt that it was his intention to make a gift of those mortgages for the benefit of that daughter whom he had restored to his favour, and, accordingly, he stated his purpose. He died the next morning. He was at the time in circumstances in which, it is clear, he apprehended that his death was approaching, and, being extremely desirous to make some provision for his daughter, in the course of that morning he stated an intention upon the subject which could leave no doubt in the mind of anybody what that intention was. It occurred afterwards that a declaration of this purpose should be made, and the question is whether the form of that declaration was sufficient to constitute a gift of the property. There was no time to draw out a regular transfer of the property, but in the course of the morning there were brought to him the instruments—the mortgages, the bonds, and so on—and, it being suggested that it was necessary, in order to make a good donatio mortis causa, that there should be delivery of the instruments, subject to the question whether such delivery constituted a good donatio mortis causa, it appears by the evidence of the gentleman who had all these instruments in his hand that Mr. Elwes took the hand of his daughter and laid it upon these instruments. The evidence presents an accurate account of the clear manifestation of his purpose to give although that manifestation was accompanied with the circumstance that he was so near the termination of his life and so reduced that he could hardly utter the words, and it was more by a look than a word that he expressed his approbation of what was done. This was, therefore, a case where one cannot help feeling a very strong wish that it should take effect, but, it must be remembered that we cannot give that effect unless the law enables us to do it.

Improvements in the law, or some things which have been considered improvements, have been lately proposed, and if, among those things called improvements, this donatio mortis causa was struck out of our law altogether, it would be quite as well, but, that not being so, we must examine into the subject of it.

I apprehend that the question is not a question between the donor and donee, but that the question is whether the act is complete to this extent—that the donor gave this in such a manner as to constitute a good donatio mortis causa which will bind the interest in the executor as to the personal estate, and bind the interest in

the heir-at-law with respect to the mortgage security as to the real estate. Because, I apprehend, that in a case where a donatio mortis causa has been carried into effect by a court of equity, that court of equity has not considered the interest as vested by the gift, but that the interest is so vested in the donee that that donee has a right to call on a court of equity, and, as to the personal estate, to compel the executor to carry into effect the intention manifested by the person he represents. The only authority it will be necessary to cite for that doctrine is referred to in *Gardner* v. *Parker* (1), a decision by the same judge under these circumstances. It was a gift of a bond by delivering the same and saying: "There, take that and keep it," in the last sickness of the donor—the donor dying two days afterwards. This was held to be a donatio mortis causa, and it was directed that the donee should be at liberty to use the executors' names in suing on the bond, he indemnifying them, and the costs of the suit to be paid out of the testator's estate, which is founded on this reason, that the money may be recovered in a proceeding at law by an action in the name of the executors, but, if the executors refuse to permit their names to be used, a court of equity will compel them to permit their names to be used in consequence of the trust which arises from the act of the donor himself.

In *Snellgrove* v. *Baily* (2) a bond for £100 was given by one Sparkman to Sarah Baily which Sarah Baily delivered to the defendant, saying: "In case I die, it is yours, and you will have something." The plaintiff, as administrator to Sarah Baily, brought a bill to have the bond delivered up. There was a question whether there had been a donatio mortis causa, and the administrator brought a bill to have the bond delivered up, as being in the hands of the alleged donee. LORD HARDWICKE, however, decided, that this was a sufficient donatio mortis causa to pass the equitable interest, not the legal interest, in the bond upon the intestate's death. I find that LORD HARDWICKE, in the case where there was a gift in the nature of a donatio mortis causa, directed that the representatives should be at liberty to file a bill to have the deeds delivered up, although he said they might bring trover for the deeds, but if the act of the donor had vested the deeds in the hands of the person in such a manner as to give an interest in the nature of a donatio mortis causa, there could be no equity to obtain the delivery up of those deeds unless the title had been settled at law.

The real question in this case is not whether this was good as a donatio mortis causa if the subject of delivery had been a bond alone, but whether, the subject of delivery being mortgages, that is, estates in land in one sense of the word, such interests in land as those are can or cannot be made the subject of a donatio mortis causa. This is a question which is left in a state of great uncertainty—a question noticed in some cases, but still left in a state of great difficulty, and I cannot but extremely lament that there should have been a decision upon a question of this importance with so little said either in argument or judgment upon the bearings of the cases to be found with reference to this subject. Upon looking into the cases, I observe that in the very first case I can find LORD HARDWICKE to have decided he expressed more doubt upon the subject than, in my humble judgment, speaking with great deference when looking at that great man's authority, former decisions upon the subject would have induced me to expect to find in his Lordship's expressions.

In *Hassel* v. *Tynte* (3), in which a lady claimed to have a sum of £1,000 secured by mortgage which she said she had become entitled to by a donatio mortis causa made by the donor (the testator is a wrong term in such a case), there were two questions. One was a question of fact, namely, whether the circumstances were such as to constitute it a gift, if it was a proper subject of gift. The other question was whether it was a proper subject of gift. LORD HARDWICKE expressed a doubt whether a mortgage deed could be made the subject of a donatio mortis causa, and he finished the case by saying:

"I observe that this lady, when she becomes twenty-one, is to be the residuary legatee of the testator, and as she will very soon attain the age of twenty-one,

I will not keep up this controversy between her as claiming this £1,000 and the person entitled to the residue if she dies under twenty-one; the probability is she will arrive at the age of twenty-one, and then, as residuary legatee, she will be entitled to all the residue, and then it will become unnecessary to determine whether this £1,000 shall be settled upon her or not."

In *Ward* v. *Turner* (4), which is a leading case upon this subject, LORD HARDWICKE entered into a very long consideration of the case in his judgment. The question there was whether, some receipts for stock having been delivered over, it was a good donatio mortis causa. He was of opinion it was not; that the mere certificate of the stock was not a document of the title, and where no document of title has been delivered there can be no transfer of the property: and he held that that was not a good donatio mortis causa.

In *Richards* v. *Syms* (5) LORD HARDWICKE is represented as having decided that, if a mortgagee gave to his mortgagor the deeds of the mortgage, and that fact was proved, that was a gift of the money for which the deeds were a security, and not within the Statute of Frauds. The whole, or the greater part of the difficulty in determining whether the gift of a mortgage can be a good donatio mortis causa, turns upon this, that the question arises how far the Statute of Frauds will allow of that. LORD HARDWICKE was of opinion, according to *Richards* v. *Syms* (5), that, if a mortgagee gave to a mortagor the deeds, the Statute of Frauds would not stand in the way. He held clearly that the mortgagee cannot get back the deeds from the mortgagor. Then he said that the documents, the deeds being in the hands of the mortgagor though the estate in the land was still in the mortgagee, yet by operation of law a trust would be created in the mortgagee to make good a gift of the debt to the mortgagor to whom he had delivered the deeds as the evidence that he forgave the debt and gave it up. We must consider the difference between the actual estate and the mortgage—and recollect that although a mortgage vests an estate in land (a fee simple mortgage, of course, vests a fee simple estate in land), yet it may be represented that there are two estates, one in the mortgagor and another in the mortgagee. A mortgage, for instance, does not revoke the will of the testator. A mortgage does not give dower—it is, in truth, nothing more than a pledge, and, if the right to the principal is divested out of the mortgagee by a valid act to divest the right of the principal, the other is considered as what they call an accident. Then the question arises, not whether the land can be got out of the mortgagee without a conveyance, but whether, if the land is to be considered as still remaining vested in the mortgagee, he is not, by operation of law, a trustee for the mortgagor, bound to answer the subpoena of that mortgagor to re-convey the estate to him, and to execute the requisites of the Statute of Frauds.

In *Hassel* v. *Tynte* (3), LORD HARDWICKE, in giving his judgment, observes that *Richards* v. *Syms* (5) was not a precedent of very considerable value, because, he says, he had directed issues to try whether there was a gift by the mortgagee to the mortgagor, and, those issues having ended in deciding that there was not, he considered that a precedent of very little authority. I consider it, however, as a precedent of very considerable authority in such a case as this. It is reported at length in BARNARDISTON'S CHANCERY CASES, and when I mention that reporter, I am sorry to have to add that I am old enough to remember LORD MANSFIELD, who practised under LORD HARDWICKE, by whom all these cases were decided, state his opinion of these reports, for he knew the man. I take the liberty of saying that in that book there are reports of very great authority. The case happens to be reported likewise in another book of no very high character. I mean the second volume of the EQUITY CASES ABRIDGED. It is not so high in character as the first volume of the EQUITY CASES ABRIDGED, but the case, as there reported, is reported from a manuscript note, and from a manuscript note which I think is better entitled to credit for this reason; that having called in assistance in this case

(which I believe will be the first absolute determination upon the subject, though I think there is a great deal laid down in the cases which ought to lead us to decide what ought to be a good donatio mortis causa), I have found authority to consider that report to be a very correct report, in the library and in the mind, which are both equally large storehouses of equity learning—I mean the library and mind of LORD REDESDALE. Upon this occasion he has had the goodness to hunt through all the books he has upon the subject, as well manuscript as printed, and I come to the foundation of my opinion with all the assistance I can have from that quarter.

According to both the reports, an issue had been directed. If there had been a good delivery, LORD HARDWICKE seems to consider that the interest in the land would have passed. He said (Barn. Ch. at pp. 92, 93):

> "But in all these cases there is a difference, both in law and equity, between absolute estates in fee or for a term of years, and conditional estates for securing the payment of a sum of money. In the case of absolute estates, it cannot be admitted of, that parol evidence of the gift of deeds shall convey the land itself. But where a mortgage is made of an estate, that is only considered as a security for money due, the land is the accident attending upon the other" (and principal object); "and when the debt is discharged the interest in the land follows of course."

A trust of the land then arises by operation of law. When a deed is given a trust also arises by operation of law.

> "In law, the interest in the land is thereby defeated, and in equity a trust arises for the benefit of the mortgagor."

And his Lordship said:

> "Suppose an obligee delivers up a bond with intent to discharge the debt, the debt will certainly be thereby discharged, . . . and the mortgage with it."

If the bond is discharged in the present case, it is very difficult to say that the mortgage debt, as debt, will not be discharged also.

In reasoning *Ward* v. *Turner* (4) and pointing out the distinction there is between the delivery of a mere chattel, and the delivery of anything which forms part of the title, LORD HARDWICKE says this- and I find by a manuscript note in the possession of the noble Lord I have mentioned, that this is exceedingly correct:

> "Suppose it had been a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and the mortgagee had delivered over this separate receipt for the consideration money, that would not have been a good delivery of the possession, nor given the mortgage mortis causa, by force of the act."

To be sure, that reasoning is quite idle unless LORD HARDWICKE meant to say that delivery of the deed with a receipt upon the back of it, not by force of the delivery of the receipt on the back of it, but by force of the delivery of the deed, would be a good donatio mortis causa.

Richards v. *Syms* (5) was argued by LORD MANSFIELD, then Mr. Murray. *Ward* v. *Turner* (4) was also argued by LORD MANSFIELD, then Mr. Murray, and he appears to have a strong recollection of it when he got into the Court of King's Bench where sometimes equity has been rather more misunderstood than it ought to be, which has, perhaps, led some men belonging to that court to abuse equity when they knew nothing about the matter. *Martin d. Weston* v. *Moulin* (6) is a case of very great importance—a case in which a man devised lands. The will, I think, was not attested by three witnesses, but he described the object of his devise of land. There was enough in his will to show that he meant to pass the personal interest in his property, and it was a question whether there was a good

devise of the mortgage or not. The land itself could not be said to be devised, but the Court of King's Bench held that it was a very good bequest of the personal interest. LORD MANSFIELD, in summing-up all this sort of doctrine, says (2 Burr. at pp. 978, 979):

> "A mortgage is a charge upon the land, and whatever would pass the money will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it—it will be liable to debts—it will go to executors—it will pass by a will not made and executed with the solemnities required by the Statute of Frauds. The assignment of the debt or forgiving it will draw the land after it as a consequence: nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow notwithstanding the Statute of Frauds."

I ought to do it in a spirit of great humility when I question the doctrine of LORD MANSFIELD. If he meant by that to say that such acts done with the money will have the effect in a court of equity of enabling you to call for a conveyance of land, I am ready to agree with him, but to say that the land is to be considered as passing under such circumstances is that to which I cannot agree, but still I maintain that the doctrine from first to last is correct, provided you lay the foundation in the intent of the gift, that the debt is well given or well forgiven, and then, as the result of that interest so given, you say that the party who has the land becomes in equity a trustee for the person entitled to the money and to the personal estate.

LORD HARDWICKE, with respect to the bond (and it is necessary that I should take some notice of this, because there has been a change in the law which that great judge did not foresee, but which, in later times, and in my own time, has become very familiar in the courts of law) LORD HARDWICKE states as one ground of his opinion in the case of the bond that it is a good gift mortis causa because he says that he who has got the bond may do what he pleases with it. He certainly disables the person who has not got the bond from bringing an action upon it, for, says LORD HARDWICKE, no man ever heard—and I have seen in the manuscript of the same LORD HARDWICKE, that he said no man ever will hear—that a person shall bring an action upon a bond without the profert of that bond. But we have now got into a practice of sliding from courts of equity into courts of law the doctrine respecting lost instruments, and I take the liberty most humbly of saying that when that doctrine was so transplanted it was transplanted upon the idea that the thing might be as well conducted in a court of law as in a court of equity—a doctrine which cannot be held by any person who knows what the doctrine of courts of equity is as to a lost instrument.

If, as is admitted, the delivery of a bond would give the debt in that bond so as to secure to the donee of that bond the debt so given by the delivery of the bond, the question is whether the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up. But there is another question to which an answer is to be given: What are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered; in the other, the judgment, which is to be considered on the same ground as specialty, is delivered with that, the evidences of the debts are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is whether, regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only.

The opinion which I have formed is that this is a good donatio mortis causa, raising by operation of law a trust—a trust which, being raised by operation of

law, is not within the Statute of Frauds, but a trust which a court of equity will execute. Therefore, in my humble judgment, this declaration must be altered by stating that this lady, the daughter, is entitled to the benefit of these securities, with a direction to the court of equity to proceed in the cause on the ground of the principle to be found in such a declaration to be made by your Lordships, which, with respect to that part of the case, I take the liberty to advise your Lordships to adopt.

Appeal allowed.

RICHARDSON *v.* MELLISH

[COURT OF COMMON PLEAS (Best, C.J., Park and Burrough, JJ.), July 2, 1824]

[Reported 2 Bing. 229; 1 C. & P. 241; 9 Moore, C.P. 435; 3 L.J.O.S.C.P. 265; 130 E.R. 294]

Damages—Prospective damages—Anticipation of future loss—Right to recovery—Breach of contract.

Evidence—Document—Public document—Ship's passenger list—Compilation by captain under statute.

Contract—Illegality—Public policy—Appointment to office—Appointment of captain to command of ship.

The defendant bought a controlling interest in the ship M. which was then commanded by the plaintiff and was under charter by the East India Co. to make six voyages to and from India of which four voyages still remained to be made. It was then agreed between the parties that the plaintiff should resign the command of the M., to which the defendant's nephew would be appointed, and would take command of another ship, and, further, that, if the nephew died or resigned before the end of the fourth voyage, the plaintiff should succeed him. The exchange of commands was approved by the East India Co.; the plaintiff and the nephew sailed on their respective voyages; and the nephew died during his second voyage in the M. The defendant refused to appoint the plaintiff to command the M. for the fifth and sixth voyages under the charter. In an action by the plaintiff against the defendant for breach of contract it was proved that, though it was the practice of the East India Co. to appoint for only one voyage the captain of a ship under charter to them, they normally re-appointed the same man as captain for further voyages under the charter, and there was admitted in evidence, to show the pecuniary value of voyages to the plaintiff, a book containing a list of passengers compiled by the plaintiff in accordance with the provisions of the East India Co. Act, 1813.

Held: (i) in assessing damages the jury were entitled to take into consideration what the plaintiff had lost by being deprived of the command of the ship not only for the fifth voyage, but also for the sixth voyage, as his re-appointment for the sixth voyage must be regarded as almost a certainty,

(ii) the list of passengers was a public document compiled by the captain who was under a statutory duty to make out the list accurately, and, therefore, it was admissible in evidence,

(iii) the agreement by which the plaintiff exchanged one ship for another was not illegal as being contrary to public policy; there was legal consideration for it; and, therefore, the plaintiff was entitled to succeed.

Public Policy—"A very unruly horse"—"It may lead you from sound law."

Per BURROUGH, J.: I protest against arguing too strongly upon public policy. It is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.

Notes. Referred to: *Edwards* v. *Baugh* (1843), 7 Jur. 607; *Egerton* v. *Brownlow* (1853), 4 H.L. Cas. 1; *Grindell* v. *Brendon* (1859), 6 C.B.N.S. 698; *Nothard* v. *Pepper* (1864), 17 C.B.N.S. 39; *Davies* v. *Davies* (1887), 36 Ch.D. 359; *Cleaver* v. *Mutual Reserve Fund Life Association*, [1891–4] All E.R. Rep. 335; *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1891–4] All E.R. Rep. 263; *Re Kelcey, Tyson* v. *Kelcey*, [1899] 2 Ch. 530; *Re Beard, Reversionary and General Securities Co.* v. *Hall, Re Beard, Beard* v. *Hall*, [1908] 1 Ch. 383; *Re Smith, Johnson* v. *Bright-Smith*, [1914] 1 Ch. 937; *Re Bowman, Secular Society* v. *Bowman* (1915), 113 L.T. 1095; *Horwood* v. *Miller's Timber and Trading Co.*, [1916] 2 K.B. 44; *Montefiore* v. *Menday Motor Components Co., Ltd.*, [1918–19] All E.R. Rep. 1188; *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; *Foster* v. *Driscoll, Lindsay* v. *Attfield, Lindsay* v. *Driscoll*, [1929] 1 K.B. 470; *Beresford* v. *Royal Insurance Co.*, [1936] 2 All E.R. 1052; *Martell* v. *Consett Iron Co.*, [1954] 3 All E.R. 339.

As to prospective damages, see 11 HALSBURY'S LAWS (3rd Edn.) 222, 223; as to documentary evidence, see ibid., vol. 15, pp. 366 et seq.; as to illegal contracts, see ibid., vol. 8, pp. 130–136. For cases see respectively 17 DIGEST (Repl.) 84–89; 22 DIGEST (Repl.) 185 et seq.; 12 DIGEST (Repl.) 269 et seq.

Cases referred to:

(1) *Evans's Case* (1672), 1 Vent. 211.

(2) *Blachford* v. *Preston* (1799), 8 Term Rep. 89; 101 E.R. 1282; 12 Digest (Repl.) 275, *2115*.

(3) *Card* v. *Hope* (1824), 2 B. & C. 661; 4 Dow. & Ry. K.B. 164; 2 L.J.O.S.K.B. 96; 107 E.R. 529; 12 Digest (Repl.) 276, *2121*.

Also referred to in argument:

East India Co. v. *Neave* (1800), 5 Ves. 173; 31 E.R. 530, L.C.; 18 Digest (Repl.) 158, *1402*.

Thomson v. *Thomson* (1802), 7 Ves. 470; 32 E.R. 190; 12 Digest (Repl.) 276, *2120*.

Morris v. *MacCulloch* (1763), 2 Eden, 190; Amb. 432; 28 E.R. 871, L.C.; 12 Digest (Repl.) 276, *2117*.

Rule Nisi obtained by the defendant for a new trial and arrest of judgment in an action brought by the plaintiff to recover from the defendant damages for breach of contract.

The plaintiff was formerly captain of the ship *Minerva*, which had been chartered by the East India Co. for six voyages to India. When the vessel had performed two of these voyages, the defendant purchased twelve sixteenths of her, and, having a nephew (Captain Mills) whom he wished to serve, he proposed that the plaintiff should give up the command of the *Minerva* to Captain Mills. To provide the plaintiff compensation for this sacrifice, an agreement was entered into by which it was stipulated that the plaintiff should resign the command of the *Minerva* to Captain Mills and should receive in exchange the command of the *Marquess of Ely*, another vessel belonging to the defendant which was then chartered for one voyage by the East India Co., and it was agreed that, provided the East India Co. should accede to this proposed exchange, and Captain Mills should be confirmed in the command of the *Minerva* and Captain Richardson in that of the *Marquess of Ely*, should Captain Mills die or resign his command before the remaining four voyages should have been performed by the *Minerva*, the plaintiff should succeed him in command of that vessel. As it appeared that the benefit to be derived from the command of the *Marquess of Ely* was a very inadequate compensation for the loss of the command of the *Minerva*, even for one voyage, the defendant undertook to procure the company's consent to change the destination of the *Marquess of Ely* and to send her to India, with liberty of calling at St. Helena and the Cape. On the other hand, Mr. Fletcher, who negotiated the agreement

on behalf of the plaintiff, undertook to pay the defendant a sum of £2,000 should the plaintiff refuse to resign his command of the *Minerva*.

By the byelaws of the East India Co., c. 13, s. 11, it was provided:

> "It is ordained that hereafter no owner or part-owner of any ship, or any commander or other person, shall directly or indirectly sell or take any gratuity or consideration, nor shall any person or persons buy, pay, or give any gratuity or consideration for the command of any ship or ships to be freighted to the company; and in case any such contract, payment, or gift shall be made, the commander or intended commander concerned therein shall from thenceforth be incapable of being employed or of serving the company in any capacity whatever, and it shall be lawful for the Court of Directors to discharge the ship from the company's service, if they shall think fit; and, moreover, the respective parties to such contract receiving, paying, or giving, or contracting to pay, receive or give, shall severally pay damages to the company at the rate of double the sum received or to be received, paid or given; . . ."

The exchange of commands having met with the approbation of the East India Co. and the destination of the *Marquess of Ely* having been altered, both vessels sailed on their respective voyages. The plaintiff's voyage in the *Marquess of Ely* having been peculiarly unfortunate, he became bankrupt soon after his return to England. It was proved by Mr. Fletcher, that, in consequence of a conversation between him and the defendant, in which the latter expressed his dislike of a captain being possessed of an agreement which he held as a rod over the head of his owners, the agreement was deposited with the defendant, who promised that it should be produced whenever it was required. While the *Minerva* was on her return to England in the fourth of her six voyages, Captain Mills, then in command of her, died and another officer brought her home. The plaintiff then made a demand on the defendant, requiring to be re-instated in his command of the *Minerva* according to the terms of their agreement, but the defendant declined to comply with his request and sold the ship.

Accordingly, the present action was commenced. These facts having been proved at the trial before Lord Gifford, C.J., and a special jury, at the London sittings after Hilary Term, 1824, the defence relied on was that the agreement had not been merely deposited with the defendant, but had been positively given up to him, the plaintiff having renounced it on account of the advantage it was supposed he would have derived from the change in the destination of the *Marquess of Ely*, and evidence was adduced to show that he had frequently spoken in warm commendation of the defendant's conduct towards him. The proof given at the trial of the value of one of the voyages consisted in the testimony of several captains who described it as being worth from £4,000 to £8,000, and in the production of a book containing a list of passengers, made by the captain, and deposited in the India House, pursuant to the East India Co. Act, 1813 [repealed by the Government of India Act, 1915], s. 15, passed for the better regulation of passengers by India vessels. This book was objected to at the trial, but was admitted in evidence by the learned judge. When about to sum-up the evidence to the jury, he was interrupted by their declaring themselves satisfied that the agreement had been merely deposited with the defendant in compliance with his earnestly expressed wish. They then found a verdict for the plaintiff, and, his Lordship having told them that if they did so, they were at liberty to give damages for the two voyages remaining to be performed when the plaintiff demanded the fulfilment of the agreement, they assessed the damages at £7,500.

A rule was obtained by the defendant on several grounds calling on the plaintiff to show cause why a new trial should not be had or the judgment be arrested.

Serjeant Vaughan and *Serjeant Bosanquet*, who were to have shown cause against the rule, were stopped by the court.

Serjeant Pell, *Serjeant Lawes* and *Serjeant Wilde* for the defendant, supported the rule.

BEST, C.J.– The questions which we are to decide are (i) whether the jury have been improperly directed as to the damages; (ii) whether evidence has been received which ought to have been excluded; (iii) whether the contract, as it appeared in evidence given at the trial, was illegal; (iv) whether the contract, as set out on the record, appears to be without consideration; and (v) whether, if it contains a consideration, that consideration is illegal and void.

I will, in as few words as possible, address myself to every one of these objections. I agree that, if LORD GIFFORD, C.J., was not warranted in telling the jury that they might take into their consideration what would be lost by the voyage succeeding the first of which the plaintiff was deprived, the present verdict ought not to stand because we are bound to suppose that the jury acted under that direction, and that part of the damages which have been given in this case (even though from the nature of the evidence we could not see that they had given damages for a second voyage) might have been given for a second voyage, and, therefore, that would have been a ground for a new trial. Was LORD GIFFORD, then, warranted in telling the jury that they might take into their consideration the second voyage, or was be bound to say: "All that you can take into consideration in estimating the damage is the loss of one voyage?" The argument that has been pressed on us today is that they could only take into consideration one voyage, and there is a great deal of speciousness in it.

It is clear that the plaintiff could only be appointed for one voyage, for the appointment of master is renewed every voyage. But, though that is the case, may not parties look to that which is the practice of the East India Co.—that, though they renew the appointment, they renew it in the same person. If that practice be legal, may I not say, if you had appointed me for the first voyage, I should have continued for the second? You have deprived me of the profits I should have made not only on the first voyage, but on the second also. It requires no legal head to decide this. Common sense says that you are not to be paid for consequences which might not turn up in your favour, but the plaintiff is entitled to have a compensation for being deprived of that which almost to a certainty happens in these cases. I am clearly of opinion that LORD GIFFORD was strictly warranted in telling the jury they might take into their consideration that by the breach of this agreement the plaintiff had been not only clearly prevented from going the first voyage, but that in all probability he had been prevented from going the second; and, therefore, in making up their minds on the damages, they ought to take into their consideration that which he might have lost from the second. If LORD GIFFORD had not told them so, I should have thought a new trial ought to be granted, for he would not have presented the case to the jury in a manner that would enable the plaintiff to recover all that he was in justice entitled to. This case has been likened to the case of stipulated payments at different times. There, undoubtedly, a new cause of action arises, but here the cause of action is complete, for the whole thing has but one neck and that neck was cut off by one act of the defendant which entitled the plaintiff to maintain this action. It would be most mischievous to say—it would be increasing litigation to say—"You shall not have all you are entitled to in your first action, but you shall be driven to bring a second, a third, or a fourth action."

I come now to the next question, that is, as to the admissibility of evidence. For the purpose of proving the damage, the plaintiff put in a list returned by a captain under the authority of the East India Co. Act, 1813 [repealed by the Government of India Act, 1915], ss. 15, 16. It is contended that that paper was not evidence against third parties. I am decidedly of opinion that there is no foundation for that objection. This is a public paper made out by a public officer under a sanction and responsibility which impel him to make that paper out accurately,

and, that being the case, it is admissible in evidence on the principle on which the sailing instructions, the list of convoy, and the list of the crew of a ship are admissible. It may be said: "But those are papers which come from government officers." However, the books of the Bank of England have been made evidence; all those are evidence that are considered as public papers, made out by persons who have a duty to the public to perform and whose duty it is to make them out accurately. On account of that duty and responsibility, credit is given to them. These papers in the present case are of as high authority as any of those I have referred to—higher than those of the books of the Bank of England, the books at Lloyd's, or the lists of convoy which have been received as evidence. These are papers which the captain is ordered by s. 15 of the statute to which we have been referred to make out upon oath, which oath an officer of the customs is authorised to administer—for what purpose? for the purpose of informing the East India Co. (who, though subjects in England, are great sovereigns in India) what kind of persons and with what sort of arms these persons are going to settlements the administration of the affairs of which is committed to them. If these are not public papers made with a view to great principles of public policy, I am at a loss to know what are public papers. Credit must be given to all papers so made. Consequently, these papers, I think, were properly received in evidence.

This brings me to the third question, whether there is any illegality in the transaction. I agree with the argument put to us, that if the defendant has clearly and satisfactorily made out by evidence a fraud in this case, or if it appears by the record in this case that this is a corrupt agreement or that this agreement is manifestly in contravention of public policy the objection must prevail. I am of opinion he makes out neither. When I come to consider the record, I see not the least pretence for this objection. It is said that it is a fraud on the East India Co., and that it is a fraud on the co-owners. It cannot be a fraud on the East India Co., for they are apprised of the whole of the transaction. They knew that both these gentlemen were commanders of ships, and they knew that the whole effect of this contract was to exchange the command of one ship for the command of another. Is there anything on the face of it that is corrupt, illegal, or impolitic? For anything that appears in this transaction from the testimony of Mr. Fletcher, this might have been done from a due regard to the service—one of the gentlemen might have been deemed fit to command on one voyage and the other fit to command on the other. On such grounds we are not to presume corruption. Corruption is to be made out. But I see no proof of any fraud or corruption.

We have heard much of this being a contravention of public policy, and that, on that ground, it cannot be supported. I am not much disposed to yield to arguments of public policy: I think the courts of Westminster Hall (speaking with deference as an humble individual like myself ought to speak of the judgments of those who have gone before me) have gone much further than they were warranted in going in questions of policy. They have taken on themselves sometimes to decide doubtful questions of policy. They are always in danger of so doing because courts of law look only at the particular case and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I, therefore, say, it is not a doubtful matter of policy that will decide this, or that will prevent the party from recovering. If once you bring it to that, the plaintiff is entitled to recover, and let that doubtful question of policy be settled by the legislature which has the means of bringing before it all the considerations that bear on the question, and can settle it on its true and broad principles. I admit that if it be clearly put upon the contravention of public policy, the plaintiff cannot succeed, but it must be unquestionable—there must be no doubt—looking at all the facts of this case, I can see no unquestioned principle of policy that stands in the way of the plaintiff to hinder him recovering in this action.

I come, then, to the other observations which I shall make on this part of the

case. Fletcher has stated a contract between him and the defendant on which he may be indicted for conspiracy. The question is: Does that corruption extend itself to the plaintiff? There is no evidence that it does; on the contrary, Fletcher's evidence distinctly is that the plaintiff did not know of it. But it has been argued today (and a reference has been made to another subject, to which I admit there is a fair analogy) that though the plaintiff did not know it, yet that if his agent makes a corrupt contract, the principal must answer for all the consequences. It is not necessary for me to decide that point today. I am aware, certainly, that, if the agent promises, the principal is liable. I do not say that there is not a great deal of weight in the analogy, but my answer to that objection is this that that point was never raised at nisi prius. LORD GIFFORD should have been desired to tell the jury: "Remember, that though corruption is not brought home to the principal, if it is brought home to the agent, that will be sufficient." To that point the attention of the jury was not called. In such a case as this we will not, where justice is all on one side, grant a new trial for the purpose of giving to the defendant an opportunity of raising that objection.

I come now to the points that have been made in arrest of judgment. I think there is no foundation for either of these objections. The first is, that no consideration appears on the record. I think there would scarcely have been ground for the objection if the declaration had been specially demurred to, but I am clearly of opinion there is sufficient in the declaration to raise a presumption of consideration after verdict. We were referred to a case in ROLLE'S ABRIDGMENT [23, pl. 27]. I have looked at that case, but in VINER'S ABRIDGMENT, vol. 1, p. 309, that case is also stated, and stated in the following terms, namely, that, if a man is tenant at will and makes a bargain with his landlord on the foundation of that tenancy at will, it is not a good consideration. No, for this plain reason, because we always can take notice of the extent of the interest of a tenant at will. We know that it is determinable at a word; the breath of the landlord's mouth annihilates that tenancy in a moment. An agreement to hold when the landlord might say, you shall not hold an instant longer, is no consideration. But the compiler of VINER says, if there be any doubt of the tenancy at will, it would have been a good consideration. It is not necessary that the tenant should have a right to hold, but, if it be doubtful whether he had a right to hold, that is a good consideration. That answers the objection. When he takes as a tenant at will, the law takes notice of what his interest is, but we cannot take notice of the interest of a captain of an East India ship. We cannot know that there might not be covenants which would secure him in possession of that for a great length of time. I think we should presume that after verdict. I do not say this merely on my own opinion; but I will mention a case in which it appears to me the court presumed a great deal more after verdict. It is *Evans's Case* (1) (1 Vent. at pp. 211, 212):

> "In an action upon the case: whereas he [the plaintiff] pretended title to certain goods in the custody of one Susan Pricket, and claimed them to be his own, intending to remove them; the defendant, in consideration that he would suffer them to continue there, assumed to see them forthcoming, and that they should not be embezzled, but safely kept to the use of the plaintiff, and shows that afterwards the goods were eloigned [removed], etc. Upon non assumpsit and verdict for the plaintiff, it was moved to stay judgment, that it doth not appear that the property of these goods was in the plaintiff, for it is alleged only that he pretended to them, and claimed them to be his own; sed non allocatur, for the declaration is full enough; at least, [it] must be intended he proved they were his own, or the jury would not have found for him."

May not we presume (after verdict), that the captain had a right to hold this ship against the defendant? It appears the case I have cited is stronger. I think there is abundant consideration stated on the record in this case; unquestionably, there is consideration which will be sufficient after verdict.

Then it is said that if there is any consideration it is illegal. We must look at the whole record, and see if it is so or not. It appears on the record that Mr. Mellish is sole owner, and, therefore, he could commit no fraud on co-owners. Could he commit a fraud on the East India Co.? For the reasons I have given, I think not. It appears to me the attention of the East India Co. was called to the whole proceeding. Is there any fraud in the proceeding? Sift it from the top to the bottom, what does it amount to? Nothing more than that a man who has the sole interest in one ship and is about to procure an interest in another, makes a bargain with the captain of the ship to exchange it for another. Is there any fraud in that? I say "No." I am aware of the difference between a legal and a moral fraud. I see no legal fraud. I see nothing in public policy against this sort of exchange being effected. It appears to me there would be nothing corrupt—nothing improper—in it; if not, then there is nothing to arrest the judgment on the ground of illegality. But we have been referred to many cases, and to an Act of Parliament which shows the utmost extent to which the legislature intended to go, and beyond which we cannot go. In that Act, which applies to offices of the East India Co. as well as offices under government, it is enacted that, if there is a sale of any office, it is void. In every section it appears there must be some corrupt pecuniary consideration. I agree that it is not necessary that the party should directly get money by it—if it is done circuitously, if by the interest made the pecuniary advantage can be got at, that will do. But the legislature never meant to carry this doctrine of corruption further. That is quite clear from the words they have used, for the word is "money;" and the terms relating to money are used in every section with that phraseology which embraces every case (whatever artifice is used) where the basis of the transaction is corruption between the parties. That is the species of corruption which the Act described. That gives us the rule. Beyond that we are not warranted in going, for, if the legislature had thought that every bargain of this description was to be prevented, the legislature would not have said: You are to consider if there is a mere pecuniary corruption, or something in the nature of pecuniary corruption, sufficient to avoid the bargain; they would have gone on to say: There shall be no bargain, no tying up of the hands of those who have to do with the appointment to the command of East India ships, all those appointments shall be made without bias, the party shall not restrict himself from appointing again as soon as the voyage is made. It is quite clear the legislature would use words of that sort if they had intended it. But they knew how impossible it was to regulate transactions by such visionary notions as these. They introduced only corruption as the thing which they could act upon, that is, personal corruption, pecuniary advantage, or something of that nature. It is not proved that Captain Richardson ever did derive from this transaction any pecuniary advantage. It does not appear on the record that either of these parties is to derive from it any pecuniary advantage or emolument whatever.

We were referred also to a great number of cases. I will not trouble the court with going over them because I stated when they were cited it was unnecessary to cite them, as they only proved that to which the court acceded. I never have doubted that it is an offence at common law to sell offices. I have never doubted that, if a man sells an office, he cannot maintain an action growing out of the contract of sale. That is all that has been decided by any one of the cases. *Blachford* v. *Preston* (2) was a direct sale. In *Card* v. *Hope* (3) it was not a direct sale; it is distinguishable from *Blachford* v. *Preston* (2) in that respect, but it was decided on the principle of *Blachford* v. *Preston* (2). Why? Because in *Card* v. *Hope* (3), though there was not a direct sale, there was an indirect sale of the appointment. It was said to the plaintiff: If you will buy these shares you shall be the captain. It will occur to every man that, if the shares were sold under such circumstances something was added to the price of the shares, and it was a colourable sale of the command of a ship . . . I am quite satisfied, that not one of the learned judges who decided that case ever conceived that its authority could be

pressed to the extent to which it has been pressed in the present case. All that was decided in that case had been decided in *Blachford* v. *Preston* (2), with the difference that in *Blachford* v. *Preston* (2) the sale was direct and in *Card* v. *Hope* (3) it was indirect. All that the court decided in those cases was that that species of sale was void in point of law. For the reasons which I have given, I am decidedly of opinion that this rule for a new trial and in arrest of judgment ought to be discharged.

PARK, J. I am of opinion that none of the grounds taken for a new trial is tenable here. One of the points taken, which would be a good ground for a motion, was that LORD GIFFORD received evidence which he ought not to have received. That was a list of the passengers which was given in with a view to damages. Captains' charges vary according to the situations and capacities to pay of those who come on board the ship, and the situation they hold either as cabin or steerage passengers. It is well known that, according to the East India regulations, hardly a person goes to the East India settlements whose death (if death has taken place) is not immediately recorded in the East India Co.'s books. What is it that the Act of 1813 has in view? It imposes on the captains of these ships the following regulations. The captain shall, on each voyage, under certain penalties, see that lists are transmitted to the India House of all the passengers who go out in the particular ship; the words are:

> "names, capacities, and descriptions of all persons on board, or who shall have been on board, such ship or vessel, from the time of the sailing thereof to the time of arrival; and all arms on board, or which shall, during such time, have been on board, such ship or vessel, and the several times and places at which such of the said persons as may have died or left the said ship or vessel, shall have so died or left such ship or vessel, or such of the said arms as have been disposed of, have been so disposed of."

Are not these public documents? They are transmitted to the company for general inspection, and have become public documents, and have been so held by my Lord Chief Justice, in the course of his judgment, as those which are received every day at Guildhall. On that ground I see no objection.

The next point was as to the extent of damages, and this branches itself into various considerations. It is argued, that the Lord Chief Justice ought not to have directed the jury to find damages for the two voyages. I am of opinion that he not only might, but that he was bound to do so. Where is the objection? Unless there be something of illegality founded on the latter point, where is there any objection to a man's reciting in an agreement that he has contracted with another, or for four voyages? Those circumstances introduced in the argument, viz., the loss of the ship, that she might be wrecked, that the captain might die, and many other circumstances of that sort, if they had happened, might have been a good answer, for you cannot deal with impossibilities, and if Mr. Mellish could have shown these things, or that Captain Richardson had a "permanent infirmity," as it is called in an Act of Parliament, all that would have gone to the action itself. But then they say there is bankruptcy, and how could he contract under that disability? Is it to be supposed the company would allow a man under such circumstances to go on such a voyage as this? To that I answer this (inasmuch as the agreement has this very proviso: "If the company shall agree to it"): if Mr. Mellish could have shown that on account of the company's refusal to let the bankrupt go, he could not comply with his contract, then the plaintiff could not have recovered, but Mr. Mellish has no right to defend himself by saying that he has put it out of his own power to fulfil his engagement. I am of opinion upon that ground there is no colour for the objection.

The next point is a matter in which is introduced the question of legality. This is in arrest of judgment. I agree with my Lord Chief Justice that, if there be corruption in the agreement, Mr. Mellish, being a defendant, has a right to take

advantage of it, for in pari delicto potior est conditio defendentis. But I see no evidence to affect the plaintiff with that at all. I do not find that, but the contrary. We have been pressed with a variety of cases, two only of which I will mention. The others really have no bearing. It is for the principle that I refer to those cases, and not for the facts. *Card* v. *Hope* (3) is the last case, and *Blachford* v. *Preston* (2) is the other. I concur, as far as is necessary, in the judgments given in these respective cases. The judgment given by ABBOTT, C.J., in *Card* v. *Hope* (3), was very elaborate, but, though I concur with the judgment in that case, I am by no means prepared to agree with every dictum in that judgment. I am quite satisfied that the reference to general policy in that case, by ABBOTT, C.J., was going further than was absolutely necessary, and I think there is nothing here to show illegality. I enter no further into the question now than to say that it strikes me that the mutual engagements contained on the face of this agreement are a sufficient consideration to support the declaration. Is there any corruption in them? I cannot say that anything is corrupt in the agreement unless it be considered as corrupt, or as a wicked and a wrong thing for any man to do, to appoint a respectable person, whose merits and abilities he knows, for a prospective voyage. I cannot go along with that. On the contrary, I am quite satisfied that, if a man has an object in view, for such and such of his relations, or for any respectable man skilful in the navigation of ships, he may reasonably be anxious to secure his services for all the voyages that the ship has to perform under the company, provided they should consent. So far from thinking it an illegal consideration, it seems to me a most meritorious one, one which a sensible, prudent, judicious shipowner would be very likely to act upon. For these reasons I am of opinion, the rule ought to be discharged.

BURROUGH, J.—When this case was argued at the Bar in arrest of judgment, it was said there was no consideration, and if there was it was illegal. The count happens to be framed in a way that avoids all possible question. It states the whole agreement as it existed, and then states mutual promises. Whoever reads the count will see something is to be done on each side; that has been held to be a good consideration. The declaration is framed upon that.

The next contention is that transaction is illegal. I am of opinion that on the face of this count there is no illegality. If it be illegal, it must be illegal either on the ground that it is against public policy or against some particular law. I, for one, protest, as my Lord has done, against arguing too strongly upon public policy—it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all, but when other points fail. Why should you not enter into such a contract as this? I know no law against it; I see no public policy against it at all. The legislature do not consider the East India Co. as a public company; they may in some senses, but not in all. They have the exclusive trade to the East Indies and employ persons (not in what may be considered as offices) to command ships. They own ships. All this is in the course of private trade, and so far public policy does not relate to such a subject. They have a right to make byelaws to regulate that trade.

As to the point of public policy, a great deal has been said and many cases have been mentioned. In *Blachford* v. *Preston* (2), a great number of general phrases were made use of by the learned judge. But one ought not to govern courts of justice by general expressions used in the administration of the law. They may have some weight, but they ought not to govern; one must look to what the point of decision was. I only need read the point of decision from the digest of the case, which puts it out of question that it has anything to do with this case. At 1 MOORE'S DIGEST, 361, it is said:

> "A sale (by the owner) of the command of a ship employed in the East India Co.'s service, without the knowledge and against the byelaws of the company, is illegal; and the contract of sale cannot be the foundation of an action."

Everybody knows that when a party is contracting with a view to the byelaws, a

sale against them would be void. We know that all these captains of ships act under charterparties. If the charterparties incorporate the byelaws, that is a matter which is to govern the contract, and if persons act against the byelaw, there is an end of the contract beyond all question. We then come to the byelaw itself. Whoever looks at it will see that it has nothing to do but with pecuniary sales. The defendant then resorts to another point, under the Sale of Offices Act, 1809, which extended the Sale of Offices Act, 1551. It extends to offices belonging to the East India Co. Who ever heard of the situation of a captain being an office? The East India Co. stand in a two-fold situation. They are a trading company and a territorial company, and this statute relates to offices in the latter respect. It has no relation to the office of a captain of a ship. That is an employment, not an office.

Then we come to damages. It is enough to say, with respect to damages, that the contract is for four voyages, and the breach is: "You have by your own act, by the disposal of the ship, prevented the possibility of complying with your own contract." The question is: What damages shall be awarded for the breach of this contract? That the contract is broken, no one can doubt. The defendant cannot appoint because he has sold the ship. The quantum of damages is for the jury; whether they give more or less is nothing to us. They have judged of that and have given £7,500, which goes to comprehend the whole loss of the first and second voyages. They may have given a greater part for the first and less for the second; they have given that sum, however, which does not seem more than they were warranted to give by the evidence. As to the question of the admissibility of evidence, enough has been said on that subject. It is impossible to maintain any objection to the list of passengers. That list is made out under oath, it is preserved for public purposes, for the use of all the kingdom, for every individual. It is a public paper, and must be governed by the same rules as other public papers. Considering the whole of the case, it does appear to me, after all the arguments we have heard, that there is no ground for a new trial, or for arresting judgment.

Rule discharged.

CUBITT *v.* PORTER

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Easter Term, 1828]

[Reported 8 B. & C. 257; 2 Man. & Ry. K.B. 267; 6 L.J.O.S.K.B. 306; 108 E.R. 1039]

Land—Adjoining lands—Party wall—Common user—Presumption as to ownership of wall.

The common user of a wall separating adjoining lands belonging to different owners is prima facie evidence that the wall and the land on which it stands belongs to the owners of those adjoining lands in equal moieties as tenants in common.

Notes. If it was presumed under the pre-1926 law that a wall belonged to adjoining proprietors as tenants in common, this presumption still applies for the purposes of the Law of Property Act, 1925. See s. 38 of the 1925 Act (20 HALSBURY'S STATUTES (2nd Edn.) 498).

Considered: *Standard Bank of British South Africa* v. *Stokes* (1878), 9 Ch.D. 68; *Watson* v. *Gray*, [1874-80] All E.R. Rep. 1001; *Jolliffe* v. *Woodhouse* (1894), 10 T.L.R. 553; *Newton* v. *Huggins* (1906), 50 Sol. Jo. 617; *Adams* v. *Marylebone Borough Council*, [1907] 2 K.B. 822. Referred to: *Bradbee* v. *Corporation of*

London (Governors of Christ's Hospital), [1835–42] All E.R. Rep. 578; *Murray* v. *Hall* (1849), 7 C.B. 441; *Colebeck* v. *Girdlers Co.* (1876), 1 Q.B.D. 234; *Mason* v. *Fulham Corpn.*, [1910] 1 K.B. 631; *Vine* v. *Wenham* (1915), 84 L.J.Ch. 913.

As to party-walls generally, see 3 HALSBURY'S LAWS (3rd Edn.) 376 et seq.; and for cases see 7 DIGEST (Repl.) 303 et seq.

Cases referred to:

(1) *Matts* v. *Hawkins* (1813), 5 Taunt. 20; 128 E.R. 593; 7 Digest (Repl.) 305, *236*.

(2) *Wiltshire* v. *Sidford* (1827), 8 B. & C. 259, n.; 1 Man. & Ry. K.B. 404; 6 L.J.O.S.K.B. 151; 108 E.R. 1040; 7 Digest (Repl.) 304, *233*.

Rule Nisi obtained by the plaintiff for a new trial in an action for trespass.

The declaration stated that the defendant broke and entered a certain close of the plaintiff and pulled down and damaged a great part of the plaintiff's wall and its materials to the value of £100, and carried away, converted, and disposed thereof to his, the defendant's, own use; and also that he built another wall a privy, and another building against and on the wall of the plaintiff, and kept them against the wall of the plaintiff for a long time, and also cast quantities of bricks and rubbish on the plaintiff's close, by means of which the wall of the plaintiff had been greatly weakened and injured. The defendant denied liability.

At the trial before ALEXANDER, C.B., at Norfolk Assizes, 1826, it appeared that the plaintiff was the occupier of a cottage and garden, as tenant to one Doman. They had formerly been the property of the plaintiff's father. The defendant was the owner of premises adjoining those occupied by the plaintiff and separated therefrom by a wall, part of which the defendant, in July, 1825, had pulled down, and erected on the site another wall of greater height than the old wall, with a cottage and other buildings against it. The present action was brought, after the new wall had been re-built, to try the right of property in that wall.

There was evidence on both sides of various acts of user of the wall by the respective owners of the plaintiff's and defendant's premises. ALEXANDER, C.B., on this evidence, told the jury to find for the defendant if they thought the wall was his, or if, from the common user of the wall by the respective owners of the plaintiff's and defendant's premises, they believed the plaintiff and defendant had a common property in it. The verdict returned by the foreman of the jury was: "We find this to be a party-wall." The Lord Chief Baron said: "That is a verdict for the defendant."

After the jury had separated, the plaintiff's counsel observed that the wall might be a party-wall and yet the plaintiff and defendant might not be tenants in common of it or of the land on which it was built; for if each of the proprietors of the two estates contributed the site of the land on which it was built in equal moieties, or had contributed in the same proportion to the expense of building it, each of them would remain the owner of a moiety of the wall and might maintain an action against the other for any injury done to that moiety.

Counsel for the plaintiff obtained a rule nisi for a new trial, on the ground, first, that the attention of the jury had not been drawn to that distinction and that it might, therefore, be true that the wall was a party-wall, and yet this action would be maintainable. Secondly, assuming that the verdict established that they were tenants in common of the wall, and of the land on which it was built, still the action was maintainable because there had been a destruction of the subject-matter of the tenancy in common by one of the two co-tenants.

Robinson and *Wallinger* for the defendant, showed caused against the rule.
Serjeant Storks and *F. Kelly* for the plaintiff, supported the rule.

BAYLEY, J.—I am of opinion that the rule for a new trial ought to be discharged. This was an action for pulling down the plaintiff's wall. If the wall was the exclusive property of the plaintiff, then the act done by the defendant was a

sufficient ground for the action. If it was entirely the property of the defendant, then he was justified in doing what he did. There was a third view of the case taken by ALEXANDER, C.B., at the trial, viz., that it might be the common property of the plaintiff and defendant. The question left to the jury was whether from the common use of the wall they would not infer that it was common property. There was certainly very strong evidence of common use and the nature of the right may be collected from the manner in which a thing has been used. The jury found that it was a party-wall; they did not in terms find that it was common property; but on having the question whether it was common property put to them, they found it was a party-wall. The Chief Baron observed that this was a verdict for the defendant. Until the jury had separated, no observation was made on the subject of the direction of the judge or on the answer of the jury on that point.

It is too late, on a motion for a new trial, to suggest that the case might have been differently presented to the consideration of the jury and that if that had been done, the verdict might have been different. The probability is against the existence of that state of things which would have justified a verdict for the plaintiff, even on that view of the case which was not presented to the consideration of the jury. Where a wall is common property, it may happen either that a moiety of the land on which it is built may be one man's, and the other moiety another's, or the land may belong to the two persons in undivided moieties.

It does not appear whether, at the time when this wall was built, the land belonged wholly to one individual. It might, at that time, have belonged entirely to one and then he might have sold off a part; or he might have sold an undivided moiety of the wall with the land on one side, and an undivided moiety of the wall with the land on the other side. If the land on which the wall was built belonged on one side to one party and on the other to the other party and they, between them, agreed to build the wall, it would have been prudent at least to make this bargain, that so long as there was to be a wall continuing on this property, the land on which it was built and the wall which stood on that land, should be taken and considered to be the common property of the two, and that the owners of the estates on each side should be tenants in common of the undivided moiety of that land and of that wall, with the power of adopting such remedies for partition as tenants in common may adopt. On the other hand, if the wall stood partly on one man's land and partly on another's, either party would have a right to pare away the wall on his side so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two.

It seems probable to me that this was not a party-wall according to the principle which was acted on in *Matts* v. *Hawkins* (1), but that it was a wall built on the common property of the two and that the wall was the common property of both. *Matts* v. *Hawkins* (1) naturally led to a different conclusion for, under the Party-Wall Act [Fires Prevention (Metropolis) Act, 1774: repealed except for ss. 83 and 86 by the Metropolitan Fire Brigade Act, 1865; see now the London Building Acts (Amendment) Act, 1939, ss. 44 et seq.] each is to contribute the land for that which is to be built on the common soil of the two. If the land is to be contributed by the parties in equal proportions, it may be a probable consequence (I do not say whether it is or not) that the wall belongs one half to the one and the other half to the other; but that in the country where the Party-Wall Act does not apply is such an improbable state of things, that we ought not to send it down again to a new trial on the ground that that view of the case was not presented to the consideration of the jury, when at the trial it was not desired by the counsel that it should be so presented to them.

The next point is whether, assuming that the land on which this wall was built and the wall itself was the common property of the two, the act done by the defendant entitled the plaintiff to maintain trespass. It has been contended that trespass is maintainable, on the ground that there was a destruction of the thing and that if one tenant in common destroy that which is the subject of the tenancy in

common, that is an actual ouster and expulsion by the one of the other, and that the party so expelled may maintain an action of trespass for what has been done in that respect. Perhaps if one had entirely destroyed the wall, that might have been a foundation for an action of trespass. But I take it, that in the case of a wall, a temporary removal with a view to improve part of the property on one side at least, and perhaps on both, is not such a destruction as will justify an action of trespass. There is no authority to show that one tenant in common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy in common, the party removing it having at the same time an intention of making a prompt restitution. It was not a destruction; the object of the party was not that there should be no wall there, but that there should be a wall there again as expeditiously as a wall could be made.

Then it is said that the wall here is much higher than the wall was before. What is the consequence of that? One tenant in common has, on that which is the subject-matter of the tenancy in common, laid bricks and heightened the wall. If that be done further than it ought to have been done, what is the remedy of the other party? He may remove it. That is the only remedy he can have. If there be land belonging to two as tenants in common, and one builds a wall on that land, the other cannot bring trespass because he is excluded from the surface of that ground for a certain period of time, viz., for so long a period as that wall stands.

This case falls within the principle acted on in *Wiltshire* v. *Sidford* (2). The view in which it was presented to the jury by the Chief Baron was the right view of it. There was evidence of a common user by both parties which justified the presumption, either that the wall was originally built on land belonging in undivided moieties to the owners of the respective premises, and at their joint expense, or that it had been agreed between them that the wall and the land on which it stood should be considered the property of both as tenants in common, so as to insure to each a continuance of the use of the wall. For these reasons I am of opinion that this rule ought to be discharged.

HOLROYD, J.—I agree. It is incumbent on the plaintiff to establish his right of action. The declaration in this case was for pulling down the old wall and building the new one. The presumption arising from the acts of enjoyment is that the wall was the property of the plaintiff and the defendant as tenants in common; for the law will presume that what was done without opposition for a considerable time was done rightfully and that these acts of enjoyment were lawful. That being the case, there was abundant evidence at the trial to raise a question to go to the jury, whether the wall was or was not the common wall of both. There having been a joint use of the wall by both, each must have had the right originally or have acquired the right in the course of time by legal means. The jury have found in effect that it was their common property.

The question then arises whether one tenant in common can maintain an action of trespass against another for such acts as were done in this case by pulling down the old wall and building the new one on its site. Taking it to be the law that where there is a complete destruction by one tenant in common of that which he has in common with others, so that that other is wholly deprived of the use of it, an action of trespass will lie, the act done by the defendant in this case cannot be considered as a destruction of the wall. The removal of the old wall was effected merely for the purpose of re-building another on its site as speedily as possible.

LITTLEDALE, J.—I am of the same opinion. The plaintiff seems to have claimed the wall as his own exclusive property and so did the defendant. There was abundant evidence to raise the question for the consideration of the jury whether the plaintiff and the defendant were tenants in common. It is suggested that although the judge left it to the jury to find whether the wall was the property of the plaintiff or of the defendant, and also whether it was the common property of both as tenants in common, yet the foreman of the jury, when he returned the

verdict, did not in express terms answer the question put to them by the judge, but said that the jury found it to be a party-wall. Further, that that finding is consistent with the fact of the wall and the soil on which it was built, having originally belonged to the plaintiff and the defendant, or to those under whom they claimed, in equal moieties. It appears that when that verdict was returned, the judge observed that it was a verdict for the defendant. The plaintiff's counsel did not then suggest to the judge the propriety of leaving to the jury the question in any other form than that in which it was left to them, or intimate any doubt as to the sufficiency of the evidence to warrant the jury in coming to the conclusion to which they did come. That being so, a new trial cannot now be granted on that ground.

Rule discharged.

CARTER *v.* CARTER AND OTHERS

[COURT OF COMMON PLEAS (Best, C.J., and Park, J.), February 10, 1829]

[Reported 5 Bing. 406; 2 Moo. & P. 732; 7 L.J.O.S.C.P. 141; 130 E.R. 1118]

Distress—For rent—Illegal distress—Payment to head landlord by tenant of ground rent and land tax—Claim for rent by immediate landlord—Distress for whole rent without any allowance for payments.

The plaintiff made two payments of ground rent owing by the defendant, his landlord, on a demand by the steward of the ground landlord. The plaintiff was given time to make the payments, but he knew that he was liable to distress if he failed to make them. Subsequently, he made payments for land tax. When the defendant claimed £25 from the plaintiff for rent due, the plaintiff tendered him £5 10s. in discharge thereof and the receipts for the ground rent and the land tax paid by him. The defendant refused the offer and distrained for the whole £25. On the plaintiff's action for wrongful distress,

Held: the payment of the ground rent was none the less compulsory because the plaintiff was given time to pay; the sum of £5 10s. was all that was owing, since the plaintiff was entitled to deduct from rent growing due his antecedent payments for ground rent, and the distress was, therefore, wrongful.

Notes. Distinguished: *Davies* v. *Stacey* (1840), 12 Ad. & El. 506; *Graham* v. *Allsopp* (1848), 18 L.J.Ex. 85. Referred to: *Spencer* v. *Parry* (1835), 3 Ad. & El. 331; *Valpy* v. *Manly*, [1843–60] All E.R. Rep. 830; *Ealon* v. *Donegal Tweed Co.* (1835), 79 Sol. Jo. 342.

As to the amounts for which distress may be made, see 12 HALSBURY'S LAWS (3rd Edn.) 123–126; and for cases see 18 DIGEST (Repl.) 306. As to excessive distress, see 12 HALSBURY'S LAWS (3rd Edn.) 159–160; and for cases see 18 DIGEST (Repl.) 360, 361. As to authorised deductions by tenants, see 23 HALSBURY'S LAWS (3rd Edn.) 547–548; and for cases see 31 DIGEST (Repl.) 271.

Cases referred to:

(1) *Sapsford* v. *Fletcher* (1792), 4 Term Rep. 511; 100 E.R. 1147; 18 Digest (Repl.) 309, *534*.

(2) *Taylor* v. *Zamira* (1816), 6 Taunt. 524; 2 Marsh. 220; 128 E.R. 1138; 18 Digest (Repl.) 309, *538*.

(3) *Andrew* v. *Hancock* (1819), 1 Brod. & Bing. 37; 3 Moore, C.P. 278; 129 E.R. 637; 18 Digest (Repl.) 310, *544*.

(4) *Branscomb* v. *Bridges* (1823), 1 B. & C. 145; 3 Stark. 171; 2 Dow. & Ry.K.B. 256; 1 L.J.K.B. 64; 107 E.R. 54; 18 Digest (Repl.) 314, *593*.

Also referred to in argument:

Stubbs v. *Parsons* (1820), 3 B. & Ald. 516; 106 E.R. 750; 18 Digest (Repl.) 310, *545*.

Rule Nisi obtained by the defendant to enter the verdict in an action for wrongful distress.

The plaintiff claimed that the defendant had wrongfully distrained for £25 when only £5 10s. was due. There were also counts for an excessive distress, a wrongful distress, and a count in trover.

At the trial before BEST, C.J., it appeared that the plaintiff rented a house of the defendant Carter at £50 a year. Shortly after he had paid his half-year's rent, due Lady Day, 1827, the ground landlord's steward called on him for £3 10s. ground rent, due the Christmas preceding, and £8 10s. due at Michaelmas preceding. The plaintiff complained of the hardship of such a demand just after he had paid the rent of his immediate landlord, and prayed for time. The steward gave him time, and £8 10s. was paid in the following July, and £8 10s. in September. The steward stated that he never called on the occupier for the ground rent, unless default had been made by the immediate lessee, which was the case in the present instance. In September, 1827, the plaintiff, being called on to do so, also paid £2 10s. for land-tax, due at Michaelmas, 1826, and Lady Day and Michaelmas, 1827. In November following, the defendant, Carter, demanded of the plaintiff £25 for half a year's rent alleged to be due the preceding Michaelmas. The plaintiff tendered him in discharge £5 10s., and the receipts for the ground rent and land-tax as above. This the defendant refused to accept, and distrained for the whole £25.

On the part of the defendant, it was objected that the action was improperly conceived; that none of the counts in the declaration were adapted to the plaintiff's case; and that if any wrong had been done to the plaintiff, his remedy was not case, but replevin, in which, to an avowry for the rent, he might have pleaded the payment of the ground rent: *Sapsford* v. *Fletcher* (1), *Taylor* v. *Zamira* (2); that the defendant, however, was entitled to distrain for the whole rent due at Michaelmas: no set-off being permitted in cases of distress (*Andrew* v. *Hancock* (3)), the distress could not be answered by anything but payment; and payment could only be of a debt due: the discharge of the ground rent, therefore, by the plaintiff could not operate as payment of the rack-rent, because at the time the ground rent was discharged, the rack-rent in question was not due. At all events no payment would go in discharge of rack-rent, but a payment by compulsion; and here the plaintiff could not be said to have paid upon compulsion, when the ground landlord's steward allowed him time to pay at his convenience.

A verdict having been found for the plaintiff, *Serjeant Wilde* obtained a rule nisi to set it aside.

Serjeant Andrews for the plaintiff, showed cause against the rule.

Serjeant Bompas (for *Serjeant Wilde*) for the defendant, supported the rule.

BEST, C.J.—The great stand made at the trial on the part of the defendant was that this payment by the plaintiff was a voluntary payment. I thought then, and am still of the same opinion, that it was not a voluntary payment. The plaintiff was liable to be distrained on for ground rent. Having just paid his rack-rent, he prayed for time to pay the ground rent. Six weeks were allowed, at the end of which time it was paid, but the defendant knew he was liable to distress, though not actually distrained on, and a payment under such circumstances is no more voluntary, than a donation to a beggar who presents a pistol.

In *Sapsford* v. *Fletcher* (1) and *Taylor* v. *Zamira* (2), the payment of ground rent by the occupier for the landlord was held not to constitute a cross-demand, but to amount to payment of so much of the occupier's rent. Here, by the same means, all the plaintiff's rent had been paid but £5 10s., notwithstanding which the defendant distrains for £25; he is, therefore, clearly liable on the count which states the excessive distress in that way. The substantial question here is: was more than £5 10s. due to the defendant? That amount had been offered, and the jury find that that was all to which he was entitled. Several of the courts are

applicable; and if the whole distress were wrongful, the count in trover is of itself sufficient, as was established in *Branscomb* v. *Bridges* (4).

PARK, J.—It is quite clear this was not a voluntary payment. The plaintiff was all along liable to a distress by the ground landlord, and if time had not been given, would have been distrained on.

Then, it has been expressly decided in *Sapsford* v. *Fletcher* (1) and *Taylor* v. *Zamira* (2), that the occupier is entitled to deduct from his own rent payments so made. But it has been argued that he cannot deduct, from rent growing due, payments for the ground rent of an antecedent half year, and *Andrew* v. *Hancock* (3) has been referred to; but in that case the occupier for several years, subsequently to paying the ground rents, made an entire payment of his own rent, and then sought to deduct the ground rents so paid, from a subsequent year's rent. Here the plaintiff seeks to make the deduction from the first payment of rent accruing due after the ground rent had been demanded and paid. It would be most unjust to refuse this, and the rule which has been obtained must be discharged.

Rule discharged.

TWOPENNY AND ANOTHER *v.* YOUNG

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Trinity Term, 1824]

[Reported 3 B. & C. 208; 5 Dow. & Ry. K.B. 259; 107 E.R. 711]

Guarantee—Surety—Joint promissory note by debtor and surety—Additional security given by debtor—No intention on its face to extinguish effect of note—Creditor's right to sue surety on note.

A joint and several promissory note was given to the plaintiff by a debtor and the defendant to secure trade debts of the debtor in the sum of £290. Later the plaintiff, having asked for further security, accepted a bill of sale from the debtor on his household goods to secure the sum of £380. That instrument recited the debt of £380 and the note given by the debtor and the defendant in respect of £290 "parcel of that sum." A stipulation in the bill allowed the defendant to remain in possession of his property, but such possession was determinable by the plaintiff by three days' notice.

Held: it was clear from the recital in the bill of sale that the promissory note was to be a continuing security; the bill of sale did not extinguish the note, on which the plaintiff was entitled to recover against the defendant, but the plaintiff was not entitled to put an end to the debtor's possession of his property without giving the stipulated three days' notice.

Notes. Considered: *Re Barrow and Geddes, Ex parte Christy* (1832), 2 Deac. & Ch. 155. Applied: *Bell* v. *Banks* (1841), 3 Man. & G. 258. Considered: *Re Keasley, Ex parte Pennell* (1841), 2 Mont. D. & De G. 273. Applied: *Ansell* v. *Baker* (1850), 15 Q.B. 20. Considered: *Owen* v. *Homan* (1851), 3 Mac. & G. 378; *Oriental Financial Corpn.* v. *Overend, Gurney & Co.* (1871), 7 Ch. App. 145, n.; *Barclays Bank, Ltd.* v. *Beck*, [1952] 1 All E.R. 549. Referred to: *Bell* v. *Shuttleforth* (1841), 10 L.J.C.P. 239; *Price* v. *Moulton* (1851), 10 C.B. 561; *Newton* v. *Chorlton* (1853), 10 Hare, 646; *Bingham* v. *Corbitt* (1863), 11 W.R. 232; *Stamps Comr.* v. *Hope*, [1891–4] All E.R. Rep. 315.

As to when the giving of an additional security by a creditor will discharge the surety, see 18 HALSBURY'S LAWS (3rd Edn.) 521–524; and for cases see 26 DIGEST (Repl.) 184 et seq. As to what constitutes giving time to a creditor, see 18 HALSBURY'S LAWS (3rd Edn.) 509, 510; and for cases see 26 DIGEST (Repl.) 186 et seq.

Cases referred to:

(1) *Solly* v. *Forbes* (1820), 2 Brod. & Bing. 38; 4 Moore, C.P. 448; 129 E.R. 871; 26 Digest (Repl.) 211, *1619*.

(2) *Dean* v. *Newhall* (1799), 8 Term Rep. 168; 101 E.R. 1326; 26 Digest (Repl.) 204, *1562*.

Also referred to in argument:

Drake v. *Mitchell* (1803), 3 East, 251; 102 E.R. 594; 26 Digest (Repl.) 208, *1599*.

Davey v. *Prendergrass* (1821), 5 B. & Ald. 187; 2 Chit. 336; 106 E.R. 1161; 26 Digest (Repl.) 182, *1345*.

Boulthee v. *Stubbs* (1811), 18 Ves. 20; 34 E.R. 225, L.C.; 26 Digest (Repl.) 185, *1374*.

Rule Nisi obtained by the defendant to enter a nonsuit in an action of assumpsit on a joint and several promissory note, dated Mar. 10, 1817, given to the plaintiffs by the defendant and one Rummen, for £290, and interest, payable on demand. The defendant pleaded non assumpsit.

At the trial before GRAHAM, B., at the Kent Summer Assizes, 1823, it appeared that Rummen, who was a publican, at the time when the note was given, was indebted to the plaintiffs, who were in partnership as distillers, in the sum of £290, and being asked for security, got the defendant to join in the note declared upon. The partnership between the plaintiffs was soon afterwards dissolved and the plaintiff Boys took upon himself all the debts and credits of the firm, and carried on the business alone, continuing to deal with Rummen as before, until the end of 1820, during which period the latter paid him £676 for goods furnished, and interest on the note. A balance of £380 for the note and goods sold was then due to Boys, who asked for further security. On Jan. 6, 1821, Rummen gave him a bill of sale, by which, after reciting that £380 was due to Boys, and that Rummen and the defendant had given the note in question in respect of £290 "parcel of that sum," and that Boys having called for payment, Rummen had requested him to accept such further security as was thereinafter mentioned, Rummen, as a further security assigned to Boys all his household goods, etc. By a stipulation in the bill of sale, Rummen was to be allowed to continue in possession during his life, subject to determination on three days' notice, at any time afterwards, while the said sum of £380, or any part thereof remained due. Rummen continued in possession, and dealt with Boys as before, until March, 1823, and between that time and Jan. 6, 1821, he paid Boys £500 for goods furnished by him. In February, 1823, a commission of bankruptcy issued against Rummen, on an act of bankruptcy committed in October, 1822; and on Mar. 4, 1823, payment of the note in question was demanded of the defendant.

The judge overruled the contentions raised on behalf of the defendant but gave him leave to move to enter a nonsuit. The plaintiffs having obtained a verdict, *Marryat* for the defendant obtained a rule, according to the leave reserved.

Abraham for the plaintiffs, showed cause against the rule.

Marryat for the defendant, supported the rule.

BAYLEY, J.—It is not necessary to decide in this case, whether a creditor, by giving time to his principal debtor, does or does not thereby discharge a surety; because I think that the instrument in question did not give time to the principal. It recites that £380 was due to Boys, and that a note had been given for £290, parcel of that sum, by the defendant and Rummen. It then states that Boys had called upon Rummen for payment, and that the latter requested him to accept a further security, and then the instrument contains an assignment of certain property to a trustee for Boys. The deed then being intended as a further security, and reciting an existing security, given by the defendant as a surety, could not have been intended to operate as an extinguishment of all claims upon him.

In general, where a simple contract security for a debt is given, it is extinguished

by a specialty security, if the remedy given by the latter is co-extensive with that which the creditor had upon the former. We are not called upon to say whether that would be the case when the remedies are not co-extensive, for where there is that in the instrument which shows that the parties intended the original security to remain in force, the new one has not the effect of extinguishing it, as was recently decided in *Solly* v. *Forbes* (1). There, a release was given to one of two partners, with a proviso that it should not operate to deprive the plaintiff of any remedy which he otherwise would have against the other partner; and that he might, notwithstanding the release, sue them jointly. A joint action having been commenced, the party released pleaded the release, to which the plaintiff replied, that he sued him only in order to recover against the other; and, on demurrer, the replication was held good.

Here, the language of the bill of sale shows that it was intended merely as a further security. That makes the effect of it the same as if an express proviso had been inserted, and prevents it from operating as an extinguishment of the remedy on the note, either as against Rummen or the defendant. This rule must, therefore, be discharged.

HOLROYD, J.—I am of opinion that the ground of the action which has been brought against the defendant was not extinguished by the deed in question. It is clear from the recital that it was intended that the note should continue to be an existing security, and the deed is not strong enough to operate by law in destruction of that intention. The plaintiffs might at any time, notwithstanding the deed, have sued on the note. The deed is a conveyance of personal property, with a condition that the covenantee may put an end to the covenantor's possession after three days' notice. He could not have acted on the covenant until after notice had been given; but he does not stipulate not to sue upon the note until after the expiration of the three days. The deed gives no action of a higher nature against the defendant Young. *Dean* v. *Newhall* (2) is in point and stronger than this case. Had Boys covenanted not to sue at all, either on the note or deed, until after the expiration of three days, it would have been exactly in point. The deed, therefore, cannot operate in discharge of the defendant. It is observable, also, that the deed was a security to Boys alone, not to Twopenny and Boys; but in the circumstances of this case, I do not rely upon that, but upon the intent appearing on the face of the deed.

LITTLEDALE, J., concurred.

Rule discharged.

HEWLINS *v.* SHIPPAM

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Michaelmas Term, 1825, Hilary Term, 1826]

[Reported 5 B. & C. 221; 7 Dow. & Ry.K.B. 783; 4 L.J.O.S.K.B. 241; 108 E.R. 82]

Easement—Right of way—Incorporeal right—Freehold interest—Creation—Need for deed.

A right of way or passage for water, while it does not create an interest in the land, is an incorporeal right and a freehold interest in it cannot be created or passed otherwise than by deed.

The plaintiff was the tenant of an inn and yard for a term of years. The defendant held an adjoining yard as tenant of W. The defendant and W. granted a parol licence to the plaintiff's landlords to construct a drain from the inn through the defendant's yard, and the plaintiff's landlords duly constructed the drain. In an action against the defendant for stopping up the drain, the plaintiff claimed the right to have the drain pass through the defendant's yard indefinitely, or for so long as the defendant should continue in possession of his yard, or for so long as necessary for the convenient occupation of the plaintiff's house.

Held: the interest claimed by the plaintiff was a freehold interest, and, as such, required a deed to create it, and, therefore, the action failed.

Notes. Section 1 of the Statute of Frauds has been replaced by s. 54 (1) of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 552).

Applied: *Cocker* v. *Cowper* (1834), 1 Cr. M. & R. 418. Considered: *Wood* v. *Leadbitter*, [1843–60] All E.R. Rep. 190; *Perry* v. *Fitzhowe* (1846), 8 Q.B. 757; *Mounsey* v. *Ismay* (1865), 12 L.T. 26; *McManus* v. *Cooke* (1887), 35 Ch.D. 681. Applied: *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437. Referred to: *Wallis* v. *Harrison* (1838), 1 Horn & H. 405; *Taplin* v. *Florence* (1851), 10 C.B. 744; *Metropolitan Rail. Co.* v. *Fowler*, [1892] 1 Q.B. 165; *Hurst* v. *Picture Theatres, Ltd.*, [1914–15] All E.R. Rep. 836.

As to casements generally, see 12 HALSBURY'S LAWS (3rd Edn.) 525 et seq.; and for cases see 19 DIGEST (Repl.) 6 et seq.

Cases referred to:

(1) *Webb* v. *Paternoster* (1619), 2 Roll. Rep. 143, 152; Palm. 71; Poph. 151; 81 E.R. 713, 719; 30 Digest (Repl.) 539, *1725*.
(2) *Wood* v. *Lake* (1751), Say. 3; 96 E.R. 783; 30 Digest (Repl.) 537, *1713*.
(3) *Godley* v. *Frith* (1609), Yelv. 159; 80 E.R. 106; 19 Digest (Repl.) 8, *6*.
(4) *Brewer* v. *Hill* (1794), 1 Anst. 413.
(5) *Bolton* v. *Bishop of Carlisle* (1793), 2 Hy. Bl. 259; 126 E.R. 540; 17 Digest (Repl.) 251, *542*.
(6) *Monk* v. *Butler* (1620), Cro. Jac. 574; 79 E.R. 491; 11 Digest (Repl.) 12, *105*.
(7) *Rumsey* v. *Rawson* (1669), 1 Vent. 18, 25; 2 Keb. 504; 86 E.R. 13, 18; 30 Digest (Repl.) 537, *1712*.
(8) *Hoskins* v. *Robins* (1671), 2 Keb. 842; Poll. 13; 2 Saund. 319; 1 Vent. 123, 163; 84 E.R. 533; sub nom. *Roberts* v. *Hoskins*, 2 Keb. 757; sub nom. *Hopkins* v. *Robinson*, 2 Lev. 2; 1 Mod. Rep. 74; 11 Digest (Repl.) 14, *140*.
(9) *Harrison* v. *Parker* (1805), 6 East, 154; 2 Smith, K.B. 262; 102 E.R. 1246; 26 Digest (Repl.) 657, *3011*.
(10) *Fentiman* v. *Smith* (1803), 4 East, 107; 102 E.R. 770; 19 Digest (Repl.) 21, *80*.
(11) *Winter* v. *Brockwell* (1807), 8 East, 308; 103 E.R. 359; 19 Digest (Repl.) 28, *128*.

(12) *Taylor* v. *Waters* (1816), 7 Taunt. 374; 2 Marsh. 551; 129 E.R. 150; 19 Digest (Repl.) 21, *83*.

Rule Nisi obtained by the plaintiff to set aside a nonsuit and enter the verdict in an action on the case for obstructing a drain.

The declaration stated, that on Jan. 1, 1820, W. Humphrey and E. Humphrey were seised in fee of an inn and adjoining yard with the appurtenances, at Chichester. By indenture, they demised the inn and yard, with the appurtenances, to the plaintiff for a term of years in the indenture mentioned, by virtue of which demise the plaintiff entered into possession. That the defendant was possessed of another yard adjoining the premises of the plaintiff, as tenant thereof to one R. Wills, the reversioner. That the defendant did give and grant, and Wills did give, grant and confirm to W. and E. Humphrey, their heirs and assigns, licence and authority to make at their own cost a certain gutter or drain from the inn, across and out of the defendant's yard into the yard of the plaintiff; so that the Humphreys, their heirs and assigns and their tenants and all future occupiers of the inn and yard, should have the foul water from the scullery of the inn running through the gutter out of the defendant's yard into the plaintiff's yard for so long time as necessary for the convenient occupation of the inn. That the Humphreys, relying on the licence duly made the gutter as aforesaid and necessarily expended a large sum of money of which the defendant had notice.

Breach, that the defendant without notice stopped up the drain. Other counts stated the right to be for so long a time as the defendant should be and continue in the possession or occupation of the yard or so long as it should be requisite for the convenient occupation of the plaintiff's house; some stated, as part of the consideration, that the defendant's landlord should do some repairs to the defendant's premises. The defendant denied liability.

At the trial before GRAHAM, B., at Sussex Assizes, 1825, it appeared that the plaintiff was a lessee of the Swan Inn, at Chichester, under W. and E. Humphrey. In May, 1819, W. and E. Humphrey re-built the Swan Inn, and being desirous to construct a drain in the adjoining premises (in the possession of the defendant) applied to Wills, the landlord, who said he had no objection if his tenant had not. The Humphreys further agreed to repair the defendant's premises, to raise his chimneys and to pave his yard. The defendant assented to the making of the drain on these terms and they raised the defendant's chimneys and paved his yard and thereby incurred an expense of £100. The drain was constructed paved at the bottom covered with solid stone and the sides with brick.

On these facts GRAHAM, B., was of opinion that the right claimed under the licence granted by the defendant and his landlord, viz., to have the drain in the soil of another, was an uncertain interest in the land within s. 1 of the Statute of Frauds and, not being granted by any instrument in writing, the plaintiff acquired under it a right at will only which was determined by the defendant's stopping up the drain. He therefore directed a nonsuit with liberty to the plaintiff to move to enter a verdict.

Counsel for the plaintiff obtained a rule nisi, and cited *Webb* v. *Paternoster* (1), *Wood* v. *Lake* (2), and *Godley* v. *Frith* (3), to show that the plaintiff acquired no interest in the land where the drain was situate but a mere easement on the land, viz., the right of having the water run over it.

Marryat and *Platt* for the defendant, showed cause against the rule.

Serjeant Taddy and *Long* for the plaintiff, supported the rule.

Cur. adv. vult.

Hilary Term, 1826. **BAYLEY, J.,** delivered the following judgment of the court.—This was an application to set aside a nonsuit. The action was for stopping up a drain leading from the plaintiff's premises through the defendant's yard. The ground of the nonsuit was that the right to have the drain pass through the defendant's yard was an interest in the defendant's land and under s. 1 of the

Statute of Frauds, there being nothing in writing to create the right, but its foundation resting in parol only, was a right at will only. The points discussed on the motion were, whether this was an interest in land or an easement only and, if it were an interest in land, whether the defendant could stop the drain without taking some previous step to determine the estate at will. When the state of the pleadings is adverted to, however, and the nature of the right there claimed considered, it will be clear that a decision on either of these points is unnecessary and that if the cause were to go down again to another trial, it must again terminate in a nonsuit.

The declaration claimed the right as a licence and authority granted to the plaintiff's landlords, their heirs and assigns, to make the drain and have the foul water pass from their scullery through the drain across the defendant's yard. One of the counts claimed it indefinitely, without fixing any limits; others restricted it either to the time the defendant should continue possessed of his yard or house or so long as it should be requisite for the convenient occupation of the plaintiff's house: some stated, as part of the consideration, that defendant's landlords should do some repairs to the defendant's premises; others did not.

Now what is the interest these counts stated? A freehold interest. In Co. Litt. 42 a, it is said:

> "If a man grant an estate to a woman dum sola, &c., or as long as the grantee dwells in such a house, &c., or for any like uncertain time, which time, as Bracton saith, is tempus indeterminatum, in all these cases, if it be of lands or tenements, the lessee hath, in judgment of law, an estate for life determinable, if livery be made; and if it be of rents, advowsons, or any other things that lie in grant, he hath a like estate for life by the delivery of the deed, and in count or pleading he shall allege the lease, and conclude that by force thereof he was seised generally for the term of his life."

Lord Hale, in his manuscript notes (see Co. Litt. 42 a, n), specifies two or three other instances, but adds that, in pleading, the limitation ought to be pleaded and continuance averred. Blackstone in his Commentaries, vol. ii, p. 121, lays it down that a general grant, without defining the limits of the estate, passes an estate for life; and *Brewer* v. *Hill* (4) is an authority to show that a lease from a vicar, so long as he should continue vicar, passes an estate for life.

What, then, was the evidence to make out the grant of an estate for life? It appeared in evidence at the trial that the drain was made in 1819, at the expense of the Humphreys [the plaintiff's landlords] with the consent of the defendant and Wills, and that the Humphreys laid out some money in improving the defendant's premises. Nothing, however, was said as to how long the drain was to continue nor was anything in writing between any of the parties; and when the inconveniences such a drain may occasion from smells and the necessity of cleaning it are considered, it is almost impossible to suppose that Wills and the defendant meant to run all risks and allow the parties an absolute interest so long as the defendant should continue in possession or so long as it should be requisite, etc. But suppose this had been the intention, can such an interest be created by parol? A right of way or a right of passage for water (where it does not create an interest in the land), is an incorporeal right and stands on the same footing with other incorporeal rights, such as rights of common, rents, advowsons, etc. It lies not in livery but in grant and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot), otherwise than by deed.

Termes de la Ley, a book of great antiquity and accuracy, defines an easement to be a privilege that one neighbour hath of another by charter or prescription, without profit, for example, "as a way or sink through his land, or such like." In Co. Litt. 9 a, Coke distinguishes between corporeal things which lie in livery, and incorporeal which lie in grant, and cannot pass but by deed, such as advowsons,

commons, etc., and it seems to be his opinion, that, except in certain specified cases, where livery is necessary as to the one, a deed is necessary as to the other. The same may be collected from the passage already cited from Co. LITT. 42 a. In Co. LITT. 169, the excepted case of parceners is mentioned, and it is said that though the common of estovers or pasture or a corody or a way lie in grant, they may, on partition between the parceners, be granted without deed. So both LITTLETON and COKE state, in the same part, that a rent may be granted in the case of parceners for owelty of partition without deed.

Further, COKE notices that rents, commons, advowsons and the like that lie in grant, though they cannot pass without deed, may be divided between parceners by parol without deed. Chattels, whether real or personal, may in general be granted without deed: SHEPPARD'S TOUCHSTONE, p. 232; and in the case of things lying in livery, a demise thereof may be made for any number of years at common law without deed. However, COKE in Co. LITT. 85 a, makes a distinction between original chattels and chattels created out of a freehold lying in grant, that the former may pass without deed, the latter cannot be created or pass without it, and whether there is a distinction in this respect between chattel interests created out of freeholds lying in livery and freeholds lying in grant (which I think there is not), it is not necessary to decide, because this is the case of a freehold not of a chattel interest.

SHEPPARD'S TOUCHSTONE, p. 231, lays it down that licence or liberty among other things, cannot be created and annexed to an estate of inheritance or freehold without deed. In 2 ROLLE'S ABRIDGMENT, p. 62, it is laid down that a thing lying merely in grant cannot pass without deed. In 9 Co. REP. 9 a, it is said, arguendo, that a tenant for life cannot, by word without deed, have the privilege of being dispunishable for waste; and that position is adopted in SHEPPARD'S TOUCHSTONE, p. 231.

In GILBERT'S LAW OF EVIDENCE (6th Edn.), p. 96, this is laid down:

> "If a man shows title to a thing lying in grant, he fails if the seal be torn off from his deed, for a man cannot show a title to a thing lying in solemn agreement, but by solemn agreement; and there can be no solemn agreement without a seal, so that possession alone is not sufficient, since the thing itself does not lie in possession but in agreement; therefore, a man cannot claim a title to a watercourse but by deed, and under seal."

Bolton v. *Bishop of Carlisle* (5) is at variance with the position laid down by GILBERT, C.B., that the party fails if the seal be torn off the deed. It was decided in that case that if the deed be destroyed, other evidence may be given to show that the thing was once granted. The general position, however, that a man cannot claim title to a thing lying in grant, but by deed, was not questioned in that case.

In *Monk* v. *Butler* (6), where the plaintiff in replevin answered an avowry for damage feasant by a plea of licence from a commoner who had right for twenty beasts, it was objected that if the commoner could licence, he could not do so without deed; and of that opinion was the whole court. In *Rumsey* v. *Rawson* (7) the objection to such a licence on the account of its not being stated to be by deed, after verdict for the plaintiff on a collateral issue was overruled because the licence was only to take the profit unica vice, and because no estate passed by it. Yet in *Hoskins* v. *Robins* (8) a similar objection was overruled, not on the ground that a parol licence would be sufficient, but on the ground that the objection to the mode of pleading the licence was waived by an issue on a collateral point and that after verdict on such issue, it must be taken that the licence was by deed; but, according to the report in SAUNDERS, HALE, C.J., and the court, seemed to be of opinion that the licence could not be granted without deed.

In *Harrison* v. *Parker* (9), where liberty and licence, power and authority were granted to the plaintiff and his heirs to build a bridge across a river from plaintiff's

close to a close of Sir George Warren, and liberty and licence to plaintiff to lay the foundations of one end on Warren's close, the grant was by deed. Again in *Fentiman* v. *Smith* (10), where the plaintiff claimed to have passage for water by a tunnel over defendant's land, LORD ELLENBOROUGH, C.J., lays it down distinctly (4 East, at p. 109):

"The title to have the water flowing in the tunnel over defendant's land could not pass by parol licence without deed."

On these authorities, we are of opinion that although a parol licence might be an excuse for a trespass till such licence were countermanded, that a right and title to have passage for the water for a freehold interest, required a deed to create it and that, as there has been no deed in this case, the present action which is founded on a right and title, cannot be supported. *Winter* v. *Brockwell* (11), which was relied on by the plaintiff is clearly distinguishable from the present case. All that the defendant there did, he did on his own land; he claimed no right or easement on the plaintiff's. The plaintiff claimed a right and easement against him, namely, the privilege of light and air through a parlour window, and a free passage for the smells of an adjoining house through defendant's area. The only point decided there was that as the plaintiff had consented to the obstruction of his easement, and had allowed the defendant to incur expense in making such obstruction, he could not retract that consent without reimbursing the defendant that expense. That, however, was not the case of the grant of an easement to be exercised on the grantor's land, but a permission to the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it.

Webb v. *Paternoster* (1), *Wood* v. *Lake* (2), and *Tayler* v. *Waters* (12) were not cases of freehold interest, and in none of them was the objection taken that the right lay in grant and, therefore, could not pass without deed. These, therefore, cannot be considered as authorities on the point. On the grounds that the right claimed by the declaration is a freehold right, and that if the thing claimed is to be considered as an easement, not an interest in the land, such a right cannot be created without deed, we are of opinion that the nonsuit was right and that the rule ought to be discharged.

Rule discharged.

LOGAN *v.* WIENHOLT AND ANOTHER

[House of Lords (Lord Brougham, L.C., the Earl of Eldon and Lord Plunket), February, March, July 27, 1832, April 4, 1833]

[Reported 7 Bli. N.S. 1; 1 Cl. & Fin. 611; 5 E.R. 674]

Specific Performance—Bond—Security for undertaking to make payment—Penal clause—Transfers and conveyances of property to avoid bond—Persons entitled under bond specialty creditors.

Will—Bequest—Transactions deemed to be testamentary dispositions—Transfers and conveyances of property to avoid agreement to make bequest in will.

In consideration of the intended marriage of his niece the testator entered into a bond with a penalty conditioned to secure to her and the issue of the intended marriage a certain sum and also such further share of his property as should be equal to the largest devise or bequest that he should make to his next of kin or any other person. Subsequently, to avoid the bond he made certain voluntary assignments and transfers of personal property and conveyances of real estate in or over which he retained a life interest or powers of appointment or revocation. By his will he gave to the two surviving children of his niece the sum of £6,000 "in full satisfaction of all claims under my bond." On a bill filed by one of the children for a declaration that she was entitled to have the agreement contained in the condition of the bond specifically performed and for an account,

Held: (i) the persons intended to be benefited by the agreement contained in the bond were not bound to accept the penalty of the bond or the legacy given by the testator's will, but were entitled in equity to have the full benefit of the provision specified in the agreement, and, therefore, the agreement ought to be specifically executed by the court according to its true intent and meaning; (ii) the assignments, transfers, and conveyances mentioned above must be declared to be in the nature of testamentary dispositions, to be considered in equity, for the purpose of giving effect to the true intent of the agreement in the bond, as if the estates had been given or devised by the testator's will; (iii) the persons entitled to the benefit of the bond were specialty creditors upon the testator's estate for satisfaction of their claims under the bond.

Notes. Applied: *Squire* v. *Whitton* (1848), 1 H.L. Cas. 333. Distinguished: *Re Powell's Insurance Trusts* (1856), 28 L.T.O.S. 19. Considered: *Burrowes* v. *Gore* (1858), 6 H.L. Cas. 907. Referred to: *Eyre* v. *Monro* (1857), 3 K. & J. 305; *Patch* v. *Shore* (1862), 11 W.R. 142; *Meadison* v. *Alderson* (1883), 49 L.T. 303.

As to specific performance of a contract containing a penal clause, see 36 Halsbury's Laws (3rd Edn.) 274, and as to evading covenants making family provision, see ibid., vol. 39, pp. 852, 853. For cases see 44 Digest (Repl.) 27, 28; 44 Digest 180.

Cases referred to in argument:

Chilliner v. *Chilliner* (1754), 2 Ves. Sen. 528; 28 E.R. 337; 7 Digest (Repl.) 257, *955*.

Jones v. *Martin* (1798), 5 Ves. 266, n.; 6 Bro. Parl. Cas. 437; 8 Bro. Parl. App. I. 242,; 31 E.R. 582; 40 Digest (Repl.) 528, *382*.

Randall v. *Willis* (1800), 5 Ves. 262; 31 E.R. 577; 40 Digest (Repl.) 524, *344*.

Appeals from decrees of Lord Eldon, L.C., and Shadwell, V.-C.

In April, 1818, the respondent, Mary Wienholt, filed her bill in the Court of Chancery against the appellants and others, stating, among other things, that in 1772 a marriage was agreed on between John Wienholt and Sarah Jopson, spinster, the niece of Daniel Birkett. In consideration of the intended marriage, Daniel Birkett agreed to secure to her and the issue of the marriage if Sarah Jopson or any issue of that marriage should survive him, the sum of

£1,000 if he should leave a wife or any lawful issue, and if he should die unmarried or without lawful issue, the sum of £2,000, and such further share of his property as should be equal to the largest devise or bequest that he should make to his next of kin or any other person. This agreement was reduced into writing, and prepared in the form of a condition to a bond, and the bond was executed on April 8, 1772. Thereby Daniel Birkett bound himself, his heirs, executors and administrators, in the penal sum of £4,000, for the due performance of the agreement contained in the condition of the bond. The bill further stated that shortly after the date of the bond, the marriage was solemnized, and there were issue of the marriage several children of whom the respondent and J. B. Wienholt were the only survivors living at the death of their mother, having attained the age of 21, and that Sarah and John Wienholt died in the lifetime of the obligor.

The bill, after describing the several interests possessed or represented by some of the parties, defendants thereto, stated, that the obligor, after the date of the bond, had a natural daughter (the appellant Sarah Logan) who in 1795 married Daniel Birkett the younger, a nephew of the obligor, and that the obligor, through the influence of Daniel Birkett the younger and his wife, became desirous of avoiding the effect of the bond and depriving Sarah Wienholt and her family of the benefit to which they might be entitled under it. The obligor, Daniel Birkett the younger, and the appellant Sarah his wife, took the advice of counsel as to the most effectual method of accomplishing this object, and, in pursuance of the suggestions contained in the opinions so taken and with a view to defeating the operation of the bond, Birkett the elder invested some £100,000, in the purchase of real estate for the purpose of withdrawing the property so invested from the effect of the bond and agreement. Of those estates some were conveyed originally to himself for life, with remainder to Birkett the younger and Sarah his wife, or one of them, and others were originally conveyed to Birkett the obligor in fee and were afterwards settled by him to the use of himself for life with remainder to Birkett the younger and Sarah his wife, or one of them. The respondent alleged that all such conveyances were made for the purpose of defeating the effect of the bond. The bill further stated that Birkett the elder assigned certain property to trustees to hold on trust for the benefit of himself and after his death in trust for his nephew and Sarah his wife, or one of them, absolutely, and that he assigned securities for money in favour of the nephew and his wife without any consideration and on the understanding that he (Birkett the elder) should retain the right of disposition of the property or should receive the dividends on the property during his life.

By his will, dated Mar. 31, 1814, Birkett the elder gave to trustees personal property and sums of money for his natural daughter and his nephew and proceeded:

> "I give to John Birkett Wienholt and Mary Wienholt, the two children of my late niece, Sarah Wienholt, the sum of £6,000 sterling, to be equally divided between them; and I declare the same to be in full satisfaction of all claims under my bond, bearing date on or about April 8, 1772; and in case they or either of them shall refuse, upon the request of my executor, to execute an effectual release of the said bond, then I revoke the last-mentioned bequest of £6,000."

The testator, after divers other bequests to servants and others, gave, devised and bequeathed all the residue and remainder of his estate and effects to his nephew, Daniel Birkett the younger, his heirs, executors, administrators and assigns, for ever, to and for his and their own use and benefit absolutely, and appointed him sole executor of his said will. The testator died on Mar. 8, 1817, unmarried, and Birkett the younger duly proved the will and codicil, and, by virtue of the probate thereof, possessed himself of the personal estate of the testator which, after payment of debts, etc. gave a clear surplus of personal estate to the amount of £20,000 and upwards, independently of the personal property assigned and transferred by

him in his lifetime. The respondent alleged that the testator's estates, including such property and the value of the real estates settled and conveyed as aforesaid, exceeded £200,000, and claimed by virtue of the bond, and in the events that happened, to have paid to them, out of the testator's personal estate, the sum of £2,000, and also such further sum as would equal the largest amount of property given by the testator's will, or by his dispositions in his lifetime to take effect in possession after his death, whether the same were of real or personal property.

The bill then charged that the property which passed by the residuary clause in the testator's will was very large and was a legacy or bequest within the meaning of the agreement set forth in the bond; that the several gifts made by the testator in his lifetime to take effect in possession after his death, whether of real or personal property, were testamentary dispositions within the meaning of the bond and agreement; and that the real estate was within the meaning and intention thereof, or, if not, that the personal property, being invested in real estate for the purpose of taking it out of the effect of the bond and agreement, such investment was a fraud upon the bond and the real estates ought either to be considered personal estate as against the parties claiming under the bond and agreement or as a security for the amount of the personalty invested in the purchase thereof; that the conveyances, settlements, transfers and assignments were made without any consideration, as mere gifts and the testator reserved a life interest in all the property so conveyed and transferred, and also a power of disposition over the same, or if not, at least that he reserved a life interest therein, and that the gifts were only reversionary, and not to take effect in possession and enjoyment till after the death of the said testator; and that all such conveyances, settlements, assignments and transfers, were void as against the respondent Mary Wienholt and all persons claiming under the bond.

The bill prayed that the respondent might be declared entitled to have the agreement contained in the condition of the bond specifically performed, and that an account might be taken of the real and personal property of Birkett the elder, conveyed, settled or transferred by him without consideration, to or in trust for Birkett the younger and Sarah his wife, or either of them, or their issue, or in any manner for their benefit, subject to any trust for or power or interest reserved to Birkett the elder, either absolutely or for the term of his life, and that all such conveyances, settlements and transfers might be declared fraudulent as against the respondents, and subject to the agreement. The respondent also prayed that an account might be taken of the general personal estate of Birkett the elder, and of his debts, funeral and testamentary expenses, and legacies, and that the same might be applied in a due course of administration, and that an account might be taken of all the real and personal estates conveyed, settled and transferred as aforesaid and the rents, profits, and produce thereof, and the proceeds of sales thereof, and that the value of the property to which the respondent was entitled under the agreement, and the value of what she was entitled to under the will, might be ascertained, and that she might be allowed to take the £6,000 bequeathed by the will, or the benefit secured by the bond, according as either should appear most beneficial for her.

Birkett the younger died before putting in an answer to the bill, and appointed his wife, Sarah (now Sarah Logan the appellant), and J. Quilter, executor and executrix of his will. They proved the will, and put in a joint and several answer to the bill, and therein admitted that the transfers of stock were voluntary as well as the assignment of the bond debt, but denied that there was any trust in favour of Birkett the elder in the stock or in the bond debt, and that the testator retained any interest therein. They insisted that the annuities and bond debt ought not to be estimated as part of the testator's personal estate at the time of his death, but that the same must be considered as effectually given away and disposed of by Birkett the elder in his lifetime in manner aforesaid. They denied that to their knowledge or belief any part or parts of the testator's personal estate was or were

assigned to Birkett the younger and the defendant Sarah Birkett, or to either of them, subject to any trust in favour of the said testator, and they denied the other allegations in the bill.

The cause came on to be heard before LORD ELDON, L.C., who, by his decree dated May 31, 1825, declared, that the condition of the bond contained an agreement which ought to be specifically executed by the court according to the true intent and meaning thereof, and that the parties intended to be benefited thereby were not bound to accept the penalty of the bond or the legacy given by the testator's will, but were entitled in equity to have the full benefit of the provision agreed to be made in the manner in the condition mentioned. His Lordship further declared that, Birkett the elder having died unmarried and without lawful issue, the sum of £2,000 ought to be paid out of his estate according to the agreement for the benefit of the parties entitled thereto, with interest at 4 per cent. from one year after the testator's death, and that, exclusive of such provision, Birkett the elder ought to be considered as having engaged by will or otherwise to give or leave to or in trust for the parties meant to be entitled to the benefit of the agreement so much in money or in valuable effects as he should give or leave to any one of his next of kin or any other person or persons, to be paid within twelve calendar months next after his decease, or, if he should make no such bequest in his will, or the same should fall short of the greatest bequest in such will, then that his executors or administrators should, for the benefit of such parties as aforesaid, pay or deliver over such bequest or make good any deficiency that the same should so fall short. His Lordship declared that, according to the true construction of the agreement contained in the bond, the respondents electing to take under that agreement and not to accept the £6,000 bequeathed by the will, were entitled to claim so much of the testator's property disposed by his will as would be equal in value to the largest amount of what was thereby bequeathed to any person or legatee, whether specific, pecuniary or residuary legatee, and, further, that the assignment of certain debts, the transfers of certain securities, and all other voluntary dispositions of personal property remaining personal at the testator's death in which he reserved or retained a life interest or over the disposition of which he had a power of appointment or revocation ought to be considered in equity, for the purpose of giving effect to the true intent and meaning of the agreement, as having the same effect as if those sums and such other personal properties voluntarily disposed of had been bequeathed by the testator's will to the persons after his death entitled thereto. It was ordered that it be referred to the Master to inquire into the transactions entered into by Birkett the elder during his lifetime, and to take an account

On Mar. 7, 1829, the Master having made his report, the case came on to be heard on exceptions to that report, and for further directions before SHADWELL, V.-C. who, by a decree then made, declared that the exceptions against the Master's report be overruled, and that the several voluntary dispositions of personal estate made by the testator were to be considered in equity, for the purpose of giving effect to the agreement contained in the condition of the bond, as having the same effect as if the personal estate so voluntarily disposed of had been bequeathed by the testator's will to the persons who after his death were intended to take the benefit of such dispositions. It was declared that, according to the true construction of the agreement, all testamentary dispositions of freehold, copyhold, and leasehold estates, and dispositions of that nature, which by the decree in the cause were declared to be of the nature of testamentary dispositions, were within the intent and meaning of the agreement, and that all the freehold and copyhold estates purchased by the testator after the execution of the bond were to be considered in equity, for the purpose of giving effect to the true intent and meaning of the agreement as if the real estates had been given or devised by the testator's will. It was further declared that the respondents were entitled to stand as specialty creditors on the estate of the testator for a sum equal to such amount and value, and

if the funds in court and other property applicable thereto under that decree should not be sufficient to answer what should be found to have been received by Birkett the younger, it was ordered that the deficiency be answered by Sarah Logan his executrix out of his estate and effects.

The appellants appealed.

Sir C. Wetherell and *Pepys* for the appellants.

Sir E. Sugden and *Sir W. Horne* for the respondents.

July 27, 1832. **THE EARL OF ELDON** said that he saw no reason to change the opinion he had formed in the court below.

LORD BROUGHAM, L.C., said that in the course of the argument, it had been the opinion of all the Lords who had heard the case that great difficulties had been pressed upon their consideration. It had been thought that the condition of the bond must be taken to operate in limine. That was the foundation of the decree of LORD ELDON, and they felt that they could have no difficulty in concurring with that view of the matter. The difficulty had arisen upon what had been since done, namely, in the decree of the vice-chancellor, and as that difficulty which had been raised in the discussion had not been removed he would propose taking further time for consideration. But, without stating that he possessed any distinct opinion on those important points to which the decree of the vice-chancellor had given rise, he could not avoid expressing the strong inclination of his opinion on one or two of the matters on which the vice-chancellor had decreed. Where his opinion was opposed to that of the vice-chancellor was that part of the decree where his Honour had said that all the testamentary dispositions of leasehold, freehold and copyhold estates, were within the intent and meaning of the agreement. He (his Lordship) was not prepared to say that that was the true construction of the agreement. He should rather say that it was confined to personalty. But that on which he had a very strong impression was, as to the mode of calculation adopted with regard to the bequests. The result of his Honour's decree on that point was that it was the plain and obvious meaning of the parties to this agreement that, whatever the most favoured person received in personalty or realty, as much should be given to Sarah Jopson, so that whatever was given to Daniel Birkett, would be suddenly taken away from him and given to Sarah Jopson, who, getting this in addition to what she before had, would, therefore, take nearly the whole. He was not prepared to put a construction on the agreement that would produce such a result. The parties ought to agree among themselves as to the division of this property, but as they would not agree, they ought to give in schemes of what each asked to obtain from their Lordships.

LORD PLUNKET concurred with the LORD CHANCELLOR on the points now referred to. There was not any difference of opinion or any doubt as to the propriety of the decree first made in this case. What LORD ELDON had decided had been most properly decided, but his decree necessarily left a great many most important points untouched. The first of these points was whether the contract related to more than personal estate. On that point he should wish for further time to consider the case and refer to the authorities. It was impossible to say on this contract, though no doubt a great benefit was intended to be given to Sarah Jopson, no greater benefit indeed to any person than to her; still, it was impossible to say that it was intended she should get all; at least so he thought at present. But if that should in the end be considered to be the effect of the contract, their Lordships must see it carried into execution.

April 4, 1833. THEIR LORDSHIPS, by an order bearing this date and reciting the substance of the two decrees of LORD ELDON and of the vice-chancellor, confirmed them both.

Appeal dismissed.

DAVIS *v.* GARRETT

[COURT OF COMMON PLEAS (Tindal, C.J., and other judges), June 22, 1830]

[Reported 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456]

Tort—Defence—Loss through wrongful act—Possibility of loss if wrongful act not committed.

Shipping—Carriage of goods—Deviation—Cargo lost during deviation Defence—Possibility of loss if deviation had not occurred.

No wrongdoer can be allowed to qualify his wrong, and, therefore, if a loss has happened while his wrongful act was in operation and is attributable to his wrongful act, he cannot set up as an answer to an action for the loss the possibility of a loss if his wrongful act had never been done.

The plaintiff loaded lime on board the defendant's barge to be conveyed by the "direct, usual and customary . . . course . . . without any voluntary and unnecessary deviation or departure from . . . the same". The ship's master unnecessarily deviated from the usual course and during the deviation and as the result of a storm the lime was wetted and became heated so that the barge caught fire and both barge and lime were lost. In an action by the plaintiff for the loss of the lime during an unnecessary deviation,

Held: (i) as a loss happened while the defendant's wrongful act of deviation was in operation and was attributable to that wrongful act, the defendant could not set up the possibility of the cargo being lost through the storm if no deviation had taken place; (ii) the law implied a duty on the owner of a vessel, whether a general ship or whether hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course, and the words "usual and customary" added to the word "direct" must be held to qualify it, and signify that the vessel should proceed on the course usually and customarily observed in that voyage. For these reasons the plaintiff was entitled to succeed.

Notes. Considered: *McAndrew* v. *Adams* (1834), 1 Bing. N.C. 29; *Thompson* v. *Hopper* (1856), 6 E. & B. 937; *Taylor* v. *Great Northern Rail. Co.* (1866), L.R. 1 C.P. 385; *Harris* v. *Great Western Rail. Co.* (1876), 1 Q.B.D. 515. Distinguished: *Morritt* v. *North Eastern Rail. Co.* (1876), 1 Q.B.D. 302. Applied: *Scaramanga* v. *Stamp* (1880), 5 C.P.D. 295; *Lilley* v. *Doubleday*, [1881–5] All E.R. Rep. 406; *James Morrison & Co., Ltd.* v. *Shaw, Savill and Albion Co., Ltd.*, [1916–17] All E.R. Rep. 1068. Considered: *Elliott Steam Tug Co.* v. *Payne*, [1920] 2 K.B. 693. Applied: *Canadian Pacific Rail. Co.* v. *Kelvin Shipping Co.* (1927), 138 L.T. 369. Considered: *Waddle* v. *Wallsend Shipping Co.*, [1952] 2 Lloyds Rep. 105. Referred to: *Thompson* v. *Hopper* (1858), E.B. & E. 1038; *The Norway* (1865), 13 W.R. 296; *Grill* v. *General Iron Screw Collier Co.* (1866), L.R. 1 C.P. 600; *Svensden* v. *Wallace* (1885), 54 L.J.Q.B. 497; *Royal Exchange Shipping Co.* v. *Dixon* (1886), 12 App. Cas. 11; *Searle* v. *Lund* (1903), 88 L.T. 863; *Shaw & Co.* v. *Symmons & Sons*, [1916–17] All E.R. Rep. 1093; *The Cap Palos*, [1921] All E.R. Rep. 249; *Gibaud* v. *Great Eastern Rail. Co.*, [1921] All E.R. Rep. 35; *Buerger* v. *Cunard Steamship Co.*, [1925] 2 K.B. 646; *Akties Steam* v. *Arcos, Ltd.*, *Akties Bruusgaard* v. *Arcos, Ltd.* (1933), 39 Com. Cas. 158; *A/S Rendal* v. *Arcos, Ltd.*, [1937] 3 All E.R. 577; *Yeoman Credit, Ltd.* v. *Apps*, [1961] 2 All E.R. 281.

As to liability for a ship's deviation from the usual route, see 35 HALSBURY'S LAWS (3rd Edn.) 269, 270; and for cases see 41 DIGEST (Repl.) 378 et seq. As to the effective cause on a claim for negligence, see 28 HALSBURY'S LAWS (3rd Edn.) 27–29; and for cases see 36 DIGEST (Repl.) 33 et seq.

Cases referred to:

(1) *Max* v. *Roberts* (1810), 12 East, 89; 42 Digest (Repl.) 672, *4251*.

(2) *Parker* v. *James* (1814), 4 Camp. 112; 171 E.R. 37, N.P.; 41 Digest (Repl.) 459, *2386*.

Also referred to in argument:

Powell v. *Layton* (1806), 2 Bos. & P. N.R. 365; 127 E.R. 669; 42 Digest (Repl.) 672, *4250*.

Rule Nisi obtained by the defendant for a new trial or to arrest the judgment in an action for negligence in respect of cargo lost on board the defendant's barge during a deviation from the usual course.

The plaintiff by his declaration stated that on Jan. 22, 1829, at London, in the parish of St. Mary-le-Bow, in the ward of Cheap, the plaintiff, at the special request of the defendant, delivered to the defendant on board his barge called the *Safety*, and the defendant received from the plaintiff on board of the said barge, 114½ tons of lime valued at £100, to be carried and conveyed by the defendant on board the said barge from Bewly Cliff in the county of Kent, to the Regent's Canal in the county of Middlesex (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature or kind being excepted), for certain reasonable reward to be paid therefor by the plaintiff to the defendant.

It was alleged by the declaration that the said barge afterwards departed on the intended voyage, having the said lime on board, and it was the duty of the defendant to have carried and conveyed the said lime on board of the said barge from Bewly Cliff to the Regent's Canal, by and according to the direct, usual, and customary way, course, and passage, without any voluntary and unnecessary deviation or departure from, or delay or hindrance in the same; but that the defendant, in breach of his duty in that behalf, wrongfully and intending to injure and prejudice the plaintiff in that respect, did not convey the said lime on board of the barge from Bewly Cliff to the Regent's Canal (although not prevented by the matters excepted as aforesaid according to the direct and usual way and without any unnecessary deviation therefrom but before the arrival of the said barge at the Regent's Canal, the defendant by one John Town, the master of the said barge, and the agent of the defendant in that behalf, without the knowledge and against the will of the plaintiff, voluntarily and unnecessarily deviated from the usual and customary way, course, and passage with the said barge to certain parts out of such usual and customary course and passage, namely, to the East Swale, and to Whitstable Bay, and there voluntarily and unnecessarily navigated the said barge, which was delayed for the space of twenty-four hours next following.

It was further claimed that the said barge was by reason of such deviation and delay out of such usual and customary course exposed to a violent storm and heavy sea, and was thereby totally wrecked, and the plaintiff's said lime on board the said barge was burnt and destroyed, and wholly lost to the plaintiff, whereby the plaintiff lost divers gains and profits, amounting to the sum of £50 which he might otherwise have made.

At the trial before TINDAL, C.J., it appeared that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration, without any justifiable cause; and that afterwards, and while such barge was out of her course, in consequence of violent and tempestuous weather, the sea communicated with the lime which thereby became heated, and the barge caught fire; and that the master was compelled, for the preservation of himself and the crew, to run the barge on shore, where both the lime and the barge were entirely lost.

A verdict having been found for the plaintiff, *Serjeant Taddy* for the defendant obtained a rule nisi for a new trial, or to arrest the judgment, on the ground (i) that the deviation by the master of the barge was not a cause of the loss of the lime

sufficiently proximate to entitle the plaintiff to recover, inasmuch as the loss might have been occasioned by the same tempest if the barge had proceeded in her direct course; and (ii) that the declaration contained no allegation of any undertaking on the part of the defendant to carry the lime directly from Bewly Cliff to the Regent's Canal, an allegation which, it was contended, on the authority of *Max* v. *Roberts* (1), was essential to the plaintiff's recovery.

Serjeant Wilde for the plaintiff, showed cause against the rule.

Serjeant Taddy for the defendant, supported the rule.

Cur adv. vult.

June 22, 1830. **TINDAL, C.J.,** delivered the following judgment of the court.—There are two points for the determination of the court upon this rule: (i) whether the damage sustained by the plaintiff was so proximate to the wrongful act of the defendant as to form the subject of an action; and, (ii) whether the declaration is sufficient to support the judgment of the court for the plaintiff.

As to the first point, it appeared upon the evidence that the master of the defendant's barge had deviated from the usual and customary course of the voyage mentioned in the declaration without any justifiable cause, and that while the barge was out of her course, in consequence of stormy and tempestuous weather the sea communicated with the lime, which thereby became heated, so that the barge caught fire and the master was compelled for the preservation of himself and the crew to run her on shore, where both the lime and the barge were entirely lost.

The first objection on the part of the defendant is not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge, for it is obvious that the legal consequences must be the same whether the loss was immediately, by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case.

The objection taken is that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself, for that the same loss might have been occasioned by the very same tempest, if the barge had proceeded in her direct course. If this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. Yet, in *Parker* v. *James* (2) where the ship was captured while in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm in one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right and ordinary voyage. The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable.

We think that the real answer to the objection is that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened while his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done; but there is no evidence to that extent in the present case.

Upon the objection taken in arrest of judgment, the defendant relies on the authority of *Max* v. *Roberts* (1). The first ground of objection upon which the judgment for the defendant in that case was affirmed is entirely removed in the present case. For in this declaration it is distinctly alleged that the defendant had received the lime in and on board of his barge to be by him carried and conveyed on the voyage in question. As to the second objection mentioned by LORD ELLENBOROUGH, C.J., in giving the judgment in that case, viz., that there is no allegation in the declaration that there was an undertaking to carry directly to Waterford, it is to be observed that this is mentioned as an additional ground for the judgment of the court, after one, in which it may fairly be inferred from the language of the Chief Justice that all the judges had agreed; and which first objection appears to us amply sufficient to support the judgment of the court. We cannot, therefore, give to that second reason the same weight as if it were the only ground of the judgment of the court. At all events, we think there is a distinction between the language of this record and that of the case referred to. In the case cited, the allegation was that it was the duty of the defendant to carry the goods directly to Waterford; but here the allegation is "that it was his duty to carry the lime by and according to the direct, usual and customary way, course, and passage, without any voluntary and unnecessary deviation and departure."

The words usual and customary being added to the word direct, more particularly when the breach is alleged in "unnecessarily deviating from the usual and customary way," must be held to qualify the meaning of the word direct, and substantially to signify that the vessel should proceed in the course usually and customarily observed in that her voyage. We cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.

We, therefore, think the rule should be discharged, and that judgment should be given for the plaintiff.

Rule discharged.

ROBERTS *v.* DAVEY

[Court of King's Bench (Denman, C.J., Littledale and Parke, JJ.), April 23, 1833]

[Reported 4 B. & Ad. 664; 1 Nev. & M.K.B. 443; 2 L.J.K.B. 141; 110 E.R. 606]

Minerals—Licence to dig and mine land—Avoidance on breach of covenants—Election of grantor—Need for act showing intention to determine.

A licence to dig and mine land for minerals for twenty-one years contained a proviso that, if the grantee or his executors should at any time neglect effectually to work the premises for a period exceeding six months in any one year or fail to perform the covenants contained in the indenture, the licence should cease, determine and be utterly void and of no effect to all intents and purposes.

Held: the word "void" in the proviso meant voidable at the election of the grantor and he or a person claiming under him must do some act to evince his intention to avoid the licence before a trespass could be maintained against the licensee for working the land for minerals.

Per Littledale, J.: This instrument is a mere licence to dig and did not pass the land. An actual entry, therefore, was unnecessary to avoid it. . . . To put an end to this licence, the grantor should have given notice of his intention to do so.

Notes. Considered: *Davenport* v. *Reginam*, [1874–80] All E.R. Rep. 157; *James* v. *Young* (1884), 27 Ch.D. 652. Referred to: *Doe d. Griffith* v. *Pritchard* (1833), 2 Nev. & M.K.B. 489; *Hughes* v. *Palmer* (1865), 19 C.B.N.S. 393; *Elliott* v. *Boynton*, [1923] All E.R. Rep. 174.

As to effect of proviso for re-entry, see 23 Halsbury's Laws (3rd Edn.) 665, 666; and for cases see 31 Digest (Repl.) 524. As to licences to work mines and carry away minerals, see 26 Halsbury's Laws (3rd Edn.) 444 et seq.; and as to exercise of legal right as defence to action for trespass, see 38 Halsbury's Laws (3rd Edn.) 751; and for cases see 33 Digest (Repl.) 834 et seq.

Case referred to:

(1) *Doe d. Bryan* v. *Bancks* (1821), 4 B. & Ald. 401; 106 E.R. 984; 33 Digest (Repl.) 829, *898*.

Also referred to in argument:

Armsby v. *Woodward* (1827), 6 B. & C. 519; 9 Dow. & Ry.K.B. 536; 108 E.R. 542; sub nom. *Armsby* v. *Woodward*, 5 L.J.O.S.K.B. 199; 31 Digest (Repl.) 527, *6503*.

Rede v. *Farr* (1817), 6 M. & S. 121; 105 E.R. 1188; sub nom. *Reid* v. *Parsons*, 2 Chit. 247; 31 Digest (Repl.) 524, *6470*.

Doe d. Hanley v. *Wood* (1819), 2 B. & Ald. 724; 106 E.R. 529; 33 Digest (Repl.) 780, *513*.

Browning v. *Beston* (1555), 1 Plowd. 131; 75 E.R. 202; 31 Digest (Repl.) 241, *3751*.

Digges's Case, *Digges* v. *Palmer* (1600), 1 Co. Rep. 173 a.

Fenn d. Matthews and Lewis v. *Smart* (1810), 12 East. 444; 104 E.R. 173; 31 Digest (Repl.) 526, *6485*.

Demurrer in an action of trespass for breaking and entering the lands of the plaintiff, called Carvannell, in the parish of Gwennap, in Cornwall; another close in the same parish called Longcroft; and another in the same county; and sinking shafts in the said closes, and carrying away ore.

The defendant pleaded, inter alia, that on June 7, 1821, long before the plaintiff had any interest in the lands, Stephen Ustwicke was seised in fee of one undivided third part in them; and by indenture between him of the one part, and John Bullocke of the other part, he, Ustwicke, granted to Bullocke, his executors,

administrators, and assigns, full and free liberty, licence and authority to dig, mine, and search for tin, tin ore, and all other ores, metals, and minerals within, throughout, and under all that, his one third part of and in the lands, for the term of twenty-one years. Further, that before the expiration of that term, J. B. made his will, and appointed Betsey Lovell Bullocke, his wife, executrix, who, on his death, undertook the execution of the will, and became legally entitled to the use, exercise, and enjoyment of the liberty, licence, and authority so granted by the indenture to Bullocke, for the residue of the term. That because, without committing the trespasses, Betsey Lovell Bullocke could not have or enjoy the liberty, licence, and authority so fully and effectually as it was lawful for her to do, the defendant, as her servant and by her command, entered into and upon the lands in the plaintiff's possession and committed the supposed trespasses.

The plaintiff replied that the supposed liberty, licence, and authority were granted subject to a condition, that if J. B., his executors, etc., should, at any time neglect effectually to work the premises, by the supposed indenture granted, for any time or times exceeding in the whole six calendar months in any one year of the term, or should not work effectually such mine or mines, and the veins and lodes discovered, or to be discovered, within the premises, unless hindered by unavoidable accident, or should fail in the performance of all or either of the covenants contained in the supposed indenture, then, and from thenceforth, that the supposed indenture, and the liberties, licences, powers, and authorities thereby granted, and every of them, should cease, determine, and be utterly void and of no effect to all intents and purposes. He then alleged that J. B. in his lifetime, and the executrix afterwards, for a space of time exceeding in the whole six calendar months, neglected effectually to work the premises contrary to the condition of the indenture, whereby the supposed indenture, and the supposed liberty, licence, and authority, long before the committing of the trespasses mentioned in the plea, i.e., on Dec. 8, 1822, ceased, determined, and became and were utterly void and of no effect.

The defendant demurred. Joinder in demurrer.

Follett for the defendant, in support of the demurrer.

Jeremy for the plaintiff.

DENMAN C.J. There is nothing to connect the plaintiff with Ustwicke, and it is possible he may have come in by title inconsistent with that of Ustwicke, who had only a third part in the lands. Assuming, however, that it had appeared that he represented the grantor of the licence, I think it quite clear, according to *Doe d. Bryan* v. *Bancks* (1), and on the wording of this grant, that it was necessary for him to have done some act showing his intention to determine the licence; until such act were shown, it continued in force.

LITTLEDALE, J. The replication cannot be supported. It seems to me that, according to *Doe d. Bryan* v. *Bancks* (1), this instrument was liable to be rendered void only at the election of the grantor. If it had been a freehold lease of land subject to a condition that it should be void on non-performance of covenants, it would have been necessary for the lessor to avoid it by entry; or, if that were impossible, by claim. This instrument is a mere licence to dig, and did not pass the land. An actual entry, therefore, was unnecessary to avoid it; but by analogy to what is required to be done in order to determine a freehold lease, which, by the terms of it, is to be void on the non-performance of covenants, it seems to follow that, to put an end to this licence, the grantor should have given notice of his intention so to do. The giving of such notice in the case of an instrument like this is equivalent to an entry or claim by the grantor of a freehold estate to which a condition is annexed. Until such notice were given, the right of possession in those claiming under the licence was so far continued that the plaintiff, who, for anything that appears, was a stranger to Ustwicke, could not take advantage of

the breach of condition. If the plaintiff had set out his title, and shown that he claimed under Ustwicke, the case might then be different.

PARKE, J.—The question is, upon the construction of this instrument, whether the grant is void or voidable only on the default in question. If it be void, the plaintiff is entitled to judgment; if it be voidable only, then, as it does not appear that the grantor did any act amounting to an exercise of his option, the defendant is entitled. It is not necessary to decide whether the word 'void' means voidable by entry, or voidable by any other act, showing the election of the grantor, because in either case, *Doe d. Bryan* v. *Bancks* (1) shows that a lease containing such a proviso is not void at all events, and that a breach of it cannot be taken advantage of by a stranger, which the plaintiff here must be taken to be, for we cannot infer any privity between him and Ustwicke. He must be taken on these pleadings to be in lawful possession, but he may have been so as the owner of the other two third parts; in order to avoid the licence, it ought to have been shown that Ustwicke, or somebody claiming under him, had done some act to determine it. That not being shown, the replication is bad, and there must be judgment for the defendant.

Judgment for defendant.

BEESTON *v.* COLLYER

[Court of Common Pleas (Best, C.J., Park, Burrough and Gaselee, JJ.), June 30, 1827]

[Reported 4 Bing. 309; 12 Moore, C.P. 552; 5 L.J.O.S.C.P. 180; 130 E.R. 786]

Master and Servant—Contract of service—Duration—Hiring without limitation of time—Presumption of contract for one year and thereafter so long as parties pleased.

If an employer hires an employee without mention of any limitation of time, that is a general hiring for a year, and if the parties continue in the relationship for some years there will be presumed a contract for a year in the first instance and so on for each succeeding year so long as it please the parties.

Notes. That part of s. 4 of the Statute of Frauds relating to contracts not to be performed within the space of one year was repealed by the Law Reform (Enforcement of Contracts) Act, 1954: 34 Halsbury's Statutes (2nd Edn.) 97.

Considered: *Dobson* v. *Collis* (1856), 1 H. & N. 81. Referred to: *Fawcett* v. *Cash* (1834), 5 B. & Ad. 904; *Davis* v. *Marshall* (1861), 4 L.T. 216; *Davey* v. *Shannon* (1879), 4 Ex. D. 81.

As to a yearly hiring, see 25 Halsbury's Laws (3rd Edn.) 480 et seq.; and for cases see 34 Digest (Repl.) 56 et seq.

Cases referred to in argument:

Johnstone v. *Hudlestone* (1825), 4 B. & C. 922; 7 Dow. & Ry.K.B. 111; 4 L.J.O.S.K.B. 71; 107 E.R. 1302; 18 Digest (Repl.) 311, *561*.

Bracegirdle v. *Heald* (1818), 1 B. & Ald. 722; 106 E.R. 266; 12 Digest (Repl.) 138, *857*.

Rule Nisi obtained by the defendant to set aside a verdict for the plaintiff and enter a nonsuit in an action of assumpsit brought by the plaintiff, a clerk to the defendant, an army agent, for an alleged breach of contract in discharging the plaintiff before the end of the year which he claimed to serve under a yearly hiring.

The declaration stated that the defendant, on Mar. 1, 1793, retained the plaintiff in his service as a clerk at a certain salary for one whole year from the day and year aforesaid, and afterwards as long as the plaintiff and defendant should respectively please, until the expiration of the current year from the said Mar. 1:

that the plaintiff stayed in the defendant's service on the terms aforesaid until Dec. 23, 1826, and was willing to continue until the expiration of the current year on Mar. 1, 1827, but that defendant discharged him on Dec. 23, 1826.

At the trial before BEST, C.J., the plaintiff's son proved a quarterly payment of £125 on June 24, 1811, and that there were entries of quarterly payments in that year in the defendant's books, but that during the last six years the salary had been received monthly on the 25th of the month. He remembered his father in the defendant's service since 1806. On Dec. 23, 1826, the plaintiff received his discharge. BEST, C.J., told the jury that the payment of the quarter's salary in 1811 was evidence of a yearly hiring, although the salary was afterwards paid monthly. The general rule was that, if a servant was hired, he was deemed to be hired for a year under certain qualifications; and though the usual contract with menial servants was for a month's wages or a month's warning, it was not the case with servants of the plaintiff's description. The jury found a verdict for the plaintiff of £83 damages. *Serjeant Wilde* for the defendant obtained a rule nisi to set it aside.

Serjeant Spankie for the plaintiff, showed cause against the rule.
Serjeant Wilde for the defendant, supported the rule.

BEST C.J.—I entertain no doubt on the law or justice of this case. The defendant has not suggested any reason for ending the service of the plaintiff; and it would be indeed extraordinary if a party in his station of life could be turned off at a month's notice like a cook or scullion.

If a master hire a servant without mention of time, that is a general hiring for a year, and if the parties go on four, five or six years, a jury would be warranted in presuming a contract for a year in the first instance, and so on for each such succeeding year as long as it should please the parties. Such a contract being implied from the circumstances, and not expressed, a writing is not necessary to authenticate it. It is not necessary for us now to decide whether six months, three months or any notice be requisite to put an end to such a contract, because, under the circumstances of the present case, after the parties had consented to remain in the relation of employer and servant from 1811 to 1826, we must imply an engagement to serve by the year, unless reasons are given for putting an end to the contract. The defendant put an end to this engagement without assigning any reason and the jury, therefore, were warranted in the finding they have come to. The principles on which the action for use and occupation proceed are the same as those which formed the ground of my direction to the jury on the present occasion. The contract is for a year at first and, if the parties do not disagree, it goes on from one year to another. It is true that one of the incidents of a tenancy of this kind is that it can only be determined by a half year's notice, concluding with that day on which the tenancy commenced. We do not say that such terms are to be engrafted on contracts for the hire of servants, but the contract between the parties in this cause has been accurately described in the first count of the declaration as a contract for one whole year, and afterwards as long as the plaintiff and defendant should respectively please, until the expiration of the current year from Mar. 1. That allegation has been proved in evidence by acts from which such a contract would be implied, and, being so implied, it was not necessary that it should be reduced into writing.

PARK, J.—We do not decide what notice to quit, if any, is requisite under a hiring like this; but the question is whether the plaintiff, who has served his employer so many years, can be turned off without any reason being assigned. Here there is evidence that the salary was once paid quarterly and, though it was afterwards paid monthly, yet, as there was no change in the nature of the plaintiff's employment, such payment is perfectly consistent with a yearly hiring and might have been made for the convenience of the plaintiff. If any ground had

been assigned for the plaintiff's dismissal the decision might have been different, but not the slightest reason is given. There was evidence to go to the jury of a hiring for a year, and I approve of their finding. Persons in the situation of the plaintiff must be supposed to possess superior acquirements, and are entitled to more respect than to be turned off without any reason being assigned.

BURROUGH, J. I can discover no objection to the declaration, and the evidence adduced at the trial has been sufficient to prove it. Unless reasonable notice were given, or ground for dismissal assigned, the defendant was bound to go on to the end of the year.

GASELEE, J.—There can be no doubt that a general hiring is a hiring for a year. In domestic service there is a common understanding that such a contract may be dissolved on reasonable notice; as a month's warning or a month's wages. There does not appear to be any such practice with respect to servants in husbandry, and we have no evidence what is the custom with clerks. We must, therefore, decide this case according to the general rule, and hold the contract between the parties to be a hiring for a year.

Rule discharged.

ARLETT *v.* ELLIS AND OTHERS

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Trinity Term, 1827]

[Reported 7 B. & C. 346; 9 Dow. & Ry.K.B. 897; 5 L.J.O.S.K.B. 301; 108 E.R. 752]

Commons Inclosure Right of lord of manor No interference with rights of commoners—Burden of proof.

An unlimited and unrestricted right, founded on a custom of the manor, entitling the lord to abridge the rights of commoners and to confer on any person from time to time such portions of the waste as he should think fit is utterly inconsistent with the existing right of common and is bad, for under such a custom the lord might by degrees enclose the whole of the waste and so annihilate the rights of the commoners. On the other hand, the lord, by granting rights of common on his waste, does not exclude himself or his tenants from any use of the waste which does not infringe the rights which he has granted to the commoners. He has a right to stock the common and to every benefit to be derived from the soil which is not inconsistent with the rights of the commoners. Where rights are extinguished or the common produces so much more herbage that a smaller portion of it may be sufficient for depasturing the cattle of the commoners entitled than when it was originally destined to that purpose the lord may have a right to enclose, but to justify his making the enclosure it is incumbent on him, or his grantee, when the right to enclose is questioned, to show that there is a sufficiency of common left.

Commons Inclosure Interference with commoners' use of common Right of commoners to pull down whole of fence or other obstruction.

Where a fence or other obstruction has been erected on a common enclosing and separating parts of that common from the residue and thereby interfering with the rights of the commoners, the latter are not by law restrained in the exercise of those rights to pulling down so much of the obstruction as it may be necessary for them to remove for the purpose of enabling their cattle to enter and feed on the residue of the common, but they are entitled to consider the whole of the obstruction as a nuisance and to remove it.

Commons—Turbary—Approvement—Right of lord—Subservience to rights of commoners—Proximity as well as quantity of turbary.

Semble: A power of approvement [to enclose superfluous waste] against a common of turbary may exist in the lord by custom, provided that this right is subservient to and not injurious to the rights of the commoners.

Per LITTLEWOOD, J.: The lord must show, not only that there was a sufficient quantity left on the waste, but that the turbary left was such that persons who had the right might conveniently get at it, for it makes a great difference to a commoner whether he has to go only a quarter of a mile for his turves or two or three miles.

Notes. Considered: *Elwood* v. *Bullock* (1844), 13 L.J.Q.B. 330; *Wakefield* v. *Buccleuch* (1867), L.R. 4 Eq. 613; *Hall* v. *Byron* (1877), 4 Ch.D. 667; *Parrott* v. *Watts* (1877), 37 L.T. 755; *Robertson* v. *Hartopp* (1889) 43 Ch.D. 484. Referred to: *Hilton* v. *Earl Granville*, [1843–60] All E.R. Rep. 597; *Perry* v. *Fitzhowe* (1846), 8 Q.B. 757; *Salisbury* v. *Gladstone* (1861), 9 H.L. Cas. 692; *Blackett* v. *Bradley* (1862), 1 B. & S. 940; *Robinson* v. *Dunleep Singh* (1879), 11 Ch.D. 798; *R.* v. *Dyer* (1952), 36 Cr. App. Rep. 155.

As to the right of the lord of the manor and commoners, see 5 HALSBURY'S LAWS (3rd Edn.) 348 et seq.; and for cases see 11 DIGEST (Repl.) 41 et seq.

Cases referred to:

(1) *Sadgrove* v. *Kirby* (1795), 6 Term Rep. 483; affirmed sub nom. *Kirby* v. *Sadgrove* (1797), 3 Anst. 892; 1 Bos. & P. 13; 145 E.R. 1073; 11 Digest (Repl.) 50, *732*.

(2) *Cooper* v. *Marshall* (1757), 1 Burr. 259; 2 Keny. 1; 97 E.R. 303; 11 Digest (Repl.) 49, *706*.

(3) *Badger* v. *Ford* (1819), 3 B. & Ald. 153; 106 E.R. 618; 11 Digest (Repl.) 28, *365*.

(4) *Bateson* v. *Green* (1793), 5 Term Rep. 411; 101 E.R. 230; 11 Digest (Repl.) 43, *584*.

(5) *Clarkson* v. *Woodhouse* (1782), 3 Doug. K.B. 189; 5 Term Rep. 412, n.; 99 E.R. 606; affirmed (1786), 3 Doug. K.B. 194, Ex. Ch.; 11 Digest (Repl.) 59, *876*.

(6) *Folkard* v. *Hemmett* (1776), 5 Term Rep. 417, n.; 101 E.R. 234; 11 Digest (Repl.) 59, *874*.

(7) *Glover* v. *Lane* (1789), 3 Term Rep. 445; 100 E.R. 669; 11 Digest (Repl.) 44, *607*.

(8) *Smith* v. *Feverell* (1675), 2 Mod. Rep. 6; 1 Freem. K.B. 190; 86 E.R. 909; 11 Digest (Repl.) 48, *683*.

(9) *Grant* v. *Gunner* (1809), 1 Taunt. 435; 127 E.R. 903; 11 Digest (Repl.) 43, *596*.

(10) *Mason* v. *Cæsar* (1676), 2 Mod. Rep. 65; 86 E.R. 944; 11 Digest (Repl.) 49, *713*.

Also referred to in argument:

Duberley v. *Page* (1788), 2 Term Rep. 391; 11 Digest (Repl.) 45, *625*.

Shakespear v. *Peppin* (1796), 6 Term Rep. 741; 11 Digest (Repl.) 45, *618*.

Lady Wilson v. *Willes* (1806), 7 East, 121; 3 Smith, K.B. 167; 103 E.R. 46; 11 Digest (Repl.) 17, *185*.

Covert's Case (1600), Cro. Eliz. 754.

Durrant v. *Child* (1611), Yelv. 217.

Kenchin v. *Knight* (1749), 1 Wils. 253; 95 E.R. 603; sub nom. *Kinchin* v. *Knight*, 1 Wm. Bl. 49; cited in 2 Wils. 101; 17 Digest (Repl.) 20, *240*.

Spooner v. *Day and Mason* (1636), Cro. Car. 432; 79 E.R. 975; 11 Digest (Repl.) 10, *80*.

Murgatroid v. *Law* (1690–1), Carth. 116.

Weeks v. *Sparke* (1813), 1 M. & S. 679; 105 E.R. 253; 11 Digest (Repl.) 36, *491*.

Rotherham v. *Green* (1597), 2 And. 89; Cro. Eliz. 593; Gouldsb. 114; Noy, 67; 123 E.R. 561; 11 Digest (Repl.) 54, *794*.

Davison v. *Gill* (1800), 1 East, 64; 102 E.R. 25; 26 Digest (Repl.) 375, *844*.

Lord Northwick v. *Stanway* (1803), 3 Bos. & P. 346; 127 E.R. 189; 11 Digest (Repl.) 44, *611*.

R. v. *Warblington (Inhabitants)* (1786), 1 Term Rep. 241.

Doe d. Lowes v. *Davidson* (1813), 2 M. & S. 175; 105 E.R. 348; 11 Digest (Repl.) 79, *995*.

R. v. *Wilby (Inhabitants)* (1814), 2 M. & S. 504.

R. v. *Hornchurch (Inhabitants)* (1818), 2 B. & Ald. 189; 106 E.R. 336; 11 Digest (Repl.) 44, *612*.

Rule Nisi obtained by the defendants for the new trial of an action in which the plaintiff alleged that the defendants had entered a close of the plaintiff at Yately, in the county of Southampton, and had broken down the gates, hedges, and fences.

The defendants pleaded that the close in question was within and parcel of the manor and hundred of Crondall, and that they, the defendants, as customary tenants of the manor, under an ancient custom had of right common of pasture on and throughout the close, which right they could not enjoy without pulling down the gates, fences and hedges which the plaintiff had wrongfully erected. They also claimed a right of common turbary on the close to cut and take turf. The plaintiff's replication took issue upon the custom, and new assigned that the defendants, on other and different occasions and for other purposes than those in their pleas mentioned, in a greater degree and to a greater extent, and with more force and violence than was necessary for abating and removing the supposed stoppages and obstructions in the pleas mentioned, committed the several trespasses. The defendants joined issue on the replication, and pleaded not guilty to the new assignment.

At the trial before PARK, J., at the Hampshire Spring Assizes, 1827, the plaintiff proved a grant by the rod, of Oct. 31, 1825, made to him by the dean and chapter of Winchester, lords of that manor, of a specified two acres of land, to hold to the plaintiff, his heirs and assigns, for ever, according to the custom of the manor, at the yearly rent of 2s. 6d., and all other burdens and services, and the plaintiff paid a fine of £8 and was admitted tenant. In February, 1826, the plaintiff began to enclose the piece of ground and made an enbankment, and before the enclosure was completed the defendants entered upon the land and threw down the embankment. The plaintiff contended that there was neither turf fit for fuel nor pasture on the land in question, and the defendants might have entered upon the land in question and turned on their cattle without throwing down the embankment. The defendants then gave evidence in support of the right of common of pasture and of turbary claimed in the pleas. The plaintiff in reply, in order to prove a custom entitling the lord to enclose parcels of the waste, produced in evidence the court rolls, containing entries of various grants of parcels of the waste made by the lords of the manor from the year 1650 to the time of the trial. It did not appear on the face of the grants that they were made with the consent of the homage or that a sufficiency of common remained for the commoners. It was contended by the defendant's counsel that this evidence was not admissible upon the issue joined in the case, that issue being whether the custom stated in the plea existed. The plaintiff's counsel then urged, that the plaintiff, at all events, was entitled to a verdict upon the new assignment, because it appeared clearly upon the evidence that the defendants, by pulling down the bank, had done more than was necessary to assert the right of common.

The learned judge left three questions to the jury—(i) whether the defendants had established the right of common of pasture and of turbary stated in the pleas, and the jury found that they had; (ii) whether there was within the manor a

custom for the lord to make grants of parcels of the waste without limit or restriction, and the jury found that there was such a custom; (iii) whether the defendants had done more than was necessary for asserting the right of common, of pasture, and of turbary. On this point the learned judge in his address to the jury observed that it appeared upon the evidence that there was neither turf nor pasture upon the land in question, and that the defendants pulled down the mound which it was not necessary for them to do in order to assert the right of common. The jury found that the defendants did more than was necessary for the purpose of asserting their right of common. The learned judge then directed a verdict to be entered for the plaintiff for 1s. damages, but reserved liberty to the defendants to move to enter a nonsuit if the court should be of opinion that the evidence of the custom to enclose ought not to have been received or if that custom was void, and it was agreed that the court should, as they thought fit, order a verdict to be finally entered for the plaintiff or the defendants on all or any of the issues. Subsequently a rule nisi for a new trial was obtained on behalf of the defendants.

P. Williams and *Follett* for the plaintiff, showed cause against the rule.

Serjeant Lawes and *Selwyn* for the defendants, supported the rule.

BAYLEY, J. I think that the rule for a new trial ought to be made absolute. The question upon which I have entertained the greatest difficulty during the argument is whether the plaintiff is entitled to retain his verdict upon the new assignment, and upon the whole I think that he is not. The authorities cited from BROOKE'S ABRIDGMENT [tit. Common, pl. 9] and the YEAR BOOK [Y.B. 15 Hen. 7, fo. 10, pl. 18] satisfy my mind that where a fence has been erected upon a common enclosing and separating parts of that common from the residue and thereby interfering with the rights of the commoners, the latter are not by law restrained in the exercise of those rights to pulling down so much of that fence as it may be necessary for them to remove for the purpose of enabling their cattle to enter and feed upon the residue of the common, but they are entitled to consider the whole of that fence so erected upon the common as a nuisance and to remove it accordingly. Those authorities show that there is an essential distinction between this case and *Sadgrove* v. *Kirby* (1). The fences placed upon the common in this case were, prima facie, as against the commoners, wrongfully and illegally placed there and were a nuisance which they might abate, but the trees growing upon the common in *Sadgrove* v. *Kirby* (1) were not, prima facie, illegally growing there, for the lord, as owner of the soil had, prima facie, a right to plant and to have those trees there, and the trees would not become wrongful as against the commoners, unless it were by their injuring their easement and not leaving them a sufficiency of common for their cattle. The lord, by granting rights of common upon his waste, does not thereby exclude himself or his tenants from all use of the waste on which the right of common is to be exercised, but merely grants to others, in common with himself and his tenants, certain rights upon that waste. All that the lord has not granted remains in him. He may, therefore, apply the waste to any purposes not inconsistent with the rights which he has previously granted to the commoners. One mode by which he may make his waste beneficial to himself is, by planting trees on it. They may also be beneficial to the commoners, by affording shade to the cattle at particular periods of the year. He may also exercise his right by turning in rabbits, provided he leave a sufficiency of common for the commoners. The turning rabbits on the common is an act not prima facie injuriosum. It is prima facie in the exercise of his legal rights, as owner of the soil. It was, therefore, properly decided, in *Sadgrove* v. *Kirby* (1), and *Cooper* v. *Marshal* (2), that a commoner in such a case is not to take upon himself to decide that the trees or rabbits on a common are a nuisance, and to cut the trees down or destroy the rabbits, but that he is bound in the first instance to bring his action, and to establish to the satisfaction of a jury they are a nuisance.

If that be a sound distinction between those cases and the present, what was the

principle upon which the verdict was given for the plaintiff on the new assignment? The jury seem to have been of opinion, that the defendant had done more than was necessary for the purpose of asserting the right of common; and if the decision in *Sadgrove* v. *Kirby* (1) were to govern the present case, and the erection of the fence were an act which the lord and his grantee prima facie had a right to do, the defendants would have done more than was necessary for the purpose of using the right of common, if they had pulled down any part of the bank or fence, because there was an opening by which they might have entered upon the plaintiff's close, but, if the whole of that bank or fence were a nocumentum injuriosum which the defendants, in the exercise of their rights of common, were justified in removing, the verdict of the jury that they had done more than was necessary for the purpose of asserting their rights, could not be well founded. It seems to me, that the verdict upon the new assignment was founded upon the notion that the defendants, in pulling down the fence, had done something more than they had a right to do in asserting their rights of common. But the authorities show that they had not done more than by law they were entitled to do. I think, therefore, that the jury were not warranted in coming to the conclusion that the defendant entered the close for other purposes than those mentioned in the pleas, and that the verdict for the plaintiff upon the new assignment is not warranted by the evidence.

The next question is whether the plaintiff be entitled to recover, on the ground that he has proved a custom for the lord to enclose parcels of the waste. That raises the great question in this case, whether the lord had any such right. The lord had granted to the plaintiff a particular spot, parcel of a large waste. The defendants had a right of common on the waste. The defendants had a right of common on the waste, including the space of land granted to the plaintiff, unless that spot had been legally separated from the residue of the manor by the lord. I have no difficulty in saying, that, if it were legally separated, the plaintiff had a sufficient possession to entitle him to maintain trespass. The possession of the whole waste, notwithstanding the right of common, remains in the lord, and if he, in the manner warranted by the custom, transfers the possession to the plaintiff and the latter enters, then he becomes possessed and acquires a lawful possession as against the lord, and the right of the commoners to turn their cattle over that land, as well as the residue of the waste, is perfectly consistent with the right of possession being vested and perfected in him.

As to the right of the lord to enclose the land in question and to grant a perfect title to the plaintiff, it was insisted, first, that the lord had an unlimited and unrestricted right (founded upon a custom in this particular manor) to abridge the rights of the commoners and to confer in severalty, upon any person from time to time, such portions of the waste as he in his discretion should think fit. It seems to me that such a right is utterly inconsistent with an existing right of common, for the lord might by degrees enclose the whole of the waste, and so annihilate the right of the commoners. *Badger* v. *Ford* (3) is an authority upon that point, but, had there been no authority, I should have thought that wherever it is once established that a right of common has existed from time immemorial such a privilege or custom in the lord cannot by law be supported because it would be in destruction of that right of common.

All the authorities which have been cited in support of such a right are distinguishable from the present case. The right claimed is to sever and take away permanently from the common a beneficial part of it so as to deprive the commoner of any power or right over that part. In *Bateson* v. *Green* (4) there had been from time immemorial a usage for the lord to dig clay upon the waste, and that was held to be evidence to show that when he granted out the right of common to the commoners he reserved to himself the right of digging clay. The extent to which it had been carried in that case did not appear to be unreasonable. LORD KENYON, in delivering judgment, intimated that there was no evidence to show that the right had been more exercised of late years than formerly. The lord, by digging

for clay, takes from the land a product of a particular species, but the land afterwards remains capable of yielding food fit for the feeding of cattle. Indeed it frequently happens that land, besides the support which it yields for the food of man or of cattle, has within it some valuable product, as marl or limestone, which it is desirable for the owner of the waste to obtain, and it is not unreasonable that the lord of a manor, when he grants rights on that land, should reserve to himself the right of taking such marl or limestone. But when he takes them, he does not permanently deprive the commoners of that benefit which they are entitled to derive from the surface of that part of the land from which the marl or limestone is so taken. A case of that sort is distinguishable from the present because the lord still leaves for the benefit of the commoner something capable of yielding food for his cattle. The user of the privilege by the lord from time to time is evidence to show that he reserved that right to himself, and the nature of the substance which is taken from the earth shows that such reservation was not unreasonable. The exercise of such a right will, no doubt, interfere with the privilege of the commoners during the time the produce is taken from the earth, and until the surface reproduces pasturage. But the distinction between that case and the present is that here the commoner is wholly and permanently deprived of the benefit of a quantity of land, whereas in that case the land was only taken away for a certain period.

Clarkson v. *Woodhouse* (5) is distinguishable from the present case. That was an action of trespass for breaking and entering the plaintiff's close in Stalmine in the county of Lancaster. The defendant by his pleas claimed, in right of an ancient messuage in Stalmine, common of pasture and of turbary. The plaintiff relied upon a grant of parcel of the waste. The right claimed by the defendant would be exercised on those portions of the waste which yielded pasture and turbary respectively. When the grants of common were first made it is probable that pasturage would be confined to those places which yielded pasture, and that that quantity was deemed sufficient for the cattle of all the commoners. The right stated in the replication was not to withdraw from the commoners any portion of the pasture or turf land, but that the owner should assign to particular individuals a particular portion of moss land, and that they should work upon that, and not elsewhere, until all the turbary should be exhausted, and then that the owner might enclose. The words are:

> "So long as any turbary remained or should remain in such respective moss-dales; and when and so often as the turbary of such moss-dales so assigned . . . . had been got and cleared therefrom by such digging and getting of turves for the purposes aforesaid, the owners of the said waste for the time being . . . had enclosed and approved to themselves all such moss-dales or parts of the said waste called Stalmine Moss as had been or should be cleared, to hold the same so enclosed at their pleasure in severalty for ever afterwards, freed and discharged from all common of pasture and turbary thereon."

The fair meaning of the custom to enclose stated upon that record seems to me to be that when the land was exhausted and incapable of producing any more turf, the owner of the same might enclose, for until it was so rendered incapable of yielding more turf, it could not be truly said that the turbary was all got and cleared therefrom. If that be the true meaning of the custom there stated, it only amounts to this, that when particular portions of the land which have been destined for turbary ceased to have the power of producing turbary the owner should be at liberty to take that portion to himself. That case, therefore, is distinguishable from the present, because the owner of the waste there did not take away from the commoners anything which had been originally appropriated to them for the purposes of pasture or turbary.

In *Folkard* v. *Hemmett* (6), the grant of the soil was made by the lord with the consent of the homage. The homage are persons associated together at the

lord's court (at which all the tenants of the manor may attend) to act as between the lord and his tenants. Being tenants themselves it is not very likely that they will lean unfairly towards the lord, and if the homage say, therefore, that a grant shall be made (assuming that the lord has a right to grant wherever there is more land than is necessary for the purpose of the commoners) it may be reasonably presumed that the homage have given their consent to the grant only when it is clear that the land granted may be taken by the grantor without interfering with the rights of the commoners. On the other hand, it may be fairly presumed that the homage would never consent to any part of the common being taken away from the tenants, unless they were satisfied that sufficient remained for the commoners. That case, therefore, is distinguishable from the present. There the grant was made with the consent of the homage; here it is done by the act of the lord himself.

I have no difficulty in saying that, in my judgment, the lord has rights of his own reserved upon the waste, I do not say subservient to, but concurrent with, the rights of the commoners. He has a right to stock the common and to every benefit to be derived from the soil which is not inconsistent with the rights of the commoners. And when it is ascertained that there is more common than is necessary for the cattle of the commoners, the lord, as it seems to me, is entitled to take that for his own purposes. That is the principle upon which the Statute of Merton is founded. The lord has a right to approve [i.e., to enclose superfluous waste] not as lord, but as owner of the soil. *Glover* v. *Lane* (7) shows that the owner of the soil, whether lord or not, may make such an approvement. It seems to me that the lord's right is this. He may approve provided he leave sufficiency of common of pasturage for all the cattle which are entitled to feed upon it. The common may originally have been destined for a definite number of cattle, or for all cattle levant and couchant upon certain lands. Many of those rights may be extinguished or the common itself may produce so much more herbage that a smaller portion of that common may be sufficient for depasturing the cattle of the persons entitled than when it was originally destined to that purpose. Whenever that is the case, I think that the lord has a right to enclose, but in order to justify his making the enclosure it is incumbent upon him or his grantee, when the right to enclose is questioned, to show that there is sufficiency of common left: *Smith* v. *Feverell* (8). In all the cases in which the right of the lord to enclose has been stated on the record, there has been an allegation that he left sufficient common for the commoners. That was so in *Glover* v. *Lane* (7) and in *Grant* v. *Gunner* (9). The commoner has a certain right over the whole of the waste, and when the lord abridges that right he ought to show that he has done that which the law requires him to do before he abridges the right of the commoner. Therefore, I am of opinion that in this case it ought to have been submitted to the jury whether there was or was not, at the time when the lord made the grant of the locus in quo, a sufficiency of common left for all the persons having rights of common upon the waste in question. The right of the lord to enclose must depend on the finding of the jury on that question. It is impossible for this court, without knowing what the fact is, to say whether the verdict ought to be entered for the plaintiff or defendants.

It is not necessary to give an opinion upon the question whether there can be any approvement against a right of common of turbary. There are, undoubtedly, authorities to show that the owner of the soil, generally speaking, cannot approve against such a right. In this manor, however, numerous instances of an exercise of the right have been shown, and in all those instances persons having the right of common of turbary must have been excluded from the parts enclosed. These enclosures having been always submitted to may establish that, at least in this manor, the right to approve does exist, and I think that such right may reasonably exist. Common of turbary must be enjoyed in respect of ancient messuages. Many of those ancient messuages may be destroyed and others not substituted, and it would be unreasonable that the whole of a waste should remain unenclosed so

long as a single commoner in respect of an ancient messuage should continue to have a right to cut turves on the common. Without giving any distinct opinion on that point, it seems to me that in this case there was sufficient evidence of a custom for the lord to enclose to take this out of the general rule which is laid down with respect to common of turbary, and that, as against the common of turbary in this case, the lord may have a right to enclose. But, inasmuch as the question whether a sufficiency of common of turbary or pasture was left for the commoner and whether the turbary left was sufficiently near and convenient to that messuage in respect of which the right is claimed has not been submitted to the jury, I think that there ought to be a new trial.

HOLROYD, J.—I am of the same opinion. *Sadgrove* v. *Kirby* (1) and *Cooper* v. *Marshal* (2) induced me to think for a considerable period that the defendants had done more than they were justified in doing in order to use the right of common because, as the enclosure was not completed, they might have entered upon the locus in quo to exercise their right of common without throwing down the embankment, or, even if the whole space had been enclosed, I thought that they would have been justified only in making an opening to enable them to enter and exercise the right of common upon the locus in quo. But the authorities cited have satisfied my mind that where fences are wrongfully erected upon land subject to a right of common the commoner in exercising his right is not restricted to pulling down so much of the fence as it may be necessary for him to remove in order to enter upon the locus in quo, but that he may remove the nocumentum injuriosum. I think, therefore, that the commoner in this case had a right to remove the whole of the fences so as to restore to himself that right of common which might be injured by their continuance. If that point had not been so established by the authorities, I think that the commoner would have had a right to do no more than restore himself to the situation of exercising his right of common and that he might have done so without pulling down the fences.

With respect to the right of the lord, I cannot accede to the doctrine that he can have an unlimited right by custom to enclose common. I think that such a custom would be void, because it would go to the destruction of the right of the commoners altogether. It would be inconsistent with that right and with the grant which from the usage and custom must be presumed to have been made to the tenants or persons entitled to the right of common. *Bateson* v. *Green* (4), *Clarkson* v. *Woodhouse* (5), and *Folkard* v. *Hemmett* (6) are distinguishable from the present case, for the reasons given by BAYLEY, J. In *Bateson* v. *Green* (4) the lord was exercising, not, strictly speaking, a right of common (because the act done was upon his own soil), but a right of getting the soil for his own benefit, and thereby enjoying that fair share of the land with the other persons having the right of common. In that case it appeared in evidence that the lord had been accustomed for seventy years to dig clay-pits which were of great size and were not filled up again, and that, if no pits had been dug, there was not sufficient common for the number of commoners. The question considered by the court was whether the right of the lord to dig for clay was subservient to that of the commoners or not, and the court decided that the custom showed the right of the commoner to be subservient to that of the lord, and that the latter, therefore, had a right to dig clay to the extent to which he had been used to do it although the right of the commoner was thereby abridged. That is a very different thing from taking the land from the commoners for all purposes and depriving them of any benefit of it.

Clarkson v. *Woodhouse* (5) is distinguishable from this case upon the same principle, and *Folkard* v. *Hemmett* (6), upon the ground that the right of enclosure could not be exercised without the consent of those persons whose rights would be affected by the enclosure, and, therefore, if there was a consent by them, it would be conclusive, not only against them, but against those whom they represented at the time when they consented to the grant. The exercise of the right

to build may have been injurious to the commoners, but they may have received compensation for any injury which they thereby sustained. That does not apply to a case where the lord claims by custom the right to enclose and take from the common any part of the waste, whether it be injurious to the commoners or not. I incline to think that the lord may by custom be entitled to grant parcel of the waste, even as against common of turbary, but this, his right, must be subservient to and not injurious to the rights of the commoners. If it be not injurious to the rights of the commoners, the lord from whom their interest is derived may reasonably make use of a part of the waste, and his so doing ought not to be prima facie considered an injury to them, but, if he goes beyond that and grants so much of the waste as to be injurious to the rights of common, I think that that is inconsistent with the grant of common, and, therefore, a custom for the lord to make a grant of the waste to that extent would be bad. But a right by the lord to grant parcels of the waste, leaving a sufficiency of common for the commoner, may exist upon the grounds stated by BAYLEY, J., both as against common of pasture and common of turbary. The cases seem to show that without a custom there cannot be an approvement against a common of turbary, but I think that they do not establish that such a power of approvement may not exist by custom. Upon these grounds I think that there should be a new trial.

LITTLEDALE, J.—It seems to me that the form of the plaintiff's replication is correct, and that it was not necessary for him to set out a custom to enclose generally, or leaving a sufficiency of common, but that on the issue joined upon the custom the plaintiff was entitled to give evidence to show that the right of common no longer existed. The defendant in his plea alleges that from time immemorial there hath been and still is a custom to have common upon the locus in quo. It lies upon him to prove the whole of that allegation. The plaintiff may, therefore, show that at the present day, by lawful enclosure or otherwise, the custom to have common upon the locus in quo no longer exists. I am, therefore, of opinion, that the evidence of the custom for the lord to enclose was admissible to negative the allegation in the plea that there still is a custom to have common upon the locus in quo.

It seems to me that a general custom for the lord of the manor to take in parts of the waste, cannot be supported, for the reasons already given by BAYLEY, J. If such a custom were valid the lord might by degrees take away the whole of the rights of the commoners, but I see no objection to a custom for the lord to make enclosures from time to time, leaving a sufficiency of common. Such an enclosure could not be made in the present case under the Statute of Merton, because by that statute, the approvements which take place must be of freeholds. Here the custom alleged is to enclose copyholds to be granted according to the custom of the manor. The right claimed by the plaintiff cannot, therefore, be maintained, except by special custom. The Statute of Merton authorises the lord to enclose, leaving a sufficiency of common of pasture, and where there is a custom to enclose copyhold lands I think that custom ought reasonably to be subject to the restriction imposed by the Statute of Merton as to freehold lands. There should, therefore, be left a sufficiency of common, and, if there be a right to enclose against common of turbary (upon which I pronounce no opinion), there ought also to be sufficient for common of turbary left.

Assuming that there can be no right to enclose without leaving a sufficiency of common, I think the onus of proving that a sufficiency of common has been left lies on the plaintiff. It has been contended that, as he has put in several grants of parcels of the waste on which enclosures have been made, it ought to be presumed that the lord has a right to enclose until the contrary be shown. But it seems to me that it lies on the lord, or the persons claiming under him, to show that a sufficiency of common is left. Where the lord approves under the Statute of Merton he shows a sufficiency of common left. In the present case it is said that as

the right does not depend upon any statute, a different consideration may be applied to it, but I think not. For when the lord is apparently abridging the right of the commoner by making an enclosure, it lies upon him to show that, although that right is apparently injured, it is not really injured. I think, therefore, that the onus probandi lay upon the plaintiff who represented the lord. That question has not been submitted to the jury, and the plaintiff has not proved that there was a sufficiency of common left. As far, indeed, as relates to the common of turbary, there was one witness who stated that there was plenty of turf left upon the waste, but the plaintiff ought to have shown, not merely that there was a sufficient quantity left upon the waste, but that the turbary left was such that persons who had the right might conveniently get at it, for it makes a great difference to a commoner whether he has to go only a quarter of a mile for his turves or two or three miles. Therefore, I think the lord, when he encloses against common of turbary, ought to show, not only that there is a sufficient quantity of turves, but that they are in a convenient situation. It has not even been proved that there is a sufficiency of common of pasture left, for although it was proved that there were 2,000 acres unenclosed, yet it appeared that there were a great number of tenants, and it was not shown that the common left was sufficient for them all.

As to the question whether the plaintiff is entitled to retain the verdict upon the new assignment, it has been contended that when the defendant justifies the breaking and entering and throwing down the enclosure he alleges that it was done for the purpose of putting in his cattle, but in point of fact no cattle were turned in while the defendants were on the ground and they entered merely for the purpose of throwing down the enclosure. But the case was not presented to the jury in that way. The only question submitted to their consideration was whether there was an excess, and they thought that there was. The question is whether the commoner was justified in throwing down the enclosure. There can be no doubt that a commoner is authorised to throw down part of the enclosure, and that he need not bring an action for disturbing his right of common. Then remains the question whether he was authorised to pull down the whole. The cases which have been cited in support of the rule show that he was authorised to pull down the whole, and those cases are not contravened by any subsequent decisions. *Sadgrove* v. *Kirby* (1) and *Cooper* v. *Marshal* (2) are quite different. There, the lord did what was necessary for the enjoyment of the waste, by having trees and rabbits there. In *Sadgrove* v. *Kirby* (1) BULLER, J., observes (1 Bos. & P. at p. 16), that *Mason* v. *Cæsar* (10) was decided on the point that the hedge was no part of the soil, and, therefore, he at that time recognised the right to pull down part. None of these cases, therefore, affects the authority of the more ancient cases cited from BROOKE'S ABRIDGMENT and the YEAR BOOK, and there does not appear to be any reason why the commoner should not pull down the whole. It might be a great injury to the commoner to have fences set up on a common in different places, and, although he might bring an action for the obstruction, yet he is in this, as in other analogous cases, entitled to abate the nuisance. That is much more convenient than that he should bring an action for every obstruction because, when the fences are thrown down, the question of right may be decided in one action. For these reasons I am of opinion that the defendant was justified in what he did and that the verdict of the jury upon the new assignment cannot be sustained. There must, therefore, be a new trial.

Rule absolute for new trial.

BEVAN *v.* WATERS

[COURT OF COMMON PLEAS (Best, C.J.), June 27, 1828]

[Reported 3 C. & P. 520; Mood. & M. 235]

Lien—Livery stable keeper—Horse sent to be trained—Lien for cost of keep and exercise.

Although a livery stable keeper has no lien on a horse which is subject to the control of its owner and may be taken out by him at any time, where the horse is sent to the keeper of the stable to be trained he has a lien on it for the cost of its keep and exercising it.

Notes. Applied: *Scarfe* v. *Morgan*, [1835–42] All E.R. Rep. 43. Considered: *Jackson* v. *Cummins* (1839), 5 M. & W. 342. Referred to: *Judson* v. *Etheridge* (1833), 3 Tyr. 954; *Sanderson* v. *Bell* (1834), 2 Cr. & M. 304; *Re Southern Livestock Producers, Ltd.*, [1963] 3 All E.R. 801.

As to lien for work done or money expended, see 24 HALSBURY'S LAWS (3rd Edn.) 151 et seq.; and for cases see 32 DIGEST (Repl.) 286 et seq.

Cases referred to:

(1) *Yorke* v. *Grenaugh* (1703), 2 Ld. Raym. 866; 92 E.R. 79; sub nom. *York* v. *Grindstone*, 1 Salk. 388; 29 Digest (Repl.) 26, *296*.

(2) *Wallace* v. *Woodgate* (1824), 1 C. & P. 575; Ry. & M. 193, N.P.; 32 Digest (Repl.) 271, *171*.

Also referred to in argument:

Gray v. *Hill* (1826), Ry. & M. 420, N.P.; 26 Digest (Repl.) 29, *172*.

Brown v. *Hodgson* (1811), 4 Taunt. 189; 128 E.R. 301; 8 Digest (Repl.) 166, *1069*.

Action of assumpsit for money paid.

Two horses, named Polecat and Blister, the latter belonging solely to the defendant, the former to the plaintiff and defendant jointly, were put into the hands of a person named Boast, who was a stable keeper, for the purpose of being trained. While they were there, the defendant sold to the plaintiff the horse Blister, and his half share of Polecat; but when the plaintiff applied to Boast to deliver them to him in pursuance of the bargain, he refused to let Blister go, because the defendant had not paid him his charges for training. Notice was given to the defendant by the plaintiff's agent that he could not get the horse on account of Boast's claim. The defendant disputed the correctness of the account in some respects and, while the dispute was going on, the plaintiff paid the charges in order to obtain the horse, and sought to recover the amount from the defendant. £40 remaining due of the purchase-money at the time at which the horse was to be delivered; but Boast's claim, at that time, amounted to £82 and was afterwards increased, so that the plaintiff was obliged to pay £130 before Boast would deliver the horse to him.

Serjeant Wilde and *R. V. Richards* for the plaintiff.

Serjeant Jones for the defendant.

BEST, C.J.– In the case of a livery stable keeper there is no lien, because the horse is subject to the control of the owner and may be taken out by him, and the first time it goes away there is of course an end of the lien. But I think as at present advised, that a man who has a horse for training has a lien for the keep and exercise of it. If Boast had not a just claim against the defendant, I think that the plaintiff could not maintain this action. I am of opinion that, if a man buys property which is in the hands of a third person who sets up an unfounded claim and will not deliver unless that claim is paid, the purchaser is bound to give notice to the seller, and cannot, after several months, go and pay the demand; because he may, by his delay, deprive the seller of his evidence of the incorrectness

of the claim. If the plaintiff in this case had paid without giving notice, I should have decided that he could not recover. It was determined in the reign of Queen Anne in *Yorke* v. *Grenaugh* (1) that a livery stable keeper had no lien on a horse for its keep, and I decided on that principle in *Wallace* v. *Woodgate* (2), in this court lately. But in the present case there is a difference, for the trainer has not only to keep the horse, but also to prepare it for racing; and therefore, I think that he has a lien on it. For I take it to be a common principle that, if a man has an article delivered to him on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid.

On the facts in this case, it appears that the plaintiff was bound to pay £40 as the balance of the purchase-money, which he has not paid, and, if the lien did not exceed that sum, then undoubtedly he could not maintain this action. But it appears that Boast's demand was £150; and, though there were sundry payments, yet he had a right to apply them to the demand for Polecat, as he had parted with Polecat and had no lien on him. It appears that there was a balance of £82 for which Blister might be detained. In point of law, and in point of justice also, the defendant ought to have cleared away that claim; and, not having done so, he is liable to the plaintiff for such proportion as was due in September, at which time the horse should have been delivered. As the horse was not delivered then, I think that the plaintiff is entitled to some part of the demand for the subsequent time; but not the whole of it, because, if the horse had been delivered at the proper time, he would have been obliged to bear the expense of keeping it.

Verdict for plaintiff.

GOSS *v.* LORD NUGENT

(Court of King's Bench (Denman, C.J., Littledale and Parke, JJ.), May 29, 1833)

[Reported 5 B. & Ad. 58; 2 Nev. & M.K.B. 28; 2 L.J.K.B. 127; 110 E.R. 713]

Sale of Land—Contract—Variation—Material term—Oral variation.

A material term of a contract for the sale of land cannot be varied by an oral agreement between the parties, since by the Statute of Frauds, s. 4 [now Law of Property Act, 1925, s. 40], all the material terms of such a contract must be expressed in writing.

Where, therefore, the defendant by a written agreement had agreed to purchase land of the plaintiff and later orally agreed to waive certain of his objections to title, on the plaintiff's action to enforce the contract,

Held: the contract which the plaintiff sought to enforce was not the original written contract, but a contract partly written and partly oral, and, questions of title being a material part of a contract for the sale of land, this contract failed to comply with the Statute of Frauds and was not enforceable.

Custom Usage Evidence of—Implication in contract Contract required to be in writing.

Verbal evidence may be given of a custom or usage applicable to the subject-matter of a contract which is required by law to be in writing, the contract being silent regarding such custom or usage.

Notes. That part of s. 4 of the Statute of Frauds relating to contracts for the sale of land has been replaced by s. 40 of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 500).

Considered: *Harvey* v. *Grabham* (1836), 5 Ad. & El. 61. Applied: *Marshall* v. *Lynn* (1840), 6 M. & W. 109; *Giraud* v. *Richmond* (1846), 2 C.B. 835. Considered: *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598; *Williams* v. *Moss' Empires*, [1915]

3 K.B. 242; *Hartley* v. *Hymans*, [1920] All E.R. 328. Referred to: *Palmer* v. *Temple* (1836), 1 Har. & W. 702; *Stowell* v. *Robinson* (1837), 3 Bing. N.C. 928; *Stead* v. *Dawber* (1839), 10 Ad. & El. 57; *Pontifex* v. *Wilkinson* (1845), 2 C.B. 349; *Emmet* v. *Dewhurst* (1851), 3 Mac. & G. 587; *Noble* v. *Ward* (1866), L.R. 1 Exch. 117; *Ogle* v. *Vane* (1867), L.R. 2 Q.B. 275; *Tyers* v. *Rosedale and Ferryhill Iron Co.* (1873), L.R. 8 Exch. 305; *Stewart* v. *Eddowes*, *Hudson* v. *Stewart* (1874), L.R. 9 C.P. 311; *Sanderson* v. *Graves* (1875), L.R. 10 Exch. 234; *Morrell* v. *Studd and Millington*, [1913] 2 Ch. 648; *Morris* v. *Baron*, [1918] A.C. 1; *North* v. *Loomes*, [1918–19] All E.R. Rep. 936; *British and Benington, Ltd.* v. *North Western Cachar Tea Co., Ltd.*, [1922] All E.R. Rep. 224; *Newsholme Bros.* v. *Road Transport and General Insurance Co., Ltd.*, [1929] All E.R. Rep. 442; *Besseler, Waechter Glover & Co.* v. *South Derwent Coal Co.*, [1937] 4 All E.R. 552; *Hill* v. *Hill*, [1947] 1 All E.R. 54.

As to parol variation of written agreement, see 8 HALSBURY'S LAWS (3rd Edn.) 154; and for cases see 17 DIGEST (Repl.) 312 et seq.

Cases referred to:

(1) *Warren* v. *Stagg* (1787), cited in 3 Term Rep. at p. 591.

(2) *Littler* v. *Holland* (1790), 3 Term Rep. 590; 100 E.R. 749; 7 Digest (Repl.) 358, *84*.

(3) *Thresh* v. *Rake* (1793), 1 Esp. 53.

(4) *Cuff* v. *Penn* (1813), 1 M. & S. 21; 105 E.R. 8; 12 Digest (Repl.) 401, *3105*.

Also referred to in argument:

Meres v. *Ansell* (1771), 3 Wils. 275; 95 E.R. 1053; 17 Digest (Repl.) 312, *1192*.

Buckhouse v. *Crossby* (1737), 2 Eq. Cas. Abr. 32; 22 E.R. 28; sub nom. *Backhouse* v. *Mohun*, 3 Swan. 434, n., L.C.; 44 Digest (Repl.) 107, *860*.

Bell v. *Howard* (1742), 9 Mod. Rep. 302; 88 E.R. 467; 44 Digest (Repl.) 50, *359*.

Parteriche v. *Powlet* (1742), 2 Atk. 383; 26 E.R. 632, L.C.; 17 Digest (Repl.) 320, *1255*.

Price v. *Dyer* (1810), 17 Ves. 356; 34 E.R. 137; 44 Digest (Repl.) 107, *863*.

Rule Nisi obtained by the defendant to enter a nonsuit in an action brought to enforce a contract for the sale of land.

The declaration stated that, on Aug. 13, 1830, the plaintiff was about to expose for sale, by public auction, fourteen lots of freehold land, upon the following, among other, conditions:

"That the purchasers should pay down immediately, into the hands of the auctioneer, a deposit of £15 per cent. on the purchase money, and should sign an agreement for the payment of the remainder on Sept. 29, then next; that the vendor, at his own expense, should deliver to each purchaser, or his solicitor, an abstract of the title of the property sold, and should deduce a good title thereto; and upon the purchaser's payment of the remainder of the purchase money, and complying with those conditions, the vendor should, at the purchaser's expense, convey his lot to, or as directed by him."

The plaintiff alleged that, before the land was exposed for sale, by an agreement between the plaintiff and the defendant, the plaintiff, in consideration of £80 paid by the defendant at the time of the signing the agreement, and of the further sum of £370, to be paid by him on Sept. 29 then next, agreed to sell, and the defendant agreed to purchase, the said land, under the conditions of sale as near as might be, or such of them as were capable of taking effect, under the said agreement. The declaration then stated mutual promises to perform the agreement and conditions of sale, and alleged that the plaintiff had delivered an abstract of the title to the property so sold, and deduced a good title thereto, and had always been ready to convey the same. The defendant had failed to pay the balance of £370 and was accordingly in breach of his said agreement.

By the second count it was stated that the plaintiff delivered an abstract of the

title to the land, and made out a good title to all the land excepting thirty-five feet thereof, and that after making the agreement, the defendant discharged and exonerated the plaintiff from making out or deducing any other title to the last-mentioned part of the land, and waived his right to require the same under the conditions of sale and agreement.

At the trial before GASELEE, J., at the Buckingham Spring Assizes, 1832, it appeared that the plaintiff having advertised the property in question for sale by public auction, the defendant agreed to purchase it by private contract, on the terms of the printed conditions of sale. The memorandum of agreement, which was annexed to the conditions of sale, was as follows:

"Thomas Goss, in consideration of £80 paid to him by George Lord Nugent at the time of signing this agreement, and of £370 to be paid to him on Sept. 29 next, doth agree to sell to G. Lord Nugent, and G. Lord Nugent agrees to purchase of T. Goss all the ground and premises described in the particulars of sale hereunto annexed, as near as may be, or such of them as are now under the present agreement capable of taking effect."

The fifth condition of sale was as follows:

"That the vendor, at his own expense, shall deliver to each purchaser or his solicitor, an abstract of the title to the property sold, and deduce a good title thereto, and upon the purchaser's payment of the remainder of the purchase-money and complying with these conditions, the vendor shall, at each purchaser's expense, convey his or her lot or lots to or as directed by him."

The agreement was drawn up at the request of the defendant, by Hatten, the plaintiff's attorney. The defendant was afterwards informed by Hatten, that as to one lot of thirty-five feet, there was a defect in the title. The defendant said he would accept the title notwithstanding that defect; and possession of the whole was delivered to him.

The vendor was called upon by the defendant's solicitor, to furnish an abstract of title, and he delivered one on Sept. 10. In November the defendant's solicitor objected to the title as to the thirty-five feet. Hatten said the objection had been waived. The defendant then refused to complete the purchase. It was objected that oral evidence of the defendant's waiver of his right to have a good title made out to the thirty-five feet, was not admissible, because the action being brought to charge him on a contract for the sale of land, the Statute of Frauds, s. 4, required the whole agreement to be in writing. The judge received the evidence, and finally directed the jury to find for the plaintiff if they thought there had been a waiver by the defendant of the right in question.

The jury having found for the plaintiff, leave was given to the defendant to move to enter a nonsuit upon the point as to the admissibility of the oral testimony. A rule nisi was obtained for that purpose.

Kelly for the plaintiff, showed cause against the rule.

Serjeant Storks and *Follett* for the defendant, supported the rule.

May 29, 1833. **DENMAN, C.J.,** delivered the following judgment of the court. - By an agreement in writing, the plaintiff contracted to sell the defendant several lots of land for the sum of £450, and to make a good title to them; and £80 was paid to him as a deposit. It was afterwards discovered, that, as to one of the lots, a good title could not be made, and it was agreed by the defendant that he would waive the necessity of a good title being made as to that lot. The plaintiff afterwards delivered possession of the whole of the lots to the defendant, which he accepted, but he now refuses to pay the remainder of the purchase-money, and he relies on the objection to the title.

By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed

between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract, but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement.

If the present contract were not subject to the control of any Act of Parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be made to the lot in question, and that the action might be maintained. The Statute of Frauds has, however, made certain regulations as to contracts for the sale of lands, and by s. 4 it is enacted, that

> "No action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

It is to be observed that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is that no action shall be brought unless they are in writing. As there is no clause in the Act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing. It is not, however, necessary to give an opinion upon that point, as this is not a waiver and abandonment of the whole written agreement, but only a part of it; and the question is: What is the effect of that?

It may be said by the plaintiff, that this does not in any degree vary what is to be done by either party; that the same land is to be conveyed, there is to be the same extent of interest in the land, and it is to be conveyed at the same time, and the same price is to be paid, and that it is only an abandonment of a collateral point. But we think that the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only.

In the present case, the written contract is not that which is sought to be enforced, it is a new contract which the parties have entered into, and that new contract is to be proved, partly by the former written agreement, and partly by the new verbal agreement; the present contract, therefore, is not a contract entirely in writing; and as to the title being collateral to the land, the title appears to us to be a most essential part of the contract; for, if there be not a good title, the land may, in some instances, better not be conveyed at all; but our opinion is not formed upon the stipulation about the title being an essential part of the agreement, but upon the general effect and meaning of the Statute of Frauds, and that the contract now brought forward by the plaintiff is not wholly a contract in writing.

We do not say that verbal evidence may not be given of customs and usages applicable to the subject-matter of the written contract where the contract is silent. That has been done in a great variety of instances.

Whether the plaintiff may not have relief in a court of equity, we give no opinion; it would be for the court to decide upon the case which should be brought before them. There have, however, been some cases at law on contracts within

the Statute of Frauds, where verbal evidence has been allowed: *Warren* v. *Stagg* (1), cited in *Littler* v. *Holland* (2), *Thresh* v. *Rake* (3), and *Cuff* v. *Penn* (4). These were cases where the time for the performance of the contract had been enlarged by a verbal agreement, and they were decided on the ground that the original contract continued, and that it was only a substitution of different days of performance. It is not necessary to say whether these cases were rightly decided; if they were so, still the present is a different case, for here, without doubt, the terms of the original contract were varied.

Rule absolute.

BAXTER *v.* TAYLOR

[COURT OF KING'S BENCH (Taunton, Patteson and Parke, JJ.), November 3, 1832]

[Reported 4 B. & Ald. 72; 1 Nev. & M.K.B. 11; 2 L.J.K.B. 65; 110 E.R. 382]

Nuisance—Private nuisance—Land subject to tenancy—Right of reversioner to sue—Permanent damage.

Where land is held by a tenant under a lease, the reversioner cannot maintain an action against a third party for entering on the land unless the act of the third party results in permanent damage to the reversion. This is so notwithstanding that the entry was made in the exercise of an alleged right of way.

Notes. Considered: *Kidgill* v. *Moore* (1850), 9 C.B. 364. Followed: *Damper* v. *Bassett*, [1901] 2 Ch. 350. Referred to: *Bower* v. *Hill* (1835), 1 Hodg. 45; *Mott* v. *Shoolbred* (1875), 23 W.R. 545.

As to the right of reversioners to bring action for nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 153; and for cases see 36 DIGEST (Repl.) 306 et seq.

Cases referred to:

(1) *Young* v. *Spencer* (1829), 10 B. & C. 145; 5 Man. & Ry.K.B. 47; 8 L.J.O.S. K.B. 106; 109 E.R. 405; 31 Digest (Repl.) 391, *5165*.

(2) *Jackson* v. *Pesked* (1813), 1 M. & S. 234; 105 E.R. 88; 36 Digest (Repl.) 306, *528*.

(3) *Wood* v. *Veal* (1822), 5 B. & Ald. 454; 1 Dow. & Ry.M.C. 11; 1 Dow. & Ry.K.B. 20; 106 E.R. 1257; 26 Digest (Repl.) 297, *191*.

Motion by the plaintiff for a rule nisi to set aside a nonsuit and for a new trial in an action on the case for injury to the reversionary interest of the plaintiff.

The plaintiff by his declaration stated that a close called Stoney Butts Lane, situate in Halifax in Yorkshire, was in the possession and occupation of J. H., J. E., and J. A., as tenants of the plaintiff, who owned the reversion thereof; yet the defendant, well knowing the premises, but contriving to prejudice and aggrieve the plaintiff in his reversionary estate and interest, while the said close was in the possession of the said J. H., J. E., and J. A., wrongfully and unjustly, and without the leave and licence, and against the will of the plaintiff, put on the said close large quantities of stones, which he continued for a long space of time; and he had also with the feet of horses, and the wheels of carriages, spoiled and destroyed divers parts of the said close, whereby the plaintiff was greatly injured in his reversionary estate and interest therein. The defendant denied liability.

At the trial before PARKE, J., it appeared that the plaintiff was seised in fee of the closes mentioned in the declaration, which he had demised to tenants; that the defendant had with his horses and cart entered upon the close called Stoney Butts Lane; and that after notice had been given him by the plaintiff to discontinue so doing, he claimed to do so in exercise of a right of way. The judge held, that although that might be good ground for an action of trespass by the occupier of the plaintiff's farm, it was not evidence of any injury to the reversionary estate,

and, therefore, that the action was not maintainable; and he nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict.

F. Pollock for the plaintiff, now moved accordingly.

TAUNTON, J.—I think that there should be no rule in this case. *Young* v. *Spencer* (1) is not in point. That was an action on the case in the nature of waste by a lessor against his own lessee. Here the action is by a reversioner against a mere stranger, and a very different rule is applicable to an action on the case in the nature of waste brought by a landlord against his tenant than to an action brought for an injury to the reversion against a stranger. *Jackson* v. *Pesked* (2) shows, that if a plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial thereto, and the want of such an allegation is cause for arresting the judgment. If such an allegation must be inserted in a count, it is material, and must be proved.

Here the evidence was that the defendant went with carts over the close in question, and a temporary impression was made on the soil by the horses and wheels; that damage was not of a permanent but of a transient nature; it was not, therefore, necessarily an injury to the plaintiff's reversionary interest. Then it is said that the act being accompanied with a claim of right, will be evidence of a right as against the plaintiff, in case of dispute hereafter. But acts of that sort could not operate as evidence of right against the plaintiff, so long as the land was demised to tenants, because, during that time, he had no present remedy by which he could obtain redress for such an act. He could not maintain an action of trespass in his own name, because he was not in possession of the land, nor an action on the case for injury to the reversion, because in point of fact there was no such permanent injury as would be necessarily prejudicial to it; as, therefore, he had no remedy by law for the wrongful acts done by the defendant, the acts done by him or any other stranger would be no evidence of right as against the plaintiff, so long as the land was in possession of a lessee.

In *Wood* v. *Veal* (3), it was held that there could not be a dedication of a way to the public by a tenant for ninety-nine years, without consent of the owner of the fee, and that permission by such tenant would not bind the landlord after the term expired. I think, therefore, that the plaintiff cannot maintain the present action; and the rule nisi for a new trial ought to be refused.

PATTESON, J.—I am of opinion that the nonsuit was right. *Young* v. *Spencer* (1) was not an action by the reversioner against a stranger, but by a landlord against his tenant. It was an action on the case in the nature of waste. To entitle a reversioner to maintain an action on the case against a stranger, he must allege in his count, and prove at the trial, an actual injury to his reversionary interest. It is said that this action is maintainable, because the plaintiff's title may be prejudiced by a trespass committed under a claim of right; but then for such an injury the action must be brought in the name of the tenant, who is the person in the actual possession of the land. It is true the landlord cannot bring an action in the tenant's name without his assent; but that, generally speaking, would be obtained without difficulty, and may be always made matter of arrangement between the landlord and his tenant. The landlord may even provide by covenant in his lease that he shall be allowed to sue in his tenant's name for any trespass committed on the land.

PARKE, J.—I am clearly of opinion that there was no injury to the plaintiff's reversionary interest; and to entitle him to maintain this action it was necessary for him to allege and prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied with a claim of right, is not necessarily injurious to the reversionary estate, and what Lord

TENTERDEN said in *Young* v. *Spencer* (1), must be construed with reference to the subject-matter then under consideration, an action on the case in the nature of waste by a reversioner against his tenant.

Rule refused.

CONST *v.* HARRIS AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), May 12, 31, June 12, 18, 28, November 20, 1823, February 6, 7, 19, 1824]

[Reported Turn. & R. 496; 37 E.R. 1191]

Partnership—Conduct of business—Decision of partners—Majority decision—Need for all partners to be heard—Exclusion of one partner from share of management—Appointment of receiver.

Partners must be true and faithful to each other and must act on the joint opinion of them all, and the discretion and judgment of any one partner cannot be excluded. The exclusion of a partner from his full share of management is the strongest ground for appointing a receiver. The act of a majority of partners may be the act of all, but only provided that all the partners are consulted and the majority are acting bona fide.

Per LORD ELDON, L.C.: The majority of partners never represents the whole body except where there has been a voice called for from the minority and submitted to and fairly overruled by the majority.

Partnership—Partnership agreement—Specific performance—Variation of terms—Conduct of partners.

The court will entertain a bill to compel partners to act according to the provisions of an instrument into which they have entered to regulate the terms on which the partnership business is to be carried on, and, where it will interfere for that purpose, will take care that the decree shall not be defeated by anything done in the meantime. If, however, there be a long course of dealing, or a course of dealing, not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. Parties claiming under a partner who has assented to the substituted terms cannot revert back to the original terms.

Partnership—Conduct of business—Material change—Notice to all partners.

Where in carrying on a partnership business there is any material change to be made, notice must be given to all the partners of what the change is and at what time it is to be taken into consideration.

Partnership—Disputes—Complainant partner—Need to perform duty towards other partners.

A partner complaining that the other partners do not do their duty towards him must be ready at all times, and must offer himself, to do his duty towards them.

Notes. Considered: *Hall* v. *Hall* (1850), 3 Mac. & G. 79; *Wall* v. *London and Northern Assets Corpn.* (1898), 2 Ch. 469. Referred to: *Great Western Rail. Co.* v. *Rushout* (1852), 5 De G. & Sm. 290; *Re Vale of Neath and South Wales Brewery Joint Stock Co., Lawe's Case* (1852), 1 De G.M. & G. 421; *Simpson* v. *Westminster Palace Co.* (1860) 2 De G. F. & J. 141; *Steuart* v. *Gladstone* (1878), 38 L.T. 557.

As to the relations of partners inter se and the appointment of receivers, see 28 HALSBURY'S LAWS (3rd Edn.) 525 et seq., 554–557; and for cases see 36 DIGEST (Repl.) 526 et seq., 590 et seq.

Bill for the specific performance of an agreement between parties, the appointment of a receiver, and consequential relief.

In 1812 the then proprietors of Covent Garden Theatre executed a deed by which they covenanted and agreed that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits. In 1822 the defendants, who were then entitled under the former proprietors to seven eighths of the theatre entered into an agreement, which provided in some respect for a different application of the profits, and otherwise affected the rights of the plaintiff, Philip Const, who was interested in the remaining eighth, and was not consulted on the subject.

The bill was filed on April 15, 1823, by the plaintiff against Henry Harris, Charles Kemble, James Trotter, William Harrison, John Saltren Willett, and John Forbes. The plaintiff stated that he refused to become a party to the agreement of 1822: that, after that agreement had been concluded the defendants Kemble, Willett, and Forbes, entered into the possession of the theatre, and took upon themselves the entire management and conduct of the concerns thereof; and that, shortly afterwards he (the plaintiff) discovered that a great part of the receipts of the theatre, instead of being applied according to the deed of Mar. 9, 1812, was, in violation of the covenants contained in that deed, applied to other purposes. Among other instances of such misapplication, it particularly referred to the receipt by Henry Harris of the rents of the private box and fruit-rooms and of the oratorio-rent, by the agreement of Mar. 11, 1822, reserved to him. The bill went on to state that, in order to enable them to misapply the receipts of the theatre, the defendants Kemble, Willett, and Forbes, soon after they undertook the management of the theatre, dismissed the treasurer, Brandon, who had given security for the due application of the receipts of the theatre according to the deed of Mar. 9, 1812, from the situation of treasurer, and appointed one Robertson to be treasurer in his place, and that Robertson had given no security, and had applied the receipts according to the direction of the last named defendants without any regard to the provisions of the deed of 1812. The plaintiff alleged that it had always been customary for the proprietors to insure the theatre to an amount at least sufficient to satisfy the outstanding liabilities, but that the theatre was not then insured: and that, in January, 1823, the defendants ordered Robertson not to furnish the plaintiff with the usual daily accounts which, as one of the proprietors of the theatre, he was entitled to have sent to him daily for his examination. The plaintiff prayed that the defendants might be decreed specifically to perform the agreements and covenants contained in the indenture of Mar. 9, 1812, and asked for consequential relief, including that a proper person might be appointed to have the management and conduct of the concerns of the theatre, until, all the debts provided for by the indenture should have been satisfied.

On April 30, 1823, the defendants Kemble, Harrison, Forbes, and Willett, put in a demurrer to the bill.

On May 3, 1823, the plaintiff gave notice of a motion before the vice-chancellor for an injunction, to restrain the defendants from applying, or permitting to be applied, any of the moneys to be received for or in respect of the theatre, and other the premises in the pleadings mentioned, to any other purposes than such as were provided and agreed upon in and by the indenture of Mar. 9, 1812, and for a reference to the Master to appoint a proper person or persons to act as, or in the nature of, a receiver and treasurer of the theatre under the authority of the court, for the purpose of receiving the moneys which should from time to time be received for admission to the theatre, or become or be payable in respect of the rents in the pleadings mentioned. On May 9, 1823, the vice-chancellor dismissed the motion, and the plaintiff gave notice of a motion, before the Lord Chancellor that the vice-chancellor's order might be discharged, and that an order might be made according to the original notice of motion. The appeal came before the Lord Chancellor in May, June, and November, 1823.

Hart, *Wetherell*, and *Rawlins* for the plaintiff.
Heald, *Shadwell*, *James*, and *Twiss* for the defendants.

In support of the motion, it was contended on behalf of the plaintiff that he had been ousted by the defendants from all the rights which, as a proprietor of the theatre, he was entitled to exercise; that the agreement of 1822 utterly destroyed the equal right of interference which ought to have existed in all the proprietors, and was framed for the express purpose of destroying that right, and vesting in the defendants the entire dominion over the theatre; that every provision in that agreement tended to exclude the plaintiff's interference, and was in direct contravention of his rights; that the dismissal of Brandon from the office of treasurer and the non-delivery to the plaintiff of the daily accounts, were parts of the same system; that the plaintiff had a clear right to be furnished with those daily accounts and that the practice which had existed of their being delivered to the proprietors must be adhered to, or, at all events, that the defendants were not justified in discontinuing that practice without communicating with the plaintiff; that all the parties were bound by the provisions of the deed of 1812, and that the defendants could not be permitted to destroy those provisions by the agreement of 1822; that no person, succeeding to a share in a partnership, could exempt himself from the obligation of performing the engagements which attached upon the partner to whom he succeeded, under the plea that he was ignorant of such engagements; and that the alleged ignorance on the part of the defendants of the deed of 1812 did not, therefore, affect the case.

On the part of the defendants it was insisted that, as the bill did not pray that the concern might be wound-up, the motion could not be granted. The acquiescence of the plaintiff amounted to a consent on his part to the abandonment of the provisions of the deed of 1812 and a substitution of the arrangement made by the agreement of 1822, and was, of itself, sufficient to prevent the summary interference of the court. The plaintiff, having renounced the character of a partner, could not call upon the court for protection against his co-partners, and that the agreement of 1822 was operative only between the parties to it and did not at all affect the plaintiff. The non-delivery of the daily accounts was justified under the circumstances appearing by the affidavits, and it was urged, that it was the plaintiff's duty to attend at the theatre and inspect the accounts.

Feb. 6, 7, 1824. **LORD ELDON, L.C.,** delivered a judgment in which he stated the facts, and said that the concern was in the nature of a partnership, and, according to the principles of the court, it would not interfere, on interlocutory motion, to regulate the concerns of any partnership, unless the objects of the bill were such as would probably be carried into execution when the cause came to a hearing. It was not the business of the court to manage or carry on from time to time a partnership of any kind, and it was impracticable for the court to do so. A bill might be filed for the purpose of compelling partners to do certain things according to the provisions of certain instruments, and the court would interfere for that purpose. When it did so it would take care that the decree to be made at the hearing of the cause, should not be defeated by anything done in the meantime, but a bill merely seeking the interposition of the court to carry on a partnership could not be maintained. HIS LORDSHIP continued:

I have never seen a deed which more irrevocably fixed upon the parties whose interests were to be bound the trusts created by it than the deed of Mar. 9, 1812. It expressly directs that the funds shall be exclusively applied to the particular purposes there pointed out, and that the treasurer shall be irrevocably directed so to apply the funds. At the same time, great difficulties might have arisen upon that deed from its not providing who should be the manager of the theatre. Suppose a manager to have been appointed by some of the persons concerned in the theatre without duly consulting the others, it would have been a much shorter way than filing a bill in equity to have stated to that manager that he had no right to

manage, and to have stated to the treasurer that he acted at his peril in applying any of the funds according to the orders of the manager. The same difficulty would then have presented itself as occurred in the case of the Opera House, that when the treasurer came to pay the performers a question would have arisen whether the person who had made the bargain with them had any authority to make it. So, in the present state of things, a question may arise whether, if the present management is a management which has not been properly created originally or properly sanctioned subsequently, Mr. Robertson will be justified in executing the very first trust of this deed unless it can be shown that the contracts with the performers are contracts which bind all the persons interested. However that may be, there can be no doubt whatever that after the execution of the deed of 1812, unless the trusts of it were altered by some effectual means, it never could be competent to any of the proprietors of the theatre, without the consent of the others, to authorise Brandon, while he acted under the deed, to apply any part of the moneys coming to his hands to any other purposes than those expressed in the deed. Considering the deed to have been an effectual deed, it has been the duty of the treasurer for the time being to say that, without the consent of all the parties interested, he could not allow any part of the moneys coming to his hands to be applied otherwise than according to the trusts of the deed. If all the parties interested except one came to him and said that he should not apply the moneys in the manner directed by the deed, he was authorised to say that he should make that application of the moneys and none other. Thus the case stood in 1812.

In ordinary partnerships nothing is more clear than that, although partners enter into a written agreement stating the terms upon which the joint concern is to be carried on, yet, if there be a long course of dealing, or a course of dealing, not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership, the parties agree, that no one of them shall draw or accept a bill of exchange in his own name without the concurrence of all the others, yet if they afterwards slide into a habit of permitting one of them to draw or accept bills, without the concurrence of the others, this court will hold that they have varied the terms of the original agreement in that respect. So, in this case, if it can be shown that in the administration of this property the proprietors in general, after 1812, pursued a different course from that provided for by the deed of March, 1812, they must be taken to have altered the agreement, and to have substituted the terms to which in their conduct they have adhered instead of the terms contained in the original agreement. With respect to the present plaintiff, there can be no doubt that if, after the deed of 1812 was executed, his testatrix gave in to a course of administration of the property different from the course provided for by the deed, if her acts, or the acts of others with her consent, afforded such evidence of departure from the terms of the written agreement as to amount to the substitution of a new agreement, though evidenced only by parol, instead of the written agreement, he, claiming under her, must be bound by her acts, and cannot be at liberty to revert back from those acts establishing a new agreement to call into operation again the old agreement, and to insist that the non-execution of the old agreement is, in such circumstances, a breach of trust. So, again, it is a principle of this court with respect to partnership concerns that a partner who complains that the other partners do not do their duty towards him must be ready at all times, and offer himself, to do his duty towards them.

Whether the observation I am about to make applies to this case at present or not, it may be useful for the guidance of these parties hereafter. It is not enough for the parties who have executed the deed of 1822 to say: "We, the owners of seven eighths, will meet, and Mr. Const may come if he pleases." Where there is any material change to be made, which is to be a binding change, notice must be given to all parties of what that change is, and at what time it is to be taken into

consideration. For instance, if notice was given with respect to dismissing Mr. Brandon, I am not of opinion, supposing the deed of 1812 to have been an operative deed when Mr. Brandon was dismissed, that it was not competent to the parties to dismiss him, duly taking into consideration whether he ought to be dismissed or not and duly providing a substitute who should be constituted and bound to all the duties Mr. Brandon was constituted and bound to, and whose discharge of those duties should be as well secured as Mr. Brandon's discharge of those duties was secured, but I say that, supposing the deed of 1812 to have been then operative, the proprietary could not dismiss Mr. Brandon without consulting all their partners. If the deed of 1812 was then operative, his dismissal ought to have been the act of all the partners, and I call that the act of all which is the act of the majority, provided all are consulted, and the majority are acting bona fide, meeting, not for the purpose of negativing what one may have to offer, but for the purpose of negativing what, when they are met together, they may, after due consideration, think proper to negative. For a majority of partners to say: "We do not care what one partner may say. We being the majority, will do what we please," is, I apprehend, what this court will not allow. So, again, with respect to making Mr. Robertson the treasurer, Mr. Const had a right to be consulted. His opinion might be overruled, and honestly overruled, but he ought to have had the question put to him and discussed. In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other. They are to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded. What weight is to be given to it is another question. The most prominent point on which the court acts in appointing a receiver of a partnership concern is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership as he, who assumes that power, himself enjoys.

What are the circumstances on which the lessees of the seven eighths rely as having varied, prior to the deed of 1822, and to what extent, and in what particulars, the deed of 1812? With respect to what they state as to their not having known of the deed of 1812, for the reasons I have already given I can pay no attention to that. What they were bound by law to know they must be taken to have known. Their obligation in law to know of the deed of 1812, cannot be altered by their not having in fact known of it, but, whether they knew of it or not, they cannot take under Harris upon better terms than those upon which Harris himself took.

I am willing, however, to agree, that usage may be taken as varying the terms of the deed of 1812. Usage cannot, of course, be of long continuance, but for this purpose may be of great effect. I am also willing to agree that, the deed of 1812 saying nothing about the appointment of a manager, it must be understood, that managers were thenceforth to be appointed in the same way as they had before been appointed; and that, if, for instance, the appointment of Mr. Henry Harris took place without any form whatever, the other parties merely standing by, and seeing him the manager from year to year, in which case I should say that their non-opposition was their accession to the appointment, a manager now appointed in the same manner, where there was the same accession to the appointment, would be a perfectly good manager, but, supposing there to have been a manager to be appointed under the deed of 1822 and the lessees of the seven eighths to have appointed the manager without consulting the parties interested in the one eighth, and the question then to have arisen whether the manager so appointed was properly appointed, on these naked facts, taking the question to have arisen immediately after the execution of the deed of 1822, I should have said that the appointment would not do, there having been no subsequent acquiescence removing the objection of the parties interested in the one eighth not having been consulted; that the lessees of the seven eighths could not, without consulting the parties interested in the one eighth, take upon themselves, merely because they were lessees of seven eighths, to do those acts, which could only be done by the body,

or by a majority of the body representing the whole of the body, and that the majority of the body never represented the whole of the body except where there had been a voice called for from the minority and submitted to and fairly overruled by the majority, which the court would generally take it to be where it had been overruled. All this applies equally to the appointment of Mr. Robertson.

His Lordship said that he could not find that there had been that sort of acquiescence by the plaintiff which precluded objection on his part, and that, unless the deed of 1812 could be argued to give Mr. Brandon a freehold for life in the office of treasurer it was competent to the parties, acting towards each other as they ought to act, to dismiss Mr. Brandon and appoint another treasurer. The deed itself, speaking for the treasurer for the time being, raised that implication, but, if the parties were to be considered as acting under the deed of 1812, they could not act under that deed in the appointment of a treasurer without calling the whole of the proprietors together, and taking into consideration who that treasurer should be. Unless something further could be stated to oust the reasoning as to the non-accession of the plaintiff to the new state of things under the deed of 1822, and, unless the deed of 1822 was to be taken to be the leading deed and to have excluded the plaintiff from all interference whatever, he (his Lordship) could not get rid of the opinion that Mr. Robertson could not be considered as treasurer, and that all the parties were to be considered as partners, having a demand upon each other for that intercourse which the court enforced between partners. If the conclusion was that Mr. Robertson was not the treasurer and that the deed of 1812 could not be displaced, the court must appoint a treasurer unless the parties would appoint one, according to the true intent and meaning of what must regulate their partnership, but, as there had been a miscarriage in the appointment of a treasurer, by the judgment of a person having been excluded whose judgment ought to have been taken, the most advisable thing to be done, considering the nature of the concern, was for a meeting of the partners to be called to appoint a treasurer.

Feb. 19, 1824. The matter was again mentioned, and it was stated that no arrangement had been made and that Mr. Harris had declined to attend any meeting, considering that, having demised his share, he had no interest in the question and was bound to accede to whatever the lessees agreed upon among themselves, but, the Lord Chancellor asked whether Mr. Harris, having made a lease of his interest without the consent of one of his partners, might not apply for an injunction, to restrain his lessees from doing any act prejudicial to that partner. His Lordship then referred it to the Master to appoint a receiver.

Order accordingly.

TASKER *v.* SMALL

[Lord Chancellor's Court (Lord Cottenham, L.C.), January 17, 18, November 18, 1837]

[Reported 3 My. & Cr. 63; Coop. Pr. Cas. 255; 7 L.J.Ch. 19; 1 Jur. 936; 40 E.R. 848]

Specific Performance—Sale of land—Contract—Proper parties to action—Mortgaged estate—Purchase from owner of equity of redemption—Liability of mortgagee or other person not party to contract to be made defendant.

To a bill for a specific performance of a contract of sale, the parties to the contract are the only proper parties. A court of equity assumes jurisdiction in such cases because a court of law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But in equity, as well as at law, the contract constitutes the right and regulates the liabilities of the parties, and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the rights nor subject to the liabilities which arise out of it, are as much strangers to the proceedings to enforce the execution of it as they are to a proceeding to recover damages for the breach of it.

Accordingly, where a bill for specific performance was filed by a person who had contracted to purchase the absolute legal and equitable interest in a mortgaged estate from the supposed owner of the equity of redemption, **held**, that neither the mortgagee nor a person who claimed an interest in the equity of redemption but was not a party to the contract could be made a defendant, and the fact that the mortgagee did not object to being made a party but required the sanction of the person claiming an interest in the equity of redemption before joining in the conveyance did not make that person a proper party.

Mortgage—Redemption—Duty of mortgagee to restore estate vested in him on repayment of what is due on mortgage to his mortgagor—No right to dispute mortgagor's title.

A mortgagee can never refuse to restore to his mortgagor or those who claim under him, on repayment of what is due on the mortgage, the estate which became vested in him as mortgagee. To him it is immaterial, on repayment of the money, whether the mortgagor's title was good or bad. He is not at liberty to dispute it any more than a tenant is at liberty to dispute his landlord's title.

Notes. Considered: *Cutts* v. *Thodey* (1844), 2 L.T.O.S. 474. Distinguished: *West Midland Rail. Co.* v. *Nixon* (1863), 1 Hem. & M. 176. Applied: *Bird* v. *Great Eastern Rail Co.* (1865), 19 C.B.N.S. 268; *De Houghton* v. *Money* (1866), 2 Ch. App. 164; *Fenwick* v. *Bulman* (1869), L.R. 9 Eq. 165; *Lumley* v. *Timms* (1873), 28 L.T. 157. Referred to: *Roberts* v. *Marchant* (1843), 13 L.J.Ch. 56; *Nelthorpe* v. *Holgate* (1844), 1 Coll. 203; *Aberaman Ironworks* v. *Wickens* (1868), 4 Ch. App. 101; *I.R. Comrs.* v. *Angus*, *The Same* v. *Lewis* (1889), 23 Q.B.D. 579; *Richards* v. *Pryse*, [1927] 2 K.B. 76; *Assaf* v. *Fuwa*, [1955], A.C. 215.

As to parties to an action for specific performance, see 36 Halsbury's Laws (3rd Edn.) 328 et seq.; and for cases see 44 Digest (Repl.) 126 et seq. As to persons entitled to redeem mortgages, see 27 Halsbury's Laws (3rd Edn.) 232; and for cases see 35 Digest (Repl.) 400.

Case referred to:

(1) *Mole* v. *Smith* (1822), Jac. 490.

Appeal by the defendant, Mrs. Small, from a decree of Shadwell, V.-C., in an action for specific performance.

The following facts are taken from the judgment of the Lord Chancellor. The defendant, Small, prior to his marriage, was entitled to the estate in question, in tail male, subject to the life estate of Mrs. Lucas; and by his marriage articles, dated Dec. 3, 1830, his intended wife (the present appellant, Mrs. Small) being then an infant, he contracted with her uncle, Ashford, that subject to the life estate of Mrs. Lucas, and to the raising by mortgage or otherwise, of any sum or sums of money, not exceeding in the whole £15,000, by himself, the estate should be conveyed and assured on the trusts of a settlement; and for that purpose he covenanted that, as soon as conveniently might be after the marriage, subject and without prejudice to the raising by any ways or means, and at any time or times he should think proper, of any sum or sums of money, not exceeding in the whole £15,000, by mortgage, annuity, or otherwise, for his own use and benefit, and to any deed or deeds and assurances which he might thereafter make or execute for securing the repayment of such sum or sums of money and the interest thereof, he would make and execute all necessary and proper acts and deeds for the purpose of settling the estate to the use of Ashford during the life of the wife, in trust to pay the rents to her, for her separate use, with remainder to himself for life, remainder amongst the children of the marriage, remainder to the survivor of the husband and wife, with various powers of management and application of the rents for the benefit of the children—all applicable to the real estate—and a provision that there should be inserted in the settlement all such powers, provisos, covenants, clauses, and agreements as might be considered essential for the parties interested therein, or as might be proper for effecting the several purposes, and as were usually contained in settlements of the like kind.

By indentures of Mar. 2 and 3, 1831, Small, having borrowed £5,000 of Thomas Phillips, conveyed the estate comprised in the articles to Phillips, subject to the usual proviso for redemption, and covenanted to levy a fine for that purpose. Phillips had a power of sale given to him by the mortgage deed and it contained an assignment of a policy of insurance for £5,000 on the life of Mrs. Lucas.

A fine was accordingly levied in Easter Term, 1831. By indentures of Oct. 26 and 27, 1832, Small, having borrowed another sum of £5,000 of the defendant Wakeford, secured the repayment of it in a similar manner; but for this loan the defendants, Benjamin Baker and Thomas Mann, joined as sureties in the covenant for payment. By indentures of Oct. 28 and 29, 1832, to which Small and Ashford, Phillips and Wakeford, two of the mortgagees, and Baker and Mann were expressed to be parties, Small conveyed the estate to Baker and Mann, subject to the life estate of Mrs. Lucas, and subject also to the mortgages, on trust, if Small made default in paying the interest on the mortgages or the premiums on the policies, to sell the estate at their discretion and to apply the proceeds in reimbursing themselves, repaying the premiums paid, paying the mortgage debts due to Phillips and Wakeford, and to pay the surplus to Small or to the persons entitled thereto under the articles of Dec. 3, 1830.

Small subsequently raised two other sums, one of £2,500 by mortgage to the defendant Hawkins, and the other of £1,000 by sale of an annuity now vested in the defendant, Sarah Baker; so that of the whole £15,000 the sum of £1,500 only remained to be raised.

The defendants, Baker and Mann, were the vendors under the deed of Oct. 29, 1832. They by an agreement dated Dec. 21, 1833 (to which they were parties of the first part, Small, of the second part, and the plaintiff, of the third part), agreed, in consideration of £19,250, to sell the fee-simple of the estate to the plaintiff, expectant on the death of Mrs. Lucas, so far as such estate had been acquired under the fine, or as Small could acquire it during her life with her concurrence. It appears that, by deeds executed in pursuance of the Fines and Recoveries Act, 1833, Mr. and Mrs. Lucas having consented, the effect of a recovery was obtained and the legal estate vested in Phillips the mortgagee. There was no allegation in

the bill respecting Mrs. Small's interest, except in the statement of the marriage articles.

To the plaintiff's bill for specific performance of the agreement for sale dated Dec. 21, 1833, Ashford and Mrs. Small put in a general demurrer, on the discussion of which two questions were raised; first, whether the marriage articles authorised Small to sell the estate to raise the £15,000, and if so, whether, in the circumstances, such power was duly exercised; secondly, whether Mrs. Small was a proper party to the suit. Counsel for Mrs. Small, being desirous of obtaining a decision on the other points, waived the objection to Mrs. Small being a party to the suit and the vice-chancellor, being of opinion that the articles authorised the sale, overruled the demurrer. But he expressed doubt whether Mrs. Small ought to have been made a party to the suit. On the argument at the hearing both points were again raised, but his Honour made a decree declaring that Small was entitled to sell the fee-simple and inheritance in remainder of the whole estate for the purpose of raising the £15,000, and referred it to the Master to inquire whether that sum, or any and what part thereof, had been raised, and whether the contract of Dec. 2, 1833, was, at the time, a fit and proper contract.

The defendant, Mrs. Small, by her next friend, presented a petition of re-hearing and submitted, first, that the vice-chancellor's decree was erroneous on the merits, and, secondly, that she ought not to have been made a party to the suit.

Knight and *Spence* for the plaintiff, supported the decree.
Cooper for the defendants Baker and Mann.
Jacob and *Willcock* for the defendant, Mrs. Small.

LORD COTTENHAM, L.C.– The bill in this case is filed by a purchaser for the specific performance of a contract made and signed by himself, on the one part, and by the defendants, Baker, Mann, and Small, on the other part. There is this peculiarity in the bill, that it prays that it may be declared that a good title can be made to the estate in question, except as to the life estate of a Mrs. Lucas; and this seems to be the real object of the suit. In order to obtain a decision on this subject, there are made defendants certain mortgagees, who are not parties to the contract. They are Mrs. Small, the wife of the party by whom the contract for the sale was made, and who is the party appealing from the decree, and Ashford, who was named as a trustee in articles executed in contemplation of her [Mrs. Small's] marriage.

[HIS LORDSHIP then stated the facts as set out above, and continued:] The decree adjudicates nothing as to the propriety of the contract and cannot, therefore, be objected to if the declaration be correct, that under the articles, Small was entitled to sell the fee-simple in remainder of the whole estate for the purpose of raising the £15,000; all questions as to the manner in which that power was exercised being reserved. However, I understand the declaration to decide that such power existed from the moment of the execution of the articles of marriage. The second question is to be considered first, because if Mrs. Small be not a proper party to the suit, it will not only be unnecessary but improper to give any opinion as to any point in the cause.

It is not disputed that generally, to a bill for a specific performance of a contract of sale, the parties to the contract only are the proper parties and when the ground of the jurisdiction of courts of equity in suits of that kind is considered, it could not properly be otherwise. The court assumes jurisdiction in such cases because a court of law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But in equity, as well as at law, the contract constitutes the right and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right nor subject to the liabilities which arise out of it, are as much strangers

to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it; and so is the admitted practice of the court. It is said, however, that this case ought to be an exception to the rule because Phillips, in whom as first mortgagee, the legal estate is vested, is not willing to convey it to the plaintiff without having competent authority for so doing and that the question being raised whether the legal estate can be so conveyed, Mrs. Small is of necessity made a party to the suit.

This proposition assumes two points: (i) that Phillips is himself a proper party to the suit, and (ii) that being so, it is competent for him to require that Mrs. Small should be made a party to it. Phillips is merely a mortgagee against whom no bill can properly be filed except for the purpose of redeeming his mortgage and that by a party entitled to redeem. This bill does not pray any redemption of Phillips's mortgage, and if it had, the plaintiff would not be entitled to file such a bill. He is only connected with the property by having contracted to purchase the equity of redemption and until that purchase is completed, he cannot redeem the mortgage. Phillips has no interest in the specific performance of the contract, he is no party to it and the performance of it cannot affect his security or interfere with his remedies. Supposing however, that it was competent for the plaintiff to redeem Phillips's mortgage, he can only be so entitled as standing in the place of the mortgagor; but a mortgagee can never refuse to restore to his mortgagor or those who claim under him, on repayment of what is due on the mortgage, the estate which became vested in him as mortgagee. To him it is immaterial, on repayment of the money, whether the mortgagor's title was good or bad. He is not at liberty to dispute it any more than a tenant is at liberty to dispute his landlord's title. Phillips, therefore, is bound, on payment, to restore the legal estate to his mortgagor or to those who claim under him. By Phillips's mortgage deed the equity of redemption was reserved to Small. If the plaintiff could show such equity of redemption to be vested in him, he would be entitled, on paying the mortgage debt, to demand a re-conveyance of the estate without regard to any other question affecting the title to the property. I am, therefore, of opinion that Phillips himself is not a proper party to this suit and that he cannot by not himself insisting on the objection, make Mrs. Small a proper party; and that even if he were himself properly made a defendant, the objection raised by him at the Bar would not make Mrs. Small a proper party.

It was argued at the Bar that the plaintiff was, in equity, invested with all the rights of Mrs. Small on the principle that by a contract of purchase, the purchaser becomes, in equity, the owner of the property. This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property.

In *Mole* v. *Smith* (1) (Jac. at p. 494), LORD ELDON, L.C., says, that when a bill is filed for a specific performance, it should not be mixed up with a prayer for relief against other persons claiming an interest in the estate. Such was his opinion in a case in which the vendor was plaintiff and the defendants were persons whom the vendor sought to compel to join in completing the title. How much stronger is the objection where the purchaser is the plaintiff and the only connection between him and the defendants is the incomplete disputed contract. I am, therefore, of opinion that Mrs. Small is not a proper party to this suit and that the bill ought to have been dismissed with costs as against her.

Appeal allowed.

WILKINSON AND OTHERS *v.* JOHNSON AND OTHERS

[Court of King's Bench (Abbott, C.J., Bayley, Holroyd and Littledale, JJ.), November 27, 1824]

[Reported 3 B. & C. 428; 5 Dow. & Ry.K.B. 403; 3 L.J.O.S.K.B. 58; 107 E.R. 792]

Bill of Exchange—Forgery—Forging of endorsements—Payment to holder in belief that endorsements genuine—Right to recover as money paid under mistake of fact—Mistake discovered before loss by holder of remedy against prior endorsers.

Bill of Exchange—Endorsement—Striking out Endorsement struck out by mistake—Rights of parties not altered.

Certain bills of exchange purporting to have, among others, the endorsement of H. & Co., bankers of Manchester, were presented for payment in London at a house where the acceptance appointed them to be paid. Payment being refused, the notary who presented them took them to the plaintiff, the London correspondent of H. & Co., and asked him to take up the bills for their honour. He did so and struck out the endorsements subsequent to that of H. & Co., and the money was paid over to the defendants, the holders of the bills. The same morning it was discovered that the bills were not genuine, and that the names of the drawer, acceptor, and H. & Co. were forgeries. The plaintiff immediately sent notice to the defendant, and demanded to have the money repaid. This notice was given in time for the post, so that notice of the dishonour could be sent the same day to the endorsers.

Held: (i) the plaintiff having paid the money through a mistake was entitled to recover it back, the mistake having been discovered before the defendant had lost his remedy among the prior endorsers; (ii) the rights of the parties were not altered by the erasure of the endorsements, that having been done by mistake, and being capable of explanation by evidence.

Notes. As to striking out endorsements, see the Bills of Exchange Act, 1882, s. 63 (2): 2 Halsbury's Statutes (2nd Edn.) 539.

Distinguished: *Cocks* v. *Masterman* (1829), post p. 431. Explained: *Mather* v. *Maidstone* (1856), 26 L.J.C.P. 58. Referred to: *London and River Plate Bank, Ltd.* v. *Bank of Liverpool*, [1895–9] All E.R. Rep. 1005.

As to striking out endorsements, see 3 Halsbury's Laws (3rd Edn.) 187, 188; as to payments under worthless instrument, see 8 Halsbury's Laws (3rd Edn.) 246; as to alteration of documents, see 11 Halsbury's Laws (3rd Edn.) 367–371; 379–381; and for cases see 6 Digest (Repl.) 97–102; 337–339; 347–350.

Cases referred to:

(1) *Jones* v. *Ryde* (1814), 5 Taunt. 488; 1 Marsh. 157; 128 E.R. 779; 6 Digest (Repl.) 99, *774*.

(2) *Bruce* v. *Bruce* (1814), 5 Taunt. 495; 1 Marsh, 165; 128 E.R. 782; 6 Digest (Repl) 99, *776*.

(3) *Price* v. *Neal* (1762), 3 Burr. 1354; 1 Wm. Bl. 390; 97 E.R. 871; 6 Digest (Repl.) 99, *773*.

(4) *Smith* v. *Mercer* (1815), 6 Taunt. 76; 1 Marsh. 453; 128 E.R. 961; 6 Digest (Repl.) 99, *776*.

(5) *Fernandez* v. *Glynn* (1806), 1 Camp. 426, n., N.P.; 3 Digest (Repl.) 244, *649*.

Action of assumpsit brought by the plaintiffs to recover back the sum of £589 6s. 8d., paid by them as they alleged in mistake on three bills of exchange.

About eleven o'clock on the morning of Monday, Feb. 3, 1823, a notary public, who had been employed by Messrs. Smith, Payne and Smith, to note three bills of exchange which became due on the Saturday preceding, and which he had on that day presented for payment at the house of Messrs. Masterman & Co., where they

were made payable, and refused payment, called, in consequence of the dishonour of the said bills, but without any order from Smith, Payne and Smith, with the said bills at the banking house of the plaintiffs, who carry on trade and business in partnership together as bankers in London, for the purpose of the same being taken up by the said plaintiffs, for the honour and on account of Messrs. A. Heywood, Sons & Co., who appeared to be endorsers upon the said bills, and whose London bankers the said plaintiffs then were, and still are.

The following is a copy of one of the bills of exchange, and of the several endorsements thereon:

"No. £214 10s.

"Liverpool, October 30, 1822.

"Three months after date, pay to the order of Charles Thompson, Esq., two hundred and fourteen pounds ten shillings sterling, value received as advised.

"*Cropper, Benson & Co.*

"To Messrs. Birly and
Hornby, Manchester.

"To be paid at Masterman's, London."

The names Birly and Hornby were written across the bill, and it was endorsed:

"Charles Thompson, A. Heywood, Sons & Co.; pay to the order of Mr. Henry G. Harvey, Geo. Green, Henry G. Harvey, pay Messrs. H. and T. Johnson & Co., or order Gordon, Batt & Co., H. and T. Johnson & Co."

The other bills were the same in form and had the same endorsements, they were drawn for £187 8s. 4d. each.

The notary, who presented the bills at the house of the plaintiffs, was employed to present and note them as aforesaid, by Smith, Payne and Smith, bankers in London, who held them as the bankers and agents of the defendants who were in partnership together. The plaintiffs believing that the bills were genuine bills, and that the endorsements in the names of A. Heywood, Sons & Co., were their genuine endorsements, took up the same for the honour, and on the account of the said A. Heywood, Sons & Co., and forthwith paid to the notary who presented the bills, the sum of £589 6s. 8d., being the amount of the several bills, which was carried by the notary and paid to Smith, Payne and Smith, as the bankers of the defendants, and the clerk of Smith, Payne & Co., immediately entered the sum in their counter book. The clerk of the plaintiffs, upon paying the money to the notary, struck out all the endorsements on the bills, subsequent to that of Messrs. A. Heywood, Sons & Co. Immediately after the bills were so paid by the plaintiffs, it was discovered that they were not genuine bills, but that the names of the drawers and acceptors, and the names of A. Heywood, Sons & Co., on whose account the payment had been made, were forgeries. On the same day and before the hour of one o'clock, the plaintiffs gave notice to the defendants, and also to Smith, Payne and Smith, that the bills were discovered not to be genuine bills, but that they were forged in the particulars before mentioned; and as well Smith, Payne & Co., as also the defendants, were at the same time informed that the names of the endorsers, subsequent to the endorsement purporting to be the endorsement of A. Heywood, Sons & Co., had been struck out by mistake, and under the belief that the endorsement purporting to be the endorsement of A. Heywood, Sons & Co. was genuine; and the plaintiffs then demanded of Smith, Payne and Smith, and of the defendants, the money which had been paid by the plaintiffs as aforesaid, which Smith, Payne and Smith, and the defendants, refused to return.

It was afterwards agreed, without prejudice, by the plaintiffs and defendants, that the defendants should return the bills to the endorsers from whom they received them, which was done accordingly, and such endorsers had due notice as well of the presentment of the bills of exchange, at the place where payable, and

of their being dishonoured, as also of the circumstances above detailed; but the endorsers refused to take them up on the ground that the bills had been paid by the plaintiffs; and also on the ground that the endorsements before mentioned had been struck out, and that the endorsers had thereby lost their remedy over.

At the trial before ABBOTT, C.J., in 1823, the jury returned a verdict for the plaintiffs subject to the opinion of the court on a Case which stated the facts set out above. The question for the opinion of the court was whether the plaintiffs were entitled to recover: if so, a verdict to be entered for the plaintiffs; if otherwise, a nonsuit to be entered.

Tindal for the plaintiffs.

R. V. Richards and *Parke* for the defendants.

Cur. adv. vult.

Nov. 27, 1824. **ABBOTT, C.J.,** delivered the following judgment of the court.—This case was argued before three of the judges at the sittings in the adjoining room, and again before the whole court at the sittings before the present term. In the argument two points were made: (i), whether the plaintiffs could have recovered back the money which they paid on the bills in question, supposing they had not struck out the endorsements subsequent to the name of Heywood & Co., for whose honour they paid the bills; (ii), whether their right to recover was defeated by that act.

Upon the first question, *Jones* v. *Ryde* (1) and *Bruce* v. *Bruce* (2) were cited for the plaintiffs; and *Price* v. *Neale* (3) and *Smith* v. *Mercer* (4) for the defendants. The general rule of law is clear and not disputed; viz., that money paid under a mistake of facts may be recovered back, as being paid without consideration. To this rule, the two cases cited for the defendant are an exception. The question is whether the present case be properly within the rule, or within the exception. *Price* v. *Neale* (3) was the case of a man upon whom two bills of exchange falling due at different times were drawn: he paid the first when presented at maturity, not having accepted it, and accepted and paid the second. This was all done under a mistaken opinion that the signature of the supposed drawer was genuine. Some time afterwards, it was discovered that the signature of the drawer was forged. The decision of LORD MANSFIELD against the plaintiff appears not to have been grounded on the delay, but rather upon the general principle, that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault or negligence than by mistake, if he pays on a forged signature. *Smith* v. *Mercer* (4) was the case of a banker at whose house a bill purporting to be accepted by one of his customers was made payable. The forgery of the acceptor's name was not discovered until the end of a week. In this case CHAMBRE, J., thought the plaintiffs entitled to recover; the other judges were of a different opinion. DALLAS, J., appears to have founded his judgment principally on the supposed fault or neglect of the plaintiffs, who ought to have known the signature of their customer; though he also notices the delay, and the inconvenience that might thereby result to the holders of the bill. HEATH, J., appears to have given his judgment entirely on the ground of the fault or neglect of the plaintiffs, who could not, in his opinion, be in a different situation from that in which their customer would have stood if he had paid the bill himself. GIBBS, C.J., grounds his judgment on the delay as sufficient for the decision of the cause; at the same time, however, declaring that he does not mean thereby to express his dissent from the larger ground on which the case had been put by the other two judges.

If we compare the facts of the present case with those of the two cases before mentioned, we shall find some important difference. The plaintiffs were not the drawees or acceptors of the bills, nor the agents of any supposed acceptor. They discovered the mistake in the morning of the day they made the payment, and gave notice thereof to the defendants in time to enable them to give notice of the dishonour to the prior parties, which was accordingly given. The plaintiffs

were called upon to pay for the honour of Heywood & Co., whose names appeared on the bills among other endorsers. The very act of calling upon them in this character was calculated in some degree to lessen their attention. A bill is carried for payment to the person whose name appears as acceptor, or as agent of an acceptor, entirely as a matter of course. The person presenting very often knows nothing of the acceptor, and merely carries or sends the bill according to the direction that he finds upon it; so that the act of presentment informs the acceptor or his agent of nothing more than that his name appears to be on the bill as the person to pay it; and it behoves him to see that his name is properly on the bill. But it is no means a matter of course to call upon a person to pay a bill for the honour of an endorser; and such a call, therefore, imports on the part of the person making it, that the name of a correspondent, for whose honour the payment is asked, is actually on the bill. The person thus called upon ought certainly to satisfy himself that the name of his correspondent is really on the bill; but still his attention may reasonably be lessened by the assertion, that the call itself makes to him in fact, though no assertion may be made in words. The fault, if he pays on a forged signature, is not wholly and entirely his own, but begins at least with the person who thus calls upon him. And though, where all the negligence is on one side, it may perhaps be unfit to inquire into the quantum, yet where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake, into which he may by his own prior mistake have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the other parties, that is, while the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches.

Further, it is not easy to reconcile the opinion of some of the judges in *Smith* v. *Mercer* (4), with the prior judgment of the same court in *Bruce* v. *Bruce* (2). That was the case of a victualling bill, of which the sum was altered and enlarged, and in this alteration the forgery consisted. The whole sum was paid at the victualling office when the bill was presented by the Bank of England, but the forgery being discovered, the bank paid back the difference, and then called upon their customer, the plaintiff, who repaid the bank, and brought his action against the defendant, from whom he had received the bill in its altered state. If the payment of the whole sum at the victualling office could not by law be rescinded on the ground of mistake, the refunding of part by the bank, and afterwards by the plaintiff, was an act done in their own wrong, and consequently not binding upon the defendant, nor giving a right of action against him. We think the present case approaches in principle nearer to that of *Bruce* v. *Bruce* (2), than to either of the other two. We think the payment in this case was a payment by mistake and without consideration to a person not wholly free from blame, and who ought not, therefore, in our opinion, to retain the money, unless the act of drawing the pen through the names of the other endorsers will have the effect of discharging them, and thereby deprive the defendants of their rights to resort to them.

This brings me to the second question in this cause. Upon this second question we are clearly of opinion, that the defendants have not been deprived of their right to resort to the prior endorsers. The striking out an endorsement by mistake cannot, in our opinion, discharge the endorser; it would be most mischievous to commerce to hold that it should. In *Fernandez* v. *Glynn* (5), which was tried before Lord Ellenborough at Guildhall, at the sittings after Michaelmas Term, 1806, it appeared that a cheque drawn upon the defendants, who were bankers in the city, by one of their customers, was passed through the clearing house, and taken from thence to the defendant's shop by one of their clerks, and there another clerk drew his pen through the name of the drawer as usual when a cheque is intended to be paid; but it being soon afterwards known that a cheque to a very large amount, drawn by a third person, and paid into the defendant's house by the drawee of this cheque, was dishonoured, the same clerk wrote under the

name, the words "cancelled by mistake," and signed his initials, and in that state the cheque was before five o'clock returned to the bankers to whom the plaintiff had delivered it, and was received back by them. It was contended for the plaintiff, that this cancellation amounted to an acceptance of the cheque, or an acknowledgement that the defendants had money in their hands to pay it, and was irrevocable. It was proved, however, to be usual to return and take back before five o'clock, cheques passing through the clearing house, and thus cancelled, if the words "cancelled by mistake" were written on them as in the present case, and the plaintiff was nonsuited.

That case shows, that the act of drawing a pen through a name on such instruments is not considered among mercantile men to be an act so absolute in itself as not to be recalled and annulled, if done by mistake. We think that, in the present case, the mistake may be shown, and that the endorsers are not discharged. If, indeed, it shall hereafter appear that the defendants are put to any additional expense, by extra proof or otherwise, on account of this improvident act of the plaintiffs, which is very unlikely, they may possibly maintain a special action upon the case to recover a compensation to the extent of the injury they sustain, but this does not necessarily extend to the whole consideration, and if not, it furnishes no defence to the present action. The verdict, therefore, is to be entered for the plaintiffs.

Judgment for plaintiffs.

HODGES *v.* HORSFALL AND OTHERS

[LORD CHANCELLOR'S COURT (Lord Lyndhurst, L.C.), December 8, 9, 16, 1829]

[Reported 1 Russ. & M. 116; 39 E.R. 45]

Evidence—Document—Parol evidence as to effect—Plan referred to in agreement—Identification of plan.

Specific Performance—Contract—Plan referred to in contract—Parol evidence to identify plan—No decree unless identification clear.

Where a written agreement expressly refers to a plan as an existing document forming a term in the contract parol evidence is admissible for the purpose of identifying the plan. But unless the evidence of identity is clear and satisfactory, specific performance of such an agreement will be refused.

Notes. Considered: *Andrew* v. *Andrew* (1856), 8 De G.M. & G. 336; *Morris* v. *Wilson* (1859), 33 L.T.O.S. 56. Referred to: *Squire* v. *Campbell* (1836), 1 My. & Cr. 459; *Re Daintry and Ryle, Re Ravenscroft, Ex parte Arkwright* (1843), 3 Mont. D. & De G. 129; *Allen* v. *Maddock*, [1843-60] All E.R. Rep. 285; *Baumann* v. *James* (1868), 3 Ch. App. 508.

As to admissibility of extrinsic evidence, see generally, 11 HALSBURY'S LAWS (3rd Edn.) 396 *et seq.*; as to identification of plan by extrinsic evidence, see 3 HALSBURY'S LAWS (3rd Edn.) 382; as to mistake as to identity of subject-matter of contract, see 26 HALSBURY'S LAWS (3rd Edn.) 897; and for cases see 12 DIGEST (Repl.) 181, 182.

Case referred to:

(1) *Clinan* v. *Cooke* (1801), 1 Sch. & Lef. 22, 33; 12 Digest (Repl.) 182, *706.

Also referred to in argument:

Saunderson v. *Jackson* (1800), 2 Bos. & P. 238; 126 E.R. 1257; 12 Digest (Repl.) 155, *991.*

Western v. *Russell* (1814), 3 Ves. & B. 187; 35 E.R. 450; 44 Digest (Repl.) 22, *127.*

Richards v. *Porter* (1827), 6 B. & C. 437; 9 Dow. & Ry.K.B. 497; 5 L.J.O.S.K.B. 175; 108 E.R. 512; 12 Digest (Repl.) 151, *962.*

Tawney v. *Crowther* (1790), 3 Bro. C.C. 161; 29 E.R. 466, L.C.; subsequent proceedings (1791), 3 Bro. C.C. 318, L.C.; 12 Digest (Repl.) 153, *977*.

Boydell v. *Drummond* (1809), 11 East, 142; 103 E.R. 958; 12 Digest (Repl.) 133, *820*.

Appeal by the plaintiff, Hodges, from a decision of LORD GIFFORD, M.R., dismissing his bill by which he sought an order that an agreement for the grant to him of a lease by the defendant should be specifically enforced.

In 1821, Samuel Hodges entered into negotiation with William Horsfall, for the purpose of procuring a reversionary lease of a parcel of land with the buildings erected thereupon, of which Horsfall was the owner in fee. The premises were at that time subject to a lease, which was not to expire until Midsummer, 1824. After some treaty, the parties respectively signed a written agreement, which was prepared by Horsfall's attorney, and which, as far as is material to the present question, was in the following words:

"Memorandum of agreement made the 18th day of August, 1821, between William Horsfall of, etc., of the one part, and Samuel Hodges of, etc., of the other part. William Horsfall does hereby agree for himself, his heirs, executors, administrators, and assigns, to grant a lease unto Samuel Hodges, his executors, administrators, or assigns, of all those premises at Battle Bridge, now in the occupation of —— —— Younge, known by the sign of the Maidenhead public house, with the additions intended to be made thereto by Samuel Hodges as per plan agreed upon, for a term of thirty-one years from Midsummer, 1824. The said Samuel Hodges agrees to pay to William Horsfall a premium of £1,500 sterling money for the grant of such lease, at £80 per annum, the said rent to commence from the 25th day of June, which will be in the year of our Lord 1924; the rent to be paid quarterly on the usual days for payment of rent, the first payment to be made on the 29th day of September, 1824."

The agreement also contained provisoes for the insertion of the usual covenants in the lease, and a clause requiring that the additions should be made within twelve months after the lessee was let into possession; and it further stipulated that the whole premium of £1,500 should be paid by Michaelmas, 1821.

Prior to this contract with Hodges, two other proposals had been made to Horsfall for a lease of the same premises, on behalf of persons of the names of Testar and Younge. The negotiations, which ensued upon the subject between them and Horsfall, were afterwards successively broken off; but in the course of them, certain plans were produced and shown by the latter, particularly specifying the additions and improvements, which he, as landlord, would expect an incoming tenant to execute. By all of these plans, special provision was made for bringing forward the front of the Maidenhead public house, so as to be in a line with three other houses which Horsfall had recently erected on the immediately adjoining plot of ground; but two of them differed considerably in their details. According to the first, denominated Testar's plan, from having been the one shown to Mr. Testar, it was intended that the whole of the old buildings, together with the required additions, should compose a single tenement only. According to the other two, of which one was rather more ornamental than the other, but which were substantially the same, and were treated throughout the argument as forming one plan, and distinguished by the name of Younge's plan, it was proposed that the additions should be made in such a manner as to constitute, with the original building, two houses.

In August, 1821, immediately on signing the agreement before stated, Hodges paid Horsfall the sum of £100 as part of the stipulated premium; and, in the October following, Horsfall having caused a lease to be prepared, to which was annexed a copy of the plan called Testar's plan, tendered it for execution to Hodges, and at the same time made a demand upon him to pay up the balance of the consideration money. Hodges, however, refused to execute the lease; and

Horsfall thereupon commenced a suit for specific performance, alleging, that the plan for converting the old buildings, together with the proposed additions into one tenement, was the one specifically designated by the memorandum. In his defence, Hodges insisted, that, if any plan were particularly referred to, it was not Testar's but Younge's plan, according to which the premises, with the projected alterations, were to form two houses, and he offered to accept a lease on the footing of that plan. That cause came on to be heard on Jan. 27, 1824, when Horsfall, having failed in his proof, the vice-chancellor decided, that there was no such agreement as the court could perform; and the suit was dismissed with costs.

The present bill was then filed by Hodges against the daughters and co-heiresses at law of Horsfall, who had died in the meantime, and against certain other persons who had accepted a lease of the premises in question with notice of the plaintiff's claim. It set forth at large the facts already detailed, and the proceedings in the previous suit. It charged that the only plans shown to the plaintiff during the treaty, were the two which had been received from Younge, and that of those the least expensive and ornamental was the one particularly referred to and intended, though certain other trifling alterations which it specified, with respect to rounding off the west corner of the building, had also been verbally agreed upon: and it prayed a specific performance of the contract on the basis of that plan; or if the court should not be satisfied that Younge's was the plan agreed upon, it prayed in the alternative that the parties might be decreed to execute a proper lease and counterpart of the footing of Testar's plan. On June 6, 1826, the cause came on to be heard before Lord Gifford, then Master of the Rolls, who dismissed the bill with costs. The plaintiff Hodges now appealed from that decree.

The material parts of the evidence adduced in support of the appellant's case are stated in the judgment of the Lord Chancellor.

Horne, *Pepys*, *Beames* and *Wigram* for the appellant.

Sir Edward Sugden, *Roupell* and *Koe* for the respondents.

Dec. 16, 1829. **LORD LYNDHURST, L.C.**—Two points were made by the defendants in the argument. First, it was insisted that parol evidence was not admissible to prove what was the particular plan agreed upon; and, secondly, even if it could be admitted, still that, in this case, there was no sufficient evidence to show that Younge's was the plan intended, or that, in fact, there was ever any precise or definite plan agreed upon at all. As for the first point, I am of opinion on the authority of all the cases, and especially *Clinan* v. *Cooke* (1), where Lord Redesdale has considered the subject very fully, that, as the written agreement refers specifically to a plan, if there be parol evidence, clear and satisfactory, to identify the particular plan, that evidence may be properly admitted for the purpose of so identifying it.

Then the next question arises, whether there is sufficient evidence here to show what particular plan was agreed upon. This depends entirely on the testimony of two witnesses, Willis and Warlters. Willis in his deposition says that, towards the end of July, 1821, Hodges called on him with two plans (which have been in the argument called Younge's plans, and were substantially the same) containing the proposed alterations in the premises, which he showed to Willis: that Hodges stated that a meeting with Horsfall on the subject of the plans was to take place in the early part of August, at which he requested Willis to attend, and he left with him the two plans. Willis accordingly attended at the meeting between Horsfall and the plaintiff, sometime early in August. On that occasion Willis produced the two plans, which had been left with him by the plaintiff at the previous interview, observing to Horsfall, when he delivered them, that these, he understood, were the plans that were to guide Hodges in the intended additions to be made to the premises, and that the front of the messuage was to be brought forward so as to be in a line with the adjoining houses—an observation to which Horsfall assented.

Willis also states that, as the friend of Hodges, he suggested some other alterations, whereupon Horsfall remarked that these or any other trifling alterations which might be suggested by the friends of the plaintiff, should have his concurrence: "but as regarding the material alterations, that [laying his hand on one of the two plans] is the one I wish the plaintiff to abide by." Nothing further took place at this interview; no answer was made to that remark of Horsfall, either by Willis or by the plaintiff; and, looking to the evidence, it is impossible to say it has been satisfactorily established that either of the two plans was finally agreed upon, as the precise and definite plan to be followed in executing the projected alterations. No meeting or conversation appears from the evidence to have taken place, subsequently to that interview, until Aug. 18, when the parties again met for the purpose of signing the agreement.

Besides the two I have mentioned, another plan which has been called Testar's plan, and which is particularly adverted to in the prayer of the bill, appears to have been in existence, and known to the parties. According to the evidence of Warlters, Lythgoe, who was present at the signing of the agreement, and who acted as Horsfall's attorney in the transaction, read over the agreement, and asked the parties whether they had any plan of the intended improvements and alterations, on which Horsfall said: "it is no matter, we understand each other;" and the plaintiff thereupon added: "you only wish to have the ground covered to do away the nuisance," and Horsfall rejoined: "we shall have no difficulty about that, we understand each other," or words to that effect. But the witness Warlters says that no plans were produced or shown at the meeting at which the agreement was signed. This evidence, so far from leading to the belief that the parties had some definite plan fixed upon, tends rather the other way, and would lead one to suppose, that the agreement upon that point was either not definitively settled, or that it was in the breast of the parties themselves. If there be not sufficient, as I think there is not, in the evidence of Willis, to fix the precise nature of the plan agreed upon, the doubt will be strengthened, rather than removed, by the evidence of Warlters, as to the subsequent transaction.

On the whole, there is not enough in this case to satisfy my mind that the parties had agreed upon either of those plans; the decision of the Master of the Rolls must, therefore, be affirmed, and with costs.

Appeal dismissed.

STREET *v.* BLAY

[Court of King's Bench (Lord Tenterden, C.J., Littledale, Parke and Patteson, JJ.), Easter Term, Trinity Term, 1831]

[Reported 2 B. & Ad. 456; 109 E.R. 1212]

Sale of Goods—Warranty—Breach—Sale of specific article—Right of buyer to return article—Liability to pay price—Mitigation of damages—Evidence of breach.

Sale of Goods—Rejection—Goods warranted of certain quality—Sample—Goods not in accordance with sample—Rejection after time for fair trial or examination.

Where the property in a specific chattel has passed to the buyer and the price has been paid the buyer has no right on a breach of warranty to return the article, re-vest the property in the vendor, and recover the price as money paid on a consideration which has failed, but he must sue on the warranty unless there is a condition in the contract authorising the return, or the seller has received back the chattel and thereby consented to rescind the contract, or has been guilty of fraud which destroys the contract altogether. Just as the buyer cannot by his own act alone, save in the excepted cases mentioned, re-vest the property in the seller and recover the price on the ground of the total failure of consideration, so he cannot, by the same means, protect himself from the payment of the price on the same ground. On the other hand, evidence of the breach of warranty may be given in mitigation of damages.

Although the buyer of a specific chattel, delivered with a warranty, may not have a right to return it, in cases of executory contracts, as where a specific article is ordered from a manufacturer who contracts that it shall be of a certain quality or fit for a certain purpose and the article sent as such is never completely accepted by the party ordering it, the latter may return it as soon as he discovers a defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial, nor would the buyer of a commodity to be afterwards delivered according to sample be bound to receive the bulk which may not agree with it, nor, after having received what was delivered as being in accordance with sample, will he be precluded by the receipt from returning the article after a reasonable time for the purpose of examination and comparison.

Notes. Considered: *Gompertz* v. *Denton* (1832), 1 Cr. & M. 207; *Allen* v. *Cameron* (1833), 1 Cr. & M. 832; *Chappel* v. *Hicks* (1833), 4 Tyr. 43; *Elliott* v. *Thomas* (1838), 1 Horn & H. 38; *Mondel* v. *Steel*, [1835–42] All E.R. Rep. 511. Applied: *Murray* v. *Mann* (1848), 2 Exch. 538. Explained: *Dawson* v. *Collis* (1850), 20 L.J.C.P. 116. Considered: *Dawson* v. *Collis* (1851), 10 C.B. 523; *Woodgate* v. *Wetton* (1854), 23 L.T.O.S. 158; *Clarke* v. *Dickson* (1858), 4 Jur. N.S. 832. Distinguished: *Bannerman* v. *White* (1861), 10 C.B.N.S. 844. Considered: *Azémar* v. *Casella* (1867), L.R. 2 C.P. 677; *Bright* v. *Rogers*, [1917] 1 K.B. 917. Referred to: *Pateshall* v. *Tranter* (1835), 3 Ad. & El. 103; *Elliott* v. *Thomas* (1838), 1 Horn & H. 38; *Sieveking* v. *Dutton* (1846), 3 C.B. 331; *Parson* v. *Sexton* (1847), 4 C.B. 899; *Murray* v. *Mann* (1848), 2 Exch. 538; *Syers* v. *Jonas* (1848), 2 Exch. 111; *Horsfall* v. *Thomas* (1862), 1 H. & C. 90; *Behn* v. *Burness* (1862), 5 L.T. 670; *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* v. *Kennedy* (1867), L.R. 2 Q.B. 586; *Re Green and Balfour, Williamson & Co.* (1890), 63 L.T. 97; *Heilbutt* v. *Hickson* (1890), 63 L.T. 97; *Bell* v. *Lever Bros., Ltd.*, [1931] All E.R. Rep. 1.

As to warranty on the sale of animals, see 1 Halsbury's Laws (3rd Edn.) 683 et seq.; and for cases see 2 Digest (Repl.) 347 et seq.

Cases referred to:

(1) *Curtis* v. *Hannay* (1800), 3 Esp. 82; 2 Digest (Repl) 357, *403*.

(2) *Weston* v. *Downes* (1778), 1 Doug. K.B. 23; 99 E.R. 19; 2 Digest (Repl.) 345, *309*.

(3) *Towers* v. *Barrett* (1786), 1 Term Rep. 133; 99 E.R. 1014; 12 Digest (Repl.) 262, *2028*.

(4) *Payne* v. *Whale* (1806), 7 East, 274; 3 Smith, K.B. 130; 103 E.R. 105; 2 Digest (Repl.) 358, *411*.

(5) *Power* v. *Wells* (1778), 2 Cowp. 818; 98 E.R. 1379; 2 Digest (Repl.) 356, *395*.

(6) *Emanuel* v. *Dane* (1812), 3 Camp. 299; 170 E.R. 1389, N.P.; 39 Digest (Repl.) 581, *1039*.

(7) *Cormack* v. *Gillis* (1788), cited in 7 East, at p. 480.

(8) *King* v. *Boston* (1789), 7 East, 481, n.; 103 E.R. 186; 39 Digest (Repl.) 583, *1049*.

(9) *Okell* v. *Smith* (1815), 1 Stark. 107; 171 E.R. 416, N.P.; 39 Digest (Repl.) 723, *2055*.

Also referred to in argument:

Fielder v. *Starkin* (1788), 1 Hy. Bl. 17; 126 E.R. 11; 2 Digest (Repl.) 356, *397*.

Parker v. *Palmer* (1821), 4 B. & Ald. 387; 106 E.R. 978; 39 Digest (Repl.) 558, *874*.

Hunt v. *Silk* (1804), 5 East, 449; 2 Smith, K.B. 15; 102 E.R. 1142; 12 Digest (Repl.) 622, *4804*.

Rule Nisi to set aside a verdict for the defendant and to enter one for the plaintiff in an action of assumpsit for a horse sold and delivered.

At the trial before LORD TENTERDEN, C.J., it was proved that the defendant, a horse-dealer, bought a horse of the plaintiff, warranted sound for £43, on Feb. 2, 1830, and on the same day sold him to a customer, Mr. Bailey, for £45. This purchaser, after having the horse in his possession a day, parted with him in exchange to one Osborne who also kept him a day and then sold him again to the defendant for £30. It did not appear that there was any warranty, except on the first sale. On Feb. 9 the defendant sent the horse back to the plaintiff's premises alleging that he was unsound and had been so at the time of the purchase on Feb. 2, and requiring the plaintiff to receive him again. The horse, when so returned, was lame. The plaintiff insisted that he was not bound to take the horse back, and brought this action to recover the purchase-money, which the defendant had never paid. LORD TENTERDEN, C.J., told the jury, that if they were of opinion that the horse was sound at the time of the first-mentioned sale, they should find for the plaintiff, otherwise for the defendant. In the case of their finding for the defendant, he reserved for the opinion of this court the question whether or not the defendant, after having sold the horse, could, on becoming possessed of him again, return him to the plaintiff and refuse payment of the price by reason of the original unsoundness. The jury found for the defendant. A rule was obtained calling on the defendant to show cause why the verdict should not be set aside and a verdict entered for the plaintiff for £43.

John Williams for the defendant, showed cause against the rule.

Sir Thomas Denman and *Erle* for the plaintiff, supported the rule.

Trinity Term, 1831. **LORD TENTERDEN, C.J.,** delivered the following judgment of the court.—We have taken time to consider this case, and are now of opinion that the rule ought to be made absolute for a new trial unless the parties can agree to enter a verdict for the plaintiff for a sum less than the full amount.

The question for consideration is whether the defendant had a right to return the horse and thereby exonerate himself from the payment of the whole price

It is not necessary to decide whether, in any case, the purchaser of a specific chattel who, having had an opportunity of exercising his judgment on it, has bought it with a warranty that it is of any particular quality or description and actually accepted and received it into his possession, can afterwards, on discovering that the warranty has not been complied with, of his own will only, without the concurrence of the other contracting party, return the chattel to the vendor and exonerate himself from the payment of the price on the ground that he has never received that article which he stipulated to purchase. There is, indeed, authority for that proposition. LORD ELDON, in *Curtis* v. *Hannay* (1), is reported to have said (3 Esp. at p. 83) that he

> "took it to be clear law, that if a person purchases a horse which is warranted, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might return the horse, and bring an action to recover the full money paid; but in the latter case the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value."

He proceeds to say that, if it were in a worse state than it would have been if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article. It is to be implied that he would have a defence in case it were returned in the same state and in a reasonable time after the discovery. This dictum has been adopted in MR. STARKIE'S work on the LAW OF EVIDENCE, Part iv, p. 645; and it is there said that a vendee may, in such a case, rescind the contract altogether by returning the article and refuse to pay the price, or recover it back if paid.

It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held that, where the property in the specific chattel has passed to the vendee and the price has been paid, he has no right on the breach of the warranty to return the article, re-vest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue on the warranty unless there has been a condition in the contract authorising the return, or the vendor has received back the chattel and has thereby consented to rescind the contract, or has been guilty of a fraud which destroys the contract altogether: *Weston* v. *Downes* (2), *Towers* v. *Barrett* (3), *Payne* v. *Whale* (4), *Power* v. *Wells* (5), and *Emanuel* v. *Dane* (6), where the same doctrine was applied to an exchange with a warranty, as to a sale, and the vendee held not to be entitled to sue in trover for the chattel delivered, by way of barter, for another received. If these cases are rightly decided, and we think that they are, and they certainly have been always acted on, it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, re-vest the property in the seller and recover the price when paid on the ground of the total failure of consideration, and it seems to follow that he cannot, by the same means, protect himself from the payment of the price on the same ground. On the other hand, the cases have established that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of actions (*Cormack* v. *Gillis* (7), *King* v. *Boston* (8)); and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty which is part of the consideration for the specific price agreed by the defendant to be paid.

It is to be observed that, although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts where an article, for instance, is ordered from a manufacturer who contracts that it shall be of a certain quality or fit for a certain

purpose, and the article sent as such is never completely accepted by the party ordering it. In this and similar cases the latter may return it as soon as he discover the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial (*Okell* v. *Smith* (9), nor would the purchaser of a commodity to be afterwards delivered according to sample be bound to receive the bulk which may not agree with it, nor, after having received what was tendered and delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article after a reasonable time for the purpose of examination and comparison. The observations above stated are intended to apply to the purchase of a certain specific chattel, accepted and received by the vendee, and the property in which is completely and entirely vested in him.

But whatever may be the right of the purchaser to return such a warranted article in an ordinary case, there is no authority to show that he may return it where the purchaser has done more than was consistent with the purpose of trial—where he has exercised the dominion of an owner over it, by selling and parting with the property to another, and where he has derived a pecuniary benefit from it. These circumstances concur in the present case, and, even supposing it might have been competent for the defendant to return this horse, after having accepted it and taken it into his possession, if he had never parted with it to another, it appears to us that he cannot do so after the re-sale at a profit. These are acts of ownership wholly inconsistent with the purpose of trial and which are conclusive against the defendant, that the particular chattel was his own; and it may be added that the parties cannot be placed in the same situation by the return of it as if the contract had not been made, for the defendant has derived an intermediate benefit in consequence of the bargain which he would still retain. But he is entitled to reduce the damages, as he has a right to action against the plaintiff for the breach of warranty. The damages to be recovered in the present action have not been properly ascertained by the jury, and there must be a new trial, unless the parties can agree to reduce the sum for which the verdict is to be entered; and, if they do agree, the verdict is to be entered for that sum.

Rule absolute.

LYDE *v.* MYNN

[Lord Chancellor's Court (Lord Brougham, L.C.), July 19, August 3, 1833]

[Reported 1 My. & K. 683; Coop. temp. Brough. 123; 47 E.R. 44]

Contract—Enforcement—Expectancy contingent on will of living person—Debt charged on expectancy.

Bankruptcy—Proof—Debts provable—Contingent debt—Personal obligation to do certain thing in specified event.

An agreement of which the subject is an expectancy contingent upon the will of a living person is not illegal, but will be enforced in equity. A claim founded on a covenant to charge a particular debt upon a specified fund in which the covenantor had no present interest but merely an expectancy is not barred by the bankruptcy of the covenantor before he acquires an actual interest in the fund.

A. granted an annuity to B. and covenanted to charge it upon all the property of which in the event of C., his wife, dying before him he might become possessed of at C.'s death either by virtue of her will or otherwise. A. became bankrupt, and obtained his discharge, and then C. died having bequeathed an annuity in trust for A.

Held: B. was entitled to a decree specifically charging his annuity upon the annuity bequeathed in trust for A.

Notes. The Bankruptcy Act, 1825 (6 Geo. 4, c. 16), was repealed by the Bankruptcy Law Consolidation Act, 1849, subsequently repealed. The law is now consolidated by the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926. See s. 28 (2), s. 30 (3), and s. 42 (2) (2 Halsbury's Statutes (2nd Edn.) 362, 364, 380).

Considered: *Wellesey* v. *Wellesley*, [1835–42] All E.R. Rep. 223. Distinguished: *Mornington* v. *Keane* (1858), 2 De G. & J. 292. Considered: *Cole* v. *Kernot*, *Thompson* v. *Cohen* (1872), 41 L.J.Q.B. 221. Distinguished: *Thompson* v. *Cohen* (1872), L.R. 7 Q.B. 527. Considered: *Collyer* v. *Isaacs* (1881), 19 Ch.D. 342. Referred to: *Re North, Ex parte McTurk* (1836), 2 Deac. 58; *Robinson* v. *Ommanney* (1882), 21 Ch.D. 780; *Montagu* v. *Sandwich* (1886), 32 Ch.D. 525; *Re Lind Industrials Finance Syndicate, Ltd.* v. *Lind*, [1914–15] All E.R. Rep. 527.

As to the effect of receiving order on assignment of after acquired property and release from provable debts on discharge, see 2 Halsbury's Laws (3rd Edn.) 324, 538; and for cases see 4 Digest (Repl.) 336 et. seq., 629. As to equitable mortgage and charge, see 27 Halsbury's Laws (3rd Edn.) 211 et seq.; and for cases see 35 Digest (Repl.) 306 et seq. As to specific performance of contract relating to contingent and expectant interest, see 36 Halsbury's Laws (3rd Edn.) 277 et seq.; and for cases see 43 Digest (Repl.) 115 et seq.

Cases referred to:

(1) *Taylor* v. *Young* (1820), 3 B. & Ald. 521; 106 E.R. 752; 4 Digest (Repl.) 288, *2635*.

(2) *Beckley* v. *Newland* (1723), 2 P. Wms. 182; 24 E.R. 691, L.C.; 24 Digest (Repl.) 1119, *19*.

(3) *Hobson* v. *Trevor* (1722), 10 Mod. Rep. 507; 2 P. Wms. 191; 88 E.R. 829; sub nom. *Hopson* v. *Trevor*, 1 Stra. 533, L.C.; 44 Digest (Repl.) 115, *946*.

(4) *Harwood* v. *Tooke* (1812), 2 Sim. 192; 57 E.R. 761, L.C.; 24 Digest (Repl.) 1119, *20*.

(5) *Wethered* v. *Wethered* (1828), 2 Sim. 183; 57 E.R. 757; 24 Digest (Repl.) 119, *21*.

(6) *Morse* v. *Faulkner* (1792); 3 Swan. 429, n.; Anst. 11; 36 E.R. 936; 44 Digest (Repl.) 115, *944*.

(7) *Carleton* v. *Leighton* (1805), 3 Mer. 667; 36 E.R. 255; 5 Digest (Repl.) 701, *6127*.

(8) *Wright* v. *Wright* (1750), 1 Ves. Sen. 409; 27 E.R. 1111, L.C.; 8 Digest (Repl.) 560, *134*.

Also referred to in argument:

Alexander v. *Duke of Wellington* (1831), 2 Russ. & M. 35; 2 State Tr. N.S. 763; 39 E.R. 308, L.C.; 8 Digest (Repl.) 562, *147*.

Appeal by the defendant, John Mynn from a decree of SHADWELL, V.-C.

In December, 1824, the defendant John Mynn, in consideration of the sum of £1,110, granted to the plaintiff Lyde for his life an annuity of £160, and covenanted duly to pay the same, and, as an additional security for the payment thereof, he further covenanted to charge this annuity upon all such property as he, Mynn, should, in the event of his wife's decease, become entitled to by virtue of her last will and testament or otherwise. In execution of a power reserved by her marriage settlement, Mrs. Mynn made a will, dated Nov. 26, 1826, whereby she gave her property to trustees upon trust to purchase an annuity of £700, and pay the same to the defendant, her husband, half-yearly during his life. On Dec. 18, 1826, a commission of bankrupt issued against John Mynn, under which he was declared bankrupt, and on March 19, 1827, he obtained his certificate. The plaintiff never applied to prove under the commission in respect of his annuity. On June 11, 1827, Mrs. Mynn died, and the trustees subsequently purchased the annuity of £700 for her husband, in pursuance of the directions in her will.

A bill was filed against the defendant Mynn and the trustees, praying that the defendants might be decreed to join in charging the annuity of £700 with the payment of the plaintiff's annuity in future, as well as of the arrears then due. SHADWELL, V.-C., made a decree according to the prayer of the bill. The defendant, Mynn, appealed.

Pepys, *Tinney* and *Parker* for the plaintiff.

Sir E. Sugden and *Wakefield* for the defendant Mynn.

Aug. 3, 1833. **LORD BROUGHAM, L.C.,** stated the facts, and continued: That the claim to the annuity is barred by the Bankruptcy Act, 1825, cannot be denied, for the annuity was an interest of which the value was capable of calculation for which proof might have been made under the commission. But the covenant to secure that annuity gave the annuitant a right which could not in any way be made the subject either of calculation or of proof, and it seems impossible to understand how such a right could be barred. Consider the nature of the interest which the covenantor had, which alone at the execution of the covenant he could pass, and which, therefore, must be the measure of the covenantee's proof under the commission, and it will appear that all proof was out of the question in such a matter, and that, consequently, there was nothing upon which the discharging power of the certificate, with its co-relative, the power of proving, could operate.

At the execution of the covenant, the bankrupt's wife was alive, and the only interest which the bankrupt possessed, and over which he covenanted to give a security, was the possibility of benefits which she might choose to leave him by her will. He bound himself, in case he should eventually take anything under that will, to give his creditor a security over it. It is impossible to treat this covenant as a contingent debt– it is, in truth, no debt at all; it is a mere personal obligation to do a certain thing in a most uncertain event. If the covenantee attempted to prove in respect of it, how was it possible for the commissioners to ascertain the value thereof, and admit him to prove the amount so ascertained, as the Bankruptcy Act, 1825, s. 56, directs? But it is plainly not at all like a debt payable upon a contingency, which forms the subject of that section. The Court of King's Bench, in *Taylor* v. *Young* (1), held it too clear to admit of argument, that no value could be put upon a covenant to perform covenants; and that the covenantor's

bankruptcy, therefore, could not be pleaded in bar to an action upon such a covenant. But the difficulty of valuing such a covenant as the one now before the court would be infinitely greater.

Another point, however, is made. The covenant itself is contended to be void on the ground of its relating to a mere expectancy; and *Beckley* v. *Newland* (2) and *Hobson* v. *Trevor* (3), in the time of LORD MACCLESFIELD, L.C., are said to have been shaken by later cases, and particularly by *Harwood* v. *Tooke* (4). But, so far is this from being correct, that on the contrary, some of those later cases recognise the authority of the older ones, and carry the principles there admitted somewhat further, while none of them, when duly considered, indicate the least departure from them. In *Wethered* v. *Wethered* (5), besides the agreement to share expectancies, there occurred the additional circumstance of the relation in which the contracting parties stood to the party from whom the property, the subject-matter of agreement, was to be derived, and the consequent argument founded on the impolicy of favouring arrangements in derogation of the parental authority. The agreement of the parties there was to share equally between them whatever of the real or personal estates of their father might come to them at his decease, by devise, descent, or otherwise; and also whatever he might advance to them in any way during his life. But SHADWELL, V.-C., after considering the cases, and denying that *Beckley* v. *Newland* (2) had been overruled by *Harwood* v. *Tooke* (4), which he considered rather to uphold it, decreed a specific performance of the agreement. Throughout the argument, the whole stress was laid, not upon the transaction being a dealing with expectancies, but only upon the relationship of the parties so dealing to the individual from whom the expectation was entertained. In *Morse* v. *Faulkner* (6) there was nothing like a decision adverse to this. It was there admitted, that if a person contracts to sell land before he has any title to it, equity binds his conscience when the title accrues, and compels him then to convey. But the inference was denied that the court would, therefore, interfere, as against the heir of such a person not having title at the time of the contract. All that was said there, however, was only said arguendo; for EYRE, C.B., expressly refused to enter into the question, observing that the sale, then the subject of the suit, was not such as it became the court to countenance. He said (3 Swan. at p. 434, n.):

> "A common soldier goes down to a country alehouse, and, late at night, calls together two or three people, and offers to sell his estate; and then two persons bid for it, and the affair is all over. The transaction is not serious enough for the court to interfere in."

Carleton v. *Leighton* (7) decides nothing against the authority of the older cases. On the contrary, it expressly recognises them, and it also recognises their application to the present question; for *Beckley* v. *Newland* (2) and *Hobson* v. *Trevor* (3) were both cited in the argument ; and LORD ELDON, L.C., in referring to them, says that they were cases of covenant to settle or assign property which should fall to the covenantor where the interest which passed by the covenant was not an interest in the land, but a right under the contract, and, therefore, no interest in the estates in question passed under the bargain and sale of the commissioners. What *Carleton* v. *Leighton* (7) actually decides (as far as that case bears upon the present) is this: not that a person may not validly deal with an expectancy, and bind himself to convey it when his title shall accrue, but only that such an obligation is merely personal. He is bound, and he may be compelled to perform the contract when he can; but if he becomes bankrupt before the accruer of his title, he has no interest which passes by the assignment. This plainly is no authority against the contention of the plaintiff in the present case; it is, as far as it goes, all in his favour. It is further to be kept in mind that LORD HARDWICKE, L.C., in *Wright* v. *Wright* (8), referred to those decisions of LORD MACCLESFIELD, L.C., and followed them in principle.

Upon the second point made, I am, therefore, of opinion that the argument against the plaintiff's right fails entirely.

One circumstance in this case, which has led me to reconsider it with more anxiety than might otherwise have been requisite is, that as the debt to secure which the covenant was given—that is, the annuity—was capable of valuation, it may be said there was a discharge of the debt itself by the certificate, and that, therefore, the security for the debt must also be gone. But that result by no means follows. The one liability was provable—it was a debt; the other was a personal obligation to do an act in a certain event which did not happen till after the bankruptcy and certificate, and which might never have happened at all: it was no debt, though it related to a debt.

In every view of the case, I think the judgment below right; and the appeal must be dismissed with costs.

Appeal dismissed.

WILSON AND OTHERS *v.* ANDERTON

[COURT OF KING'S BENCH (Lord Tenterden, C.J., Littledale, Taunton and Patteson, JJ.), November 19, 1830]

[Reported 1 B. & Ad. 450; 9 L.J.O.S.K.B. 48; 109 E.R. 855]

Conversion—Bailment—No title to goods in bailor No better title in bailee Action by owner of goods against bailee—Evidence—Refusal by bailee to give up goods.

The captain of a ship who had taken goods on freight and claimed to have a lien on them delivered them to a bailee. The owner demanded them from the bailee who refused to deliver without the instructions of the bailor.

Held: as the bailor had no lien on the goods, refusal by the bailee was sufficient evidence of a conversion.

Per LORD TENTERDEN, C.J.: If the bailor has no title, the bailee can have none, for the bailor can give no better than he has. . . . But a bailee who forebears to interplead and makes himself a party by retaining the goods for the bailor must stand or fall by his title.

Notes. Considered: *Catterall* v. *Kenyon* (1842), 6 Jur. 507; *Lee* v. *Bayes* (1856), 18 C.B. 599; *Wetherman* v. *London and Liverpool Bank of Commerce* (1914), 31 T.L.R. 20. Referred to: *Hawkes* v. *Dunn* (1831), 1 Tyr. 415; *Marshall* v. *Newson* (1843), 7 Jur. 991; *Skinner* v. *Lambert* (1850), 16 L.T.O.S. 244; *Thorne* v. *Tilbury* (1858), 31 L.T.O.S. 206; *The Tigress* (1863), Brown & Lush. 38; *Biddle* v. *Bond*, [1861–73] All E.R. Rep. 477; *Glyn, Mills, Currie & Co.* v. *East and West India Dock Co.* (1880), 5 Q.B.D. 129; *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*, [1950] 2 All E.R. 605.

As to interpleader by bailee, see 2 HALSBURY'S LAWS (3rd Edn.) 139. As to the nature of interpleader and examples of relief, see 22 HALSBURY'S LAWS (3rd Edn.) 456, 461; and for cases see 3 DIGEST (Repl.) 123 et seq. As to demand and refusal in trover, see 38 HALSBURY'S LAWS (3rd Edn.) 781; and for cases see 46 DIGEST (Repl.) 485.

Case referred to:

(1) *Laclough* v. *Towle* (1800), 3 Esp. 114, N.P.; 17 Digest (Repl.) 52, *600*.

Also referred to in argument:

Ogle v. *Atkinson* (1814), 5 Taunt. 759; 1 Marsh. 323; 128 E.R. 890; 3 Digest (Repl.) 107, *305*.

Action of trover for five bales of carpeting.

The plaintiffs carried on business as merchants at Liverpool, and also at Buenos Aires; Wilson and M'Gregor being the resident partners at Liverpool. The defendant was a merchant at Liverpool. On Feb. 22, 1826, the five bales of

carpeting, being the goods in question, were, among other goods, shipped by the plaintiffs, to their house at Buenos Aires, on board a vessel called the *Monarch*, belonging to Joseph Mondell, John Mondell and others, and commanded by John Mondell the younger. The latter signed a bill of lading in the usual form. The freight was paid in one month after sailing, according to the customary credit in Liverpool. On Feb. 18, 1826, a notice appeared in the LONDON GAZETTE, that it had been notified by the Brazilian Minister for Foreign Affairs, to His Majesty's chargé d'affaires at Rio de Janeiro, by a communication dated Dec. 7, 1825, that the Emperor of Brazil had ordered a strict blockade of the ports in the river Plate belonging to the government of Buenos Aires. On Mar. 11, 1826, the *Monarch* cleared out from Liverpool for Buenos Aires, and on May 23, 1826, was taken possession of by the *Piranza*, a ship of war belonging to the Brazilian government, in the river Plate, nearly abreast the harbour of Monte Video, and about ninety or a hundred miles from Buenos Aires, on a charge of breaking the blockade of Buenos Aires. The *Monarch* was the first vessel which was captured on such charge. At the time when she was captured, she was sailing for Buenos Aires without any intention of going into Monte Video. She was sent under the care of a prizemaster, and an armed force, into Monte Video. On June 19, 1826, part of her crew was taken out, and she was sent in the same custody to Rio de Janeiro for condemnation. On July 21, 1826, Captain Mondell, with that part of the crew consisting of four men, which had been left on board, rose upon the Brazilians, consisting of twenty-two sailors and soldiers and two officers, overpowered them, and re-took possession of the *Monarch*. On Sept. 27, 1826, the *Monarch* returned to Liverpool with the goods on board, which were deposited by Captain Mondell in the warehouse of the defendant.

About Mar. 1, 1827, the plaintiffs having occasion for some haberdashery, part of the goods shipped by them on board the *Monarch* and brought back to Liverpool, Mr. Clay, the plaintiffs' attorney, applied to Mr. Mallaby, the defendant's attorney, for them. Mr. Mallaby claimed salvage. Three bales of haberdashery were delivered to the plaintiffs on payment of £21 for salvage, without prejudice, and under a protest against such claim made by Mr. Clay as their attorney. On Aug. 15, 1827, the plaintiffs waited on the defendant, accompanied by Mr. Clay, when the following conversation took place:

> Mr. Clay: "I demand the delivery to Mr. Wilson of the firm of Wilson, Hardisty & Co. of the goods landed from the *Monarch* and placed in your hands: namely, five bales of carpeting." Defendant: "I cannot part with them without the directions of the parties for whom I act." Mr. Clay: "The goods are in your hands, and if you have any lawful charges upon them, Mr. Wilson is ready and now offers to pay them; and I demand the goods again." Defendant: "I can only say, I will not part with them without directions." Mr. Clay: "We understand Captain Mondell is now at Lancaster, and is about to sail. You have, therefore, an opportunity of consulting him, if you want any directions from him." Defendant: "Mr. Clay, you know Mr. Mallaby is my attorney, and I think you ought to have gone to him first." Mr. Clay: "Mr. Anderton [the defendant], the goods are in your possession, and I necessarily make this demand upon you, in order to found an action against you."

It was known by the plaintiffs and Mr. Clay, at the time the demand was made, that the defendant detained the goods upon a claim of salvage made by Captain Mondell, to pay which no offer was made. The defendant made no claim for himself. No offer of indemnity was made, none was required or asked for. The goods were not delivered by the defendant, and they remained in his possession at the time of trial. Upon this demand and refusal, the action was brought. The jury found specially that the captain had no instructions to break the blockade at all events, nor any intention so to do.

At the trial before BAYLEY, J., in 1828 the jury returned a verdict for the plaintiffs awarding them £1,300 damages to be reduced to 1s. on the defendant returning the goods, subject to the opinion of the court on a Case which stated the facts set out above. The question for the opinion of the court was whether the plaintiffs were entitled to recover the value of the five bales of carpeting. If the court should be of opinion that the plaintiffs were so entitled, the verdict was to stand. If the court should be of a contrary opinion, then a nonsuit was to be entered.

Cottingham for the plaintiff, was not called on to argue.

F. Pollock for the defendant.

LORD TENTERDEN, C.J.—If the law be, as is now contended, there has rarely been a sitting at Guildhall where injustice has not been done, for the title to goods has been repeatedly tried in actions against warehousemen. A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right to the property may, therefore, be tried in an action against the bailee, and a refusal like that stated in the Case has always been considered evidence of a conversion. The situation of a bailee is not one without remedy. He is not bound to ascertain who has the right. He may file a bill of interpleader in a court of equity. But a bailee who forbears to adopt that mode of proceeding, and makes himself a party by retaining the goods for the bailor, must stand or fall by his title.

LITTLEDALE, J.—There is no doubt that the property in the goods was in the plaintiffs, and that the defendant or Captain Mondell had not any lien on them for salvage. The question is whether, under the circumstances stated in this Case, the bailee can set up any title against the real owner? What is the situation of a bailee? He has no other title, except that which the bailor had. As to *Laclough* v. *Towle* (1) the nisi prius case before GOULD, J., it is not applicable to the present point. There the carrier, on the goods being demanded by a third party, voluntarily identified himself with that party, by proposing to retain them on an indemnity, and offering to set up the title of that party on an action by he bailor. A lessee cannot dispute the title of his lessor at the time of the lease, but he may show that the lessor's title has been put an end to; and, therefore, in an action of covenant by the lessor a plea of eviction by title paramount, or that which is equivalent to it, is a good plea, and a threat to distrain or bring an ejectment, by a person having good title, would be equivalent to an actual eviction. So here, if the bailor brought an action against the defendant as bailee, the latter might, on the same principle, show that the plaintiff recovered the value of the goods, or that, on being threatened with an action by a person who had good title to the goods, he had delivered them to him. Then, the next question is whether there was evidence of a conversion. I think there was; for the defendant rested his right to retain on the right of the bailor, who had no right whatever. There was an unqualified refusal, and that is evidence of a conversion, unless the party refusing can show an adverse right to the immediate possession.

TAUNTON, J.—The defendant, or the person from whom he received the goods, had no lien on the property. The remuneration claimed for rescuing the property was not salvage, for the property was not seized jure belli by an enemy. That being so, the only question is whether there was sufficient evidence of a conversion. This is not the case of a bailee setting up the right of a third person, who has no title or a questionable title, but of one setting up the title of the person from whom he received the property against the undisputed title of the real owner. It appears that Captain Mondell claimed to retain the property for salvage, and that, the defendant holding the goods as his agent, an application was made to him by the plaintiffs' attorney to deliver them. It seems to me that the conversation between him and the defendant is sufficient evidence of a conversion. The defendant having said he

would not part with the goods without Mondell's directions, thereby identified himself with Mondell; and being told that the demand was made in order to make it the foundation of an action, he persisted in retaining the goods. Here, therefore, there was a demand of the goods, and a refusal of them; and unless there be a legal excuse for refusal, there is a sufficient evidence for a conversion.

PATTESON, J., gave no judgment, having been concerned in the case as counsel when at the Bar.

Judgment for plaintiffs.

HOLDERNESS AND ANOTHER *v.* SHACKELS

[COURT OF KING'S BENCH (Lord Tenterden, C.J., and Bayley, J.), November 14, 1828]

[Reported 8 B. & C. 612; Dan. & Ll. 203; 3 Man. & Ry. K.B. 25; 7 L.J.O.S.K.B. 80; 108 E.R. 1170]

Partnership—Bankruptcy—Right of trustee to share of partnership effects—Need for bankrupt to have paid all due from him to partnership.

Partnership—Share—Lien for expenses—Division of partnership property into shares by setting aside and marking—Qualified appropriation—Effect on right to lien.

Together with others, F., L. and the defendant were part owners in a whale fishing ship. On arrival at the home port the usual mode of dealing with the cargo was for the whalebone to be taken by L., the ship's husband, and sold in part discharge of the ship's expenses. The blubber was deposited in the defendant's warehouse, which was rented by the shipowners, and the oil extracted was put in casks. The share of each owner was weighed out and stored separately in casks marked with his initials. After the division the practice was for the warehouseman to deliver to the separate order of each part owner his share of the oil unless he was notified by the ship's husband that such part owner's share of the expenses had not been paid, in which case the warehouseman detained the oil until the ship's husband's demand had been met. In June, 1825, the ship arrived at the home port, and, adopting the usual course, twenty-nine tons of oil were allocated to F. and were deposited in the warehouse in casks marked with his initials. Twenty tons were delivered to the order of F. prior to his bankruptcy in January, 1826, and then the warehouseman was notified by the ship's husband not to deliver to F. the remaining nine tons of oil as F.'s share of the ship's expenses was unpaid. In an action of trover by the assignees of F. against the defendant for the nine tons of oil, the residue of F.'s share at the date of his bankruptcy,

Held: the other part owners had originally a lien on the residue of F.'s share for his share of the ship's expenses, and this right had not been divested by the separation and the placing of F.'s share in marked casks, for that amounted only to a qualified appropriation to F. enabling him to take the oil if the ship's husband prevented him by giving notice to the warehouseman; accordingly, the action failed.

Per LORD TENTERDEN, C.J.: If one partner becomes bankrupt his assignees can obtain no share of the partnership effects until they first satisfy all that is due from him to the partnership.

Notes. The Partnership Act, 1890, s. 24 (17 HALSBURY'S STATUTES (2nd Edn.) 173), provides rules for the determination of the interests and duties of partners but subject however to any special agreement. The Bankruptcy Act, 1914, s. 33 (6) (2 HALSBURY'S STATUTES (2nd Edn.) 369), provides the mode of appropriation of the joint and separate estates of partners in bankruptcy.

Applied: *Green* v. *Briggs* (1848), 6 Hare, 395.

As to the rights of a bankrupt and proof of debts, see 2 HALSBURY'S LAWS (3rd Edn.) 496; and for cases see 4 DIGEST (Repl.) 494. As to shares in partnership, see 28 HALSBURY'S LAWS (3rd Edn.) 534 et seq., and as to partner's lien, see ibid. at p. 543; and for cases see 36 DIGEST (Repl.) 541 et seq.

Case referred to:

(1) *Smith* v. *De Silva* (1776), 2 Cowp. 469; 98 E.R. 1191; 4 Digest (Repl.) 494, *4352*.

Also referred to in argument:

Doddington v. *Hallet* (1750), 1 Ves. Sen. 497; 27 E.R. 1165, L.C.; 42 Digest (Repl.) 666, *4177*.

Hurry v. *Mangles* (1808), 1 Camp. 452; 170 E.R. 1018, N.P.; 39 Digest (Repl.) 667, *1670*.

Stoveld v. *Hughes* (1811), 14 East, 308; 104 E.R. 619; 39 Digest (Repl.) 769, *2460*.

Hammond v. *Anderson* (1803), 1 Bos. & P.N.R. 69; 127 E.R. 384; 39 Digest (Repl.) 746, *2237*.

Action of trover for twenty tons of whale-oil, of the value of £1,000. The first count of the declaration alleged the property to belong to the bankrupt before his bankruptcy; the second count stated the property to be in the plaintiffs, as his assignees. Plea, general issue.

The plaintiffs were the assignees of Foxton, under a commission dated May 20, 1826, and their title to sue in that character was fully proved. The bankrupt Foxton, jointly with one Locking and the defendant, and some other persons, was part owner of the ship *Jane*, a vessel belonging to Hull, engaged in the whale fishery. Locking was the ship's husband. The usual mode of managing the cargo was as follows. On the arrival of the vessel at Hull from the fishery, the whalebone was taken into the possession of Locking, and sold by him for the part discharge of the expenses of the ship. The blubber was landed and deposited in a yard belonging to the defendant, in which were several warehouses, each of which was appropriated to a particular ship. One of these was rented from the defendant by the owners of the ship *Jane*, and appropriated exclusively to that ship. The blubber was boiled in a boiling-house in the yard by one Gilchrist, employed at the defendant's yard as foreman, and paid by the owners of the several ships; and for this a certain price per ton was charged by the defendant. The blubber, being then reduced into oil, was put into casks; each part owner's share was then weighed out, and placed separately in the warehouse rented by the owners of the ship; and the particular casks containing his oil were marked with his initials in chalk. Gilchrist kept the key of the warehouse, and lived in the yard. After each division, the practice was for him to deliver to the separate orders of each owner the oil belonging to them, unless previously to the delivery he received a notification from the ship's husband, that the part owner's share of the disbursements had not been paid to him. In that case, he used to detain the oil till the ship's husband's demand had been satisfied. It was optional for the owner to have his oil in his own or the ship's casks. In the latter case he was to send away the oil in the ship's casks, he returning the casks or paying for them when wanted.

In June, 1825, the ship *Jane* arrived with a cargo, and the above being the usual course, was followed on that occasion. The share weighed and set apart for the bankrupt Foxton before his bankruptcy was twenty-nine tons and thirty-six gallons. Part of this was stowed in the ship's casks. All the casks were set apart in the ship's warehouse, and had the bankrupt's initials upon them in chalk. Foxton, before his bankruptcy, gave various delivery orders to Gilchrist, under which twenty tons of this oil had been delivered. The remainder, nine tons thirty-six gallons, being all in the ship's casks, remained in the ship's warehouse at the time of the bankruptcy. In January, 1826, Gilchrist had orders from Locking, as the ship's husband, not to

A deliver to Foxton the remaining oil as his share of the disbursements of the ship was not paid. Locking, the ship's husband, became bankrupt in April, 1826. Foxton stopped payment in January, 1826. There were two accounts between Locking and Foxton, one being the ship's account, and the other a general account-current. In the ship's account it appeared that after charging every disbursement on account of the vessel, as if they had actually been paid by him (except the rent B of the warehouse and the charges of boiling, which remained due to the defendant), and after giving credit for the sale of the whalebone and a small portion of oil, there remained due from the bankrupt Foxton at the time of his bankruptcy in respect of his share of the ship the sum of £564 12s. This sum was due to the defendant and the other owners. The other owners had paid up Foxton's share by making deductions from balances which Locking owed them. Locking had not paid every dis- C bursement before he failed; he paid them later by money received from the other owners. Upon the general account current, there was a balance against Locking of £261 7s. 4½d. But Foxton had credit therein for two of his own acceptances for £300 and £450, which were afterwards dishonoured.

On Jan. 8, 1826, the plaintiffs, as assignees of Foxton, formally demanded posses- D sion of the nine tons thirty-six gallons of oil from the defendant, offering to pay to him a sum which exceeded what he demanded in respect of rent and charges for boiling the blubber. This sum he had himself, by an account in his own handwriting, fixed at £59 6s. In answer to this demand, the defendant stated that he wished the matter to stand over for a few days. Accordingly, on Jan. 31, the plaintiff Holderness called again upon the defendant, and tendered to him the sum due in E respect of his demand for rent and boiling, but the defendant then absolutely refused to receive the moneys or give up the oil. He, however, stated that the oil was in his possession and under his control, and that he could give it up if he thought proper; but he added, that the owners of the *Jane* had instructed him not to do so. The value of the oil so detained was £220 10s.

At the trial before Bayley, J., at York Spring Assizes, 1828, the jury returned a F verdict for the plaintiffs awarding them £220 10s. damages, subject to the opinion of the court on a Case which stated the facts set out above.

E. H. Alderson for the plaintiffs.

Parke for the defendant, was stopped by the court.

LORD TENTERDEN, C.J.—This is not the case of a claim of lien on the share G of a ship, but a claim by persons, being part owners of a ship, engaged together in an adventure, and the subject-matter, in respect of which this action is brought is part of the proceeds of that adventure, viz., part of the oil which had been obtained on a fishing voyage. It is clearly established as a general principle of law that if one partner becomes a bankrupt, his assignees can obtain no share of the partnership effects until they first satisfy all that is due from him to the partnership.

H *Smith* v. *De Silva* (1) is a very entangled case, and the facts stated in the report are not very clear or perspicuous. It appears that De Silva had originally made advances, not as part owner of the ship, nor even as partner in the adventure, but as a person appointed by all the part owners to manage the adventure for them, rather as their agent than as their partner. He afterwards acquired an interest by purchasing a part of the ship, and so became a partner in the adventure; but he I was not an original partner. *Smith* v. *De Silva* (1) may, therefore, have been properly decided, without breaking in on the general principle to which I have adverted.

Supposing that the partners in the present case originally had a lien, has anything happened to take it away? First, it is said that they had no lien against Foxton, because nothing was due from Foxton to the then part owners, but if the account be taken as between Foxton and Locking generally, there can be no question that the bankrupt was indebted to the other part owners. For they were ultimately obliged to pay the expense which had been incurred before the bankruptcy.

The next point turns on the separation of that portion of the oil which belonged to the bankrupt, upon which great reliance has been placed on the part of the plaintiff. It has been said, that there has been an appropriation of that quantity of oil to the bankrupt, and that the property thereby vested in him, and cannot be divested. But in order to decide whether the property vested in him or not, it is necessary to look at the practice of the part owners of this ship in antecedent voyages, in order that we may know what was the effect of marking particular casks with the initials of any of the part owners. The Case states that when the blubber had been reduced to oil, each part owner's share was weighed out, and placed separately in the warehouse rented by the owners of the ship, and the particular casks containing his oil were marked with his initials in chalk; that Gilchrist kept the key of the warehouse and lived in the yard; that after each division, the practice was for him (Gilchrist) to deliver to the separate orders of such owners the oil belonging to them, unless, previously to the delivery, he received a notification from the ship's husband that the part owner's share of the disbursements had not been paid to him. In that case he used to detain the oil till the ship's husband's demand had been satisfied. That having been the practice between the parties, it appears to me that the separation of the oil of a particular part owner from the residue, and putting his initials upon the casks, was not an absolute appropriation of the cask and its contents to that part owner, but only a qualified appropriation enabling him to take the goods unless the ship's husband afterwards prevented him by giving notice to the warehouseman. That particular circumstance of separating the oil in question from the residue, and putting on the cask which contained it the initials of Foxton, connected with the previous usage between the parties, appears to me to amount in this case not to an absolute but to a qualified appropriation only. The property in the oil was thereby vested, but subject to be divested (as in point of fact it was) by the intervention of Locking. It seems to me that the justice and law of the case are with the defendant, and that there ought to be a judgment of nonsuit.

BAYLEY, J.—Where there is a joint adventure which produces certain goods, the proper course is, first to deduct all the expenses which have been incurred in order to obtain those goods, and then to divide the residue among the shareholders, in proportion to the shares to which each is entitled respectively. In this case the joint adventurers obtained a quantity of oil in bulk. No partner, or representative of a partner, had a right to his aliquot part of that oil until he had paid his share of the expense of procuring it. That will be the case, whether the shareholder has become bankrupt or continues solvent. If he continues solvent, he may pay his share of the outfit, and of the expense. If he does not pay it in money, the other part owners have a right to see that an aliquot part of what has been gained in the adventure be retained, so as to pay that share of the outfit which he ought to pay. In this case Foxton became bankrupt, and having become bankrupt, if he could have paid in money his share of the outfit, there would have been twenty-nine tons of oil coming to him. He could not pay, and, therefore, as it seems to me, the justice and the law of the case is that his share of the expense should be paid out of the twenty-nine tons, and that, until he has paid his share of the expense, he cannot claim that quantity. It has been said that there has in this case been a delivery, and that, in consequence of that delivery, the rights of Foxton and of his assignees are different from what they otherwise would have been. But it seems to me that there has not been a perfect delivery. It would have been perfect if the other part owners had been dispossessed of the oil. That has not been done. The property still remained in the warehouse, and was the joint property of all. A part only has been removed. The removal of that part does not vary the right as to the residue. It is clear that the assignees cannot recover the twenty-nine tons before they pay Foxton's share of the expense. The other part owners might say, there are twenty-nine tons allotted to you; you may take

possession of all to which you will be entitled, but you must first pay your share of the expense: nine tons will be sufficient for that purpose; you may, therefore, take away twenty tons. The right of the other part owners is not varied by their having allowed the bankrupt to take away twenty tons. That being so, the plaintiffs are not entitled to recover.

It has been urged that there has, in this case, been a change of possession, by reason of Locking's having debited the bankrupt in account with a portion of the rent. But that portion of the rent must have been paid by the bankrupt before he took away the oil in specie; or it might have been deducted out of his share of the produce, if he compelled the other shareholders to sell, in order to pay his share of the expense. The usage being for the part owners to detain the oil, until each part owner's share of the expense has been paid, it seems to me, that the fact of debiting the party with warehouse rent can have no effect. I think, therefore, that the plaintiffs have not made out their right to the residue of the oil; and, consequently, that there ought to be a nonsuit.

Judgment for defendant.

SIMMONS *v.* NORTON AND WIFE

[COURT OF COMMON PLEAS (Tindal, C.J., Park, Gaselee and Bosanquet, JJ.), June 4, 1831]

[Reported 7 Bing. 640; 5 Moo. & P. 645; 9 L.J.O.S.C.P. 185; 131 E.R. 247]

Landlord and Tenant—Waste—Ploughing up ancient meadow land into arable.

Ploughing up and converting ancient meadow land into arable is prima facie waste because it changes the course of husbandry and materially affects the proof or evidence of the lessor's title.

Notes. Distinguished: *Huntley* v. *Russell* (1849), 13 Q.B. 572. Considered: *St. Albans* v. *Skipwith* (1845), 8 Beav. 354. Referred to *Green* v. *Jenkins* (1860), 1 De G. & J. 454.

As to liability for waste, see 1 HALSBURY'S LAWS (3rd Edn.) 264, 276, ibid., vol. 23, p. 566 et seq.; and for cases see 2 DIGEST (Repl.) 57, 58, and 31 DIGEST (Repl.) 389 et seq.

Cases referred to:

(1) *Maleverer* v. *Spinke* (1537), 1 Dyer, 35 b; 73 E.R. 79; 2 Digest (Repl.) 103, *698*.

(2) *Lord Darcy* v. *Askwith* (1618), Hob. 234; 80 E.R. 380; 31 Digest (Repl.) 389, *5156*.

(3) *Rennell* v. *Wither* (1818), Manning's Nisi Prius Digest 2nd Edn. 291; 31 Digest (Repl.) 399, *5282*.

(4) *Barret* v. *Barret* (circa 1629), Het. 34; 124 E.R. 321; 31 Digest (Repl.) 390, *5159*.

(5) *Anon.* (1587), 2 Leon. 174; 74 E.R. 454; 31 Digest (Repl.) 392, *5173*.

Also referred to in argument:

Doe d. Foley v. *Wilson* (1809), 11 East, 56; 103 E.R. 925; 2 Digest (Repl.) 94, *589*.

Cole v. *Forth* (1672), 1 Mod. Rep. 94; 86 E.R. 759; sub nom. *Cole* v. *Green*, 1 Lev. 309; sub nom. *Greene* v. *Cole*, 2 Wms. Saund. 228, H.L.; 31 Digest (Repl.) 393, *5181*.

City of London v. *Greyme* (1607), Cro. Jac. 181; 79 E.R. 158; sub nom. *London Corpn.* v. *Grimes*, Moore, K.B. 877; 31 Digest (Repl.) 126, *2646*.

Redfern v. *Smith* (1823), 1 Bing. 382; 8 Moore, C.P. 443; 2 L.J.O.S.C.P 30; 130 E.R. 154; 2 Digest (Repl.) 133, *999*.

Rule Nisi obtained by the defendants for a new trial in an action of waste brought by the infant plaintiff, a reversioner, against the defendants as tenants for life, for ploughing up ancient meadow land and cutting down timber. The defendants pleaded nul wast on which issue was joined.

At the trial before TAUNTON, J., at Somerset Assizes the defence as to the ploughing was that the meadow had become sour and mossy through age, and that it had been ploughed up according to the rules of good husbandry, sown with barley and clover, and laid down to grass again, such a process being occasionally necessary to restore old meadow to a healthy state. The defendants had also raised a few potatoes on a portion of the land. Some witnesses said that the crop of grass ensuing was better than before, others, that it was as good, and would have been better if lime had been thrown on the land. The plaintiff proposed to prove further that it was the custom of the country to restore old meadow land with lime and that he had contracted for lime to be employed in furtherance of his project, but had countermanded the order when the action was commenced. TAUNTON, J., thought the whole ought to have been pleaded, and that the defence set up was not available under the general issue. Evidence of the custom was, however, ultimately admitted though not of the contract for the lime: the plaintiff having adduced conflicting testimony as to the custom and the effect of the ploughing, the judge told the jury that the custom had not been proved, and that ploughing up old meadow was waste, whether for the purpose of melioration or not. The jury found for the plaintiff, with 10s. damages.

As to the timber, the defence was that the defendants had cut down for the purpose of necessary repairs what appeared to him to be likely trees, but that when they were down they turned out to be unfit for the purpose, whereupon the defendants, after an application to the guardian of the plaintiff's estate, exchanged them for other timber fit for repairing the premises. The judge rejected evidence of these facts as they amounted to a species of set-off which the defendant could not have pleaded and a verdict was given for the plaintiff with 5s. damages. The defendants in Easter Term moved for a new trial, and a rule nisi was granted.

Serjeant Wilde for the plaintiff, showed cause against the rule.
Serjeant Russell for the defendants, supported the rule.

TINDAL, C.J.—This was a writ of waste brought by a reversioner against a tenant for life, in respect of waste of two different kinds or descriptions: one the ploughing up of old meadow land and converting it into arable; the other, the cutting down of two timber trees. The defendants had only pleaded the general issue, viz., no waste done; and at the trial, the plaintiff having proved that the meadow had been ploughed up and converted into arable, and that two oak trees growing on the premises had been felled, the jury found a verdict for the plaintiff, with ten shillings damages for ploughing up the meadow, and five shillings each for the trees which the defendants had cut down. A motion was made in the last term to set aside this verdict, and to have a new trial, on the ground, that the learned judge who tried the cause had misdirected the jury in omitting to leave it to them to say whether the meadow had not been ploughed to ameliorate the land. It has been said, that ploughing up meadow is no waste if it be done for the the purpose of ameliorating the land, and a passage in ROLLE'S ABRIDGMENT, vol. 2. p. 814, pl. 5, has been relied on as an authority to that effect, and was the substantive ground of the motion.

It is unnecessary for us to say whether the doctrine there laid down be law to the full extent, because, upon this record as it is now framed the evidence was not admissible. All the authorities agree in establishing the position, that ploughing meadow land and converting it into arable is prima facie waste. I need only refer to COKE ON LITTLETON, 53 a: *Maleverer* v. *Spinke* (1) (1 Dyer, at p. 37 a): and *Lord Darcy* v. *Askwith* (2) (Hob. 234); and one of the reasons given that such an act is waste, is because it alters the evidence of title; a reason which I think

ought not to be treated lightly. In grants, land frequently passes by the specific description of meadow, pasture, arable, or the like; and if an estate, described as consisting of meadow land, be converted into arable, I am not prepared to say that the alteration of the surface might not introduce considerable difficulty in the title. It is the daily practice of this court to amend fines and recoveries, on account of the misdescription of the quality of the land; and the ground for making such amendments is that these documents are preserved and handed down, as certifying the title to, and identifying the lands, by reference to the purposes to which they have been applied. There is another reason why the conversion of meadow land into arable is prima facie waste, viz., that in ancient meadow which has been constantly watered for a great length of time, a series of years, perhaps ages, must elapse, before it can be restored to its original state and value. Prima facie, therefore, the ploughing up the meadow in question was an injury to the plaintiff's reversionary estate. Although there may be a material difference or distinction with respect to the character of waste, for instance, if it should appear to have been done for the necessary cultivation and improvement of the land; yet, under these circumstances, the specific reason for altering the character of the land should appear, and be expressly stated on the record. In COMYNS' DIGEST, tit. Pleader, 3, (O.) 7, it is laid down that, to an action for waste, the general issue is, no waste done, and that it may be pleaded in all cases where there is no waste, as if destruction happens by tempest, lightning, enemies, etc., but it is no plea where the defendant has matter of justification or excuse.

Applying that doctrine to the present case, if the surface of the meadow had been destroyed by an act of Providence, as by an extraordinary flood, or had been ploughed or dug up by enemies, it would have been no act of waste by the tenant or occupier, as it was attributable to the act of God, or of a hostile force, which the law emphatically terms vis major. But even in such a case, it is incumbent on the tenant to endeavour to repair the injury as soon as possible. However, it is sufficient to say that the plea of the general issue applies only to cases where the act done or complained of is not the act of the party; and if he has prima facie committed waste, he must admit and justify it on the record, whenever he has matter of justification to allege, for instance, if he cut down timber trees, he must plead that he cut them down for the purpose of repairing the premises. So, if he pulled down an old house, he might plead that it was in a dilapidated or decayed state, and that he had built another in its stead. The object and motive of the party doing the act must be apparent, and stated on the face of the record, so as to give the party complaining the opportunity of taking issue on such an allegation; and if, in this case, the defendants had pleaded that that they caused the meadow to be ploughed up to ameliorate and improve the land, and proved that it had that effect, I am not prepared to say that the passage cited from ROLLE'S ABRIDGMENT might not have been in their favour. But as they have not so pleaded it, the question could not be submitted to the jury. There was, consequently, no misdirection of the judge in this respect. So, as to the cutting down the trees, the defendants should have pleaded that they cut them for repairs, and the plea of the general issue affords no legal answer; and, as there was no plea of justification, the evidence as to the exchange of one of the trees with the consent of the plaintiff's guardian was properly rejected. *Rennell* v. *Wither* (3) appears to me to be distinguishable from the present, as there the trees cut down were excepted out of the lease, and the plaintiff was bound by his covenant to furnish timber to be pointed out and assigned by his bailiff; but here, the defendants were limited to the cutting of such trees only as were fit and proper for repairs; but as it was proved that they had cut one tree which was not fit for that purpose, although it was exchanged for another with the assent of the plaintiff's guardian, it must be taken that she has sustained an injury to her reversionary interest, and it therefore appears to me that there is no ground for disturbing the verdict which she has obtained.

PARK, J.—It must be admitted from the current of all the authorities that ploughing up and converting ancient meadow land into arable is prima facie waste, because it changes the course of husbandry and materially affects the proof or evidence of the lessor's title. Here, the defendants have only pleaded the general issue of no waste done, but where the act done is the act of the party, any excuse he has to offer must be made the subject of a plea of justification, and put on the record. The plea of no waste committed or done can only apply where the thing done is attributable to the act of God, or of a hostile force, or cases of a like nature. Although *Barret* v. *Barret* (4) established the general principle that the law will not allow that to be waste which is not prejudicial to the inheritance, yet there are several exceptions; and it has, nevertheless, been held, that a lessee or tenant cannot change the nature of the thing demised, although the alteration might be for the advantage or profit of the lessor. All the cases are collected in BACON'S ABRIDGMENT, tit., Waste (C), and it is there said:

> "That if the tenant converts arable into wood, or è converso, it is waste, for it not only changes the course of husbandry, but also the proof of evidence."

And although in *Anon.* (5) it was decided, that the converting of a meadow into a hop-garden was not waste, yet PERIAM, J., said (2 Leon. 174, pl. 210):

> "The conversion of a meadow into an orchard is waste, though it be to the greater profit of the occupier."

As to the custom of the country, although evidence of it was admitted at the trial, the learned judge was of opinion that the custom was not proved, or made out in fact, but I am of opinion that such evidence was not admissible under the general issue, and, although it has been said that this is a harsh action, yet we cannot control the law; and it is quite clear that the defendants were not entitled to prove that one of the trees had been exchanged for another with the consent of the plaintiff's guardian, as they had not pleaded that fact, or that they were cut down for the purpose of repairing the premises.

GASELEE, J.—I see no reason to disturb this verdict. It is clear from all the authorities that where the tenant or occupier has matter of justification or excuse, as where he cuts down timber trees for repairs, he must plead it specially, and cannot give it in evidence under a general issue. As to *Rennell* v. *Wither* (3), I was counsel for the plaintiff, the Dean of Winchester, and the defendant was his tenant; and although the ruling of the learned judge created some surprise, yet I perfectly recollect, that, considering the situation of the parties, the plaintiff did not wish a further investigation.

BOSANQUET, J.—The plaintiff, in his declaration, has charged the defendants with the commission of two several and distinct acts of waste: the one, ploughing up and converting meadow land to arable; the other, the cutting down timber trees. Breaking up ancient meadow is, prima facie, waste, and evidence as to the custom of the country ought not to have been received; and, although it was admitted, the learned judge thought, that the custom had not been proved:—so the evidence as to the amelioration or improvement of the land, or that the meadow had been laid down according to the course of good husbandry, ought not to have been admitted, as it should have been made the subject of a special plea, and put upon the record. With respect to the trees, it is quite clear, that the defendants should have pleaded for what purpose they were felled, namely, either for repairs, or for necessary botes; and as they did not do so, I am of opinion, that evidence of the exchange of one of the trees with the consent of the plaintiff's guardian was properly rejected. If, indeed, the defendants had pleaded the fact, evidence of it might have been received in mitigation of damages; but as they did not do so, it is unnecessary to consider *Rennell* v. *Wither* (3). The rule for a new trial must, therefore, be discharged.

Rule discharged.

MORRIS AND ANOTHER *v.* ROBINSON

[Court of King's Bench (Bayley, Holroyd and Littledale, JJ.), Trinity Term, 1824]

[Reported 3 B. & C. 196; 5 Dow. & Ry. K.B. 34; 107 E.R. 706]

Conversion—Waiver of right of action—Conversion by two persons—Successive conversions—Action against one tortfeasor— Right to proceed subsequently against other tortfeasor.

The master of a ship which was damaged by perils of the sea put into Mauritius, and there abandoned the ship and cargo, which were afterwards sold under an order of the Vice-Admiralty Court there, the proceeds being paid into that court. The cargo was not damaged or perishable, nor was there any pressing necessity for the sale. The owners of the cargo brought an action on the case against the owners of the ship for wrongfully selling the cargo instead of carrying it to London according to their contract, with a count in trover, and recovered a general verdict for the value of the ship and freight, which was one-fifth of the value of the cargo. They also sent out a power of attorney to an agent at Mauritius to procure from the Vice-Admiralty Court there the proceeds of the sale which had been paid in. The agent demanded them, but they had been previously remitted to the High Court of Admiralty in England. In an action for money had and received by the owners against the purchaser of the goods,

Held: (i) while a master may hypothecate a cargo for the purposes of the voyage, he has no right beyond that to act as agent for the owner of the goods unless in cases of absolute necessity; (ii) no regard could be paid to the decree of the Vice-Admiralty Court, since it had not been proved that that court had jurisdiction; (iii) accordingly, the master had no authority to sell the cargo; (iv) while the action against the purchaser would have been barred if, in the former proceedings against the shipowner, the cargo-owner had recovered the full value of the goods, no such bar existed as the judgment in the former proceedings had not been entered and was in any event only for part of the value of the goods; (v) the cargo-owner had not, by unsuccessfully endeavouring to obtain the proceeds from the Vice-Admiralty Court, ratified the sale and waived the tort; and (vi) the cargo-owner was, accordingly, entitled to recover against the purchaser.

Notes. Applied: *Knight* v. *Legh* (1828), 1 Moo. & P. 528; *Valpy* v. *Sanders*, [1843–60] All E.R. Rep. 869; *Brinsmead* v. *Harrison*, [1861–73] All E.R. Rep. 465. Considered: *Rice* v. *Reed*, [1895–9] All E.R. Rep. 262; *Ellis* v. *John Stenning & Son*, [1932] All E.R. Rep. 597. Referred to: *Cammell* v. *Sewell* (1860), 6 Jur. N.S. 918; *Freshwater* v. *Bulmer Rayon Co.*, [1933] Ch. 162; *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; *B. O. Morris, Ltd.* v. *Perrott and Bolton*, [1945] 1 All E.R. 567; *Kohnke* v. *Karger*, [1951] 2 All E.R. 179.

As to authority of master to sell cargo, see 35 Halsbury's Laws (3rd Edn.) 138, 139; as to wrongful sale, see ibid. 434–437; as to damages for successive conversions, see 38 Halsbury's Laws (3rd Edn.) 797; and as to waiver of tort, see ibid. 798. For cases see 41 Digest (Repl.) 412 415; 46 Digest (Repl.) 530, 531.

Cases referred to:

(1) *Freeman* v. *East India Co.* (1822), 5 B. & Ald. 617; 1 Dow. & Ry. K.B. 234; 106 E.R. 1316; 41 Digest (Repl.) 413, *1998*.

(2) *Reid* v. *Darby* (1808), 10 East, 143; 103 E.R. 730; 41 Digest 293, *1526*.

Also referred to in argument:

Cannan v. *Meaburn* (1823), 1 Bing. 243; 8 Moore, C.P. 127; 1 L.J.O.S.C.P. 84; 130 E.R. 98; 41 Digest (Repl.) 409, *1952*.

Action of assumpsit for money had and received. Plea, the general issue.

The plaintiffs and the defendant were merchants residing in London. On or about Dec. 3, 1820, Macintyre & Co., of Calcutta, who were merchants, shipped on board the ship *Lady Banks*, of which one Isaac Valance was the master, 140 chests of indigo, the property, and on account and risk of the plaintiffs, under three several bills of lading signed by the captain: one for 72 chests, one for 45, and one for 23, total 140. By these bills of lading, the indigo was to be delivered to the port of London to the plaintiffs or their order. The *Lady Banks* sailed from Calcutta December 21, 1820, with the 140 chests of indigo on board, and a cargo of various other merchandise bound for the port of London, and afterwards put into Trincomalee for repairs. She sailed from Trincomalee on Feb. 17, 1821, for London, and met with tempestuous weather, which occasioned her to become very leaky. During the bad weather about 600 bags of sugar were necessarily thrown overboard, and with much difficulty the ship was conducted to the island of Mauritius, where she arrived on Mar. 24, 1821, and assistance being procured, she was run upon a sand bank, with a view to the preservation of the ship and cargo, and it was necessary that the ship should be wholly unladen, and that she should be hove down in order to examine and repair the damages which had been sustained.

The captain employed a proctor, and on Mar. 24 petitioned the Vice-Admiralty Court of that island, and under an order made by that court, the cargo was landed and deposited in warehouses. An accidental fire having happened at the warehouse where part of the cargo had been deposited, great part thereof was burnt or materially damaged, and it was sold by auction, and twenty-one chests of indigo were (by the proceedings of the Admiralty Court afterwards referred to) reported to be damaged, and were also sold by public auction, but these formed no part of the demand in the present action. After the sale there only remained of the whole cargo, 119 chests of the indigo comprised in the bills of lading before mentioned, and two sample chests of indigo, thirty casks of tallow, some buffaloes' horns, and a few packages of small value. In pursuance of an order of the said Vice-Admiralty Court the ship was surveyed, and an estimate was made by competent persons upon oath, that the necessary repairs and other incidental expenses to enable the ship to perform her voyage to England would amount to the sum of 25,669 dollars; and the surveyors reported, that if the ship had these repairs done to her, she would then be a good sound ship. Two merchants, however, residing at Port Louis, declared upon their oath in the proceedings in the Vice-Admiralty Court their belief, that the amount of the repairs would far exceed the value of the ship when repaired. The captain had no funds, and could not procure any to pay for the repairs except by the sale of part of her cargo, but there was an opportunity to tranship the indigo from Mauritius for England soon after the arrival of the vessel there, and such opportunity afterwards again occurred.

Under these circumstances the captain, bona fide believing that the repairs would cost at least as much as the estimate before mentioned, thought it best for the interest of all concerned to abandon her and the residue of the cargo: and he accordingly entered protests to that effect on May 9, 1821. On May 12, the judge of the Vice-Admiralty Court made an order for the sale of the hull of the ship: and she was accordingly sold by auction, on May 14, 1821, for 1946 dollars, and her stores, etc., for 7,303 dollars. The ship was afterwards repaired at Port Louis, and sailed from Mauritius on a voyage to China on account of the purchaser. After three surveys, ordered by the Vice-Admiralty Court, upon the 119 chests of indigo which remained, and the reports of the surveyors thereupon that they were sound, the said judge, on May 16, 1821, made the following order:

> "Let the within goods, abandoned under the protest of the captain of the *Lady Banks*, be forthwith sold by public auction, and the proceeds immediately lodged in the registry of this court."

The 119 chests of indigo were, in pursuance of the said order, sold by public

auction by the deputy marshal of that court, after having been advertised in the GAZETTE, and otherwise notified to the inhabitants of the island in the most public manner; and in such advertisements and notifications, it was stated that the indigo had been part of the cargo of the ship *Lady Banks*; and that the same would be sold by the order and under the authority of the Vice-Admiralty Court, by the deputy marshal of that court.

The agent of the defendant then being at Mauritius, who was no party to the proceedings in the Vice-Admiralty Court, attended in consequence of the public notification of the sale, and became the purchaser of 20 chests of the indigo, and paid the price for the same into the court, and the indigo was delivered to him. The defendant's agent, a few days after this sale, purchased from Messrs. Blaize and Baudet, merchants at Port Louis, 32 chests of the said indigo, which they had previously purchased at the auction, and agreed to give an advance of 5½ per cent. upon the price which Blaize and Baudet had paid for the same at the public sale. The defendant's agent paid Blaize and Baudet that sum, and received from them the said 32 chests of indigo. The damaged part of the cargo, which was first sold, as before mentioned, produced 11,879 dollars and the 119 chests of indigo produced 52,321 dollars, and the amount thereof, and of the proceeds of the ship and stores, as before mentioned, reduced, by means of the incidental expenses, to 53,846 dollars, or £8,109 6s. 11d. sterling, were remitted by the register of the Vice-Admiralty Court to the High Court of Admiralty in England, and now remain in the last mentioned court.

The 52 chests of indigo, purchased by the defendant's agent, formed part of the indigo mentioned in the three bills of lading, and in the following proportions, viz.:

"15	chests,	part	of the 72	chests	in the first bill of lading mentioned
19	–	–	45	–	second ditto.
18	–	–	23	–	third ditto."

On June 12, 1821, 20 of the said 52 chests of indigo were shipped on board the *Woodbridge*, and on July 12 the remaining 32 chests were shipped per the *Asia* for the port of London. Both ships arrived at that port in October, 1821; and the 52 chests were delivered to the defendant. Soon after the indigo arrived in the port of London, the plaintiffs gave notice to the defendant, that they were the original proprietors of the said 52 chests of indigo, and claimed the delivery thereof to them, but the defendant refused to deliver the indigo to the plaintiffs, and afterwards sold and disposed of the same, and received the proceeds thereof.

In respect of the 72 chests of indigo, contained in the bill of lading first mentioned, the plaintiffs commenced an action against the owners of the *Lady Banks* for not carrying the indigo to London, but selling the same unlawfully, as it was alleged, at Mauritius, and they obtained a verdict against the owners in that action, under which they were entitled to recover from the owners to the extent of the value of the ship and her freight, but it was admitted that the sum which they would receive therefrom would not exceed £1,500, and the 72 chests mentioned in the first bill of lading, were of the value of £7,000 and upwards. In respect of the 45 chests of indigo in the second bill of lading mentioned, the plaintiffs, after they had received information of the sale of the indigo, under the circumstances aforesaid, executed and sent out a power of attorney to Messrs. Saunders and Wicke, of Mauritius, empowering them to claim and receive out of the said Vice-Admiralty Court the sum which was produced by the sale of the said 45 chests, and they did accordingly apply to the registrar of the said Vice-Admiralty Court, and claimed to receive such proceeds, but the same had then been remitted to England. In respect of the 23 chests of indigo in the third bill of lading mentioned, the plaintiffs have not taken any measures, nor pursued any remedy, except the proceeding in the present action. The 52 chests, so purchased by the defendant's agent, were sound and in good order, and free from

damage, when the same were purchased by them at Mauritius as aforesaid, and when they came into the possession of the defendant in London.

At the trial before ABBOTT, C.J., in 1823 the jury returned a verdict for the plaintiffs awarding them £7,000 damages subject to the opinion of the court on a Case which stated the facts set out above. It was agreed, and admitted at the trial, that the plaintiffs having recovered a verdict in the said action against the owners of the said ship, in respect of the indigo mentioned in the first bill of lading, and having sent out such power of attorney as aforesaid, in respect of the indigo mentioned in the second bill of lading, should not prejudice or affect their right of recovery in respect of any other part of the indigo, besides the particular chests for which the said action was brought, and the power of attorney sent out, respectively; but in regard to the particular chests for which the verdict had been obtained, and the power of attorney had been sent out, the defendant was to be at liberty to derive such advantage as those circumstances would afford him. The question for the opinion of the court was, whether the plaintiffs were entitled to recover in this action for all, or any, and what part of the said 119 chests of indigo. If the court should be of opinion that the plaintiffs were entitled to recover for the whole or any part, the verdict to be entered accordingly, and the amount of the damages to be settled out of court. If the court should be of opinion that the plaintiffs were not entitled to recover for any part, a nonsuit to be entered.

F. Pollock for the plaintiffs.
Campbell for the defendant.

BAYLEY, J.—There is no doubt but the master of a ship may hypothecate the cargo for the purposes of the voyage, but beyond that he has no right to act as agent for the owner of the goods, unless in cases of absolute necessity. The decree of the Vice-Admiralty Court constitutes the only difference between this case and *Freeman* v. *East India Co.* (1). But without meaning to speak at all disrespectfully of that court, I cannot say that I think it had any jurisdiction. The decree can only be looked upon as the fair opinion of a person residing on the spot, for as it is not found as a fact that the court there had jurisdiction, we cannot make it the foundation of our judgment. There was not any necessity for the sale of the cargo; it was not damaged or perishable.

It being my opinion then, upon the general question, that the purchaser obtained no property by the act of the person who professed to sell, two questions arise as to the seventy-two chests, to which the former recovery applies, and the forty-five chests, for the proceeds of which the power of attorney was sent out. The whole argument on these two points proceeds on the ground that the defendant had no property in the goods but what he acquired by the confirmation of the plaintiffs. To take the second parcel first. When the owners heard that a wrongful sale had been effected at Mauritius, and that the proceeds were lodged in the Vice-Admiralty Court, surely they might endeavour to obtain those proceeds without ratifying the sale; but the agent did not succeed in obtaining them. The plaintiffs, therefore, are left in the same situation as if no application had been made to that court. Then as to the seventy-two chests, the facts stand thus. The plaintiffs brought an action against the owners for the breach of their duty as carriers, with a count in trover. The jury might, on that count, have given the full value of the goods in damages, but their power on the special counts was restricted to a certain amount, and the verdict was restricted to that amount. No judgment has been entered up, and, therefore, there has been no actual satisfaction. It is argued that the plaintiffs had merely an election to sue the owners for the misconduct of the captain or the defendant for the value of the goods. But independently of the statute 53 Geo. 3, c. 159 [relating to the responsibility of shipowners: repealed by the Merchant Shipping Repeal Act, 1854, s. 4], the jury were not bound to make the full value of the goods the measure of the damages in the former action. They might reasonably give small damages, as

A the ground that an action would lie against the purchasers. If concurrent actions had been brought, that against the owners could not have barred the other; why then should it have that effect because they have been brought at different times? If indeed the plaintiffs were to recover the full value of the goods in each action, a court of equity would interfere to prevent them from having a double satisfaction, but there is nothing in the former action which can, in a court of law, prevent the B recovery in this.

HOLROYD, J.—I am of opinion that all the questions that have been raised must be decided in favour of the plaintiffs. *Freeman* v. *East India Co.* (1), and *Reid* v. *Darby* (2), show that the captain has no authority to sell the cargo, unless in cases of absolute necessity, even although the sale be sanctioned by a Vice-Admiralty C Court. With respect to the action against the owners, the verdict recovered in that is not in law sufficient to bar or diminish the plaintiff's claim in this proceeding. The very ground of that action was that the sale was wrongful; it cannot, therefore, be a ratification. But where in trover the full value of the article has been recovered, it has been held that the property is changed by judgment and satisfaction of the damages. Unless the full amount is recovered, it would not bar even other actions D in trover. Here it is plain that the full value had not been recovered on the count in trover; the value of the goods mentioned in that action was £7,000, the verdict £1,500, to which sum the verdict on the other counts was necessarily limited. The probability of a recovery in an action against this defendant might keep down the damages given on the count in trover. In an action against a sheriff for an escape, small damages are often given, on the ground that the debt is not E extinguished; and the whole amount may afterwards be recovered, notwithstanding the recovery against the sheriff. The former action brought by these plaintiffs against the shipowners is not, then, any legal ground for diminishing the sum to be recovered in this. The power of attorney clearly furnishes no defence; nothing was done upon it; a demand, indeed, was made, but the money was not given up.

F **LITTLEDALE, J.**—I am of the same opinion. It is admitted that the sale was not under the pressure of necessity. As to the decree of the Vice-Admiralty Court, if it had authority to make it, that should have been stated in the Case. It has no such power by the law of nations, and no such authority is exercised by the Court of Admiralty here. Suppose an action had been brought against an officer of that court, and he pleaded a justification, his authority must have been set out. Then, as to the recovery in the former action; in the first place there has been no judgment in that case; and if one party attempts to avail himself of the technical effect of such a recovery, the other may set up a technical answer, viz., that judgment has not been entered up. But an action of trover is clearly no bar, unless the full value has been recovered; here the verdict amounted to little more than one-fifth of the value. The justice of the case then is that the plaintiffs H should be allowed to recover the residue. The power of attorney merely amounted to this; the plaintiffs were willing to waive the tort, and take the money lodged in the Vice-Admiralty Court; but they could not procure it. Surely that ought not to bar their claim on those who had the goods. For these reasons I think that the plaintiffs were entitled to recover for all the indigo purchased by the defendant.

Judgment for plaintiffs.

BURNETT AND OTHERS *v.* LYNCH

[Court of King's Bench (Abbott, C.J., Bayley, Holroyd and Littledale, JJ.), June 1, 1826]

[Reported 5 B. & C. 589; 8 Dow. & Ry. K.B. 368; 4 L.J.O.S. 274; 108 E.R. 220]

Landlord and Tenant—Lease—Assignment—Covenants by lessee—Failure of assignee to perform—No express covenant by assignee—Damages for breach of covenant recovered by lessor from lessee—Right of lessee to recover against assignee.

Landlord and Tenant—Lease—Execution—Proof—Need of evidence of subscribing witness.

The plaintiffs, executors of a deceased lessee, assigned the lease to the defendant, who later assigned it to one D. There was no express covenant in the assignment to the defendant by which he undertook to perform the covenants in the lease, but the plaintiffs alleged that he was fully aware of the terms of the lease. The defendant failed to perform certain covenants to repair, and the lessor recovered damages for the breaches of those in an action against the plaintiffs. The plaintiffs then claimed to recover from the defendant the amount of the damages they had had to pay to the lessor and their costs. At the trial the lease was produced by the solicitor of the assignee D., and was put in evidence by the defendant's counsel.

Held: (i) the lease having come from a person who claimed under the defendant and having been recited in the deed of assignment by the defendant to D., it was not necessary for the plaintiffs to call the subscribing witnesses to the lease to prove its due execution; (ii) although the defendant had not entered into an express covenant to perform the covenants in the lease the effect of the assignment to him was that he stood in the same position as the lessee and became bound to perform the covenants, and an action lay against him for breach of that duty.

Landlord and Tenant—Covenant—Landlord's good title—Quiet enjoyment—Implication—Effect of word "demise" in lease.

The word "demise" in a lease imports a covenant by the lessor that he has a good title and that the lessee shall quietly enjoy during the term.

Notes. Considered: *Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644; *Humble* v. *Langston* (1841), 7 M. & W. 517; *Walker* v. *Bartlett* (1856), 18 C.B. 845; *Moule* v. *Garrett* (1872), L.R. 7 Exch. 101. Referred to: *Walker* v. *Moore* (1829), 8 L.J.O.S.K.B. 159; *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415; *Hancock* v. *Caffyn* (1832), 8 Bing. 358; *Wright* v. *Doe d. Tatham* (1834), 1 Ad. & El. 3; *Edwards* v. *Bates* (1844), 7 Man. & G. 590; *Magnay* v. *Edwards* (1853), 17 Jur. 839; *Smith* v. *Peat* (1853), 9 Exch. 161; *Rolin* v. *Steward* (1854), 14 C.B. 595; *Nokes* v. *Fish* (1857), 3 Drew. 735; *Dutton* v. *Powles* (1861), 2 B. & S. 174; *Maugham* v. *Sharpe* (1864), 17 C.B.N.S. 443; *Grissell* v. *Bristowe* (1868), L.R. 3 C.P. 112; *Rudge* v. *Bowman* (1868), L.R. 3 Q.B. 689; *Sheppard* v. *Murphy* (1868), 16 W.R. 948; *Kellock* v. *Enthoven* (1874), L.R. 9 Q.B. 241; *Whitaker* v. *Forbes* (1875), 45 L.J.Q.B. 140; *Woodhouse* v. *Walker* (1880), 5 Q.B.D. 404; *Baynes* v. *Floyd*, [1895] 2 Q.B. 610; *Miller* v. *Emcer Products, Ltd.*, [1956] 1 All E.R. 237.

As to covenants implied in a lease and the liability of an assignee of a lease to indemnify the assignor, see 23 Halsbury's Laws (3rd Edn.) 598 et seq., 654-658. For cases see 31 Digest (Repl.) 128 et seq., 447 et seq.

Cases referred to:

(1) *Gordon* v. *Secretan* (1807), 8 East, 548; 103 E.R. 453; 22 Digest (Repl.) 500, *5524*.

(2) *Kinlyside* v. *Thornton* (1776), 2 Wm. Bl. 1111; 96 E.R. 657 ; 31 Digest (Repl.) 231, *3657*.

(3) *Jones* v. *Hill* (1817), 1 Moore, C.P. 100; 7 Taunt. 392; 129 E.R. 156; 31 Digest (Repl.) 396, *5244*.

(4) *Dickon* v. *Clifton* (1766), 2 Wils. 319.

(5) *Bretherton* v. *Wood* (1821), 3 Brod. & Bing. 54; 9 Price, 408; 6 Moore, C.P. 141; 147 E.R. 134, Ex. Ch.; 8 Digest (Repl.) 169, *1098*.

Also referred to in argument:

Pearce v. *Hooper* (1810), 3 Taunt. 60; 128 E.R. 25; 22 Digest (Repl.) 500, *5526*.

Orr v. *Morice* (1821), 3 Brod. & Bing. 139; 6 Moore, C.P. 347; 129 E.R. 1235; 22 Digest (Repl.) 500, *5528*.

Ford v. *Lord Grey* (1703), 6 Mod. Rep. 44; 1 Salk. 285; 87 E.R. 807; 32 Digest (Repl.) 531, *1285*.

Brett v. *Cumberland* (1616), Cro. Jac. 521; 3 Bulst. 163; Godb. 276; Poph. 136; 1 Roll. Rep. 359; 2 Roll. Rep. 63; 79 E.R. 446; 31 Digest (Repl.) 454, *5806*.

Rule Nisi for a new trial in an action for breach of covenant.

By a lease dated Aug. 30, 1804, the lessor demised certain premises to Sir Robert Burnett subject to certain rents and certain covenants therein contained by Sir Robert Burnett, his executors, administrators, and assigns, to be performed. The following covenants were then set out:

"To paint the outside woodwork of the house, and the iron railing . . . once in every five years, to repair during the term, and to yield up the premises sufficiently repaired at the expiration of the term, and to keep in proper order and condition the garden and gravel walks, preserve the fruit trees therein, and to replace such shrubs and fruit trees as might die or decay with others of an equally good or better sort; and at the end of the said term leave the garden walls properly planted with fruit trees, and the kitchen garden ground properly planted with vegetables and roots."

In 1817 the plaintiffs, the executors of Sir Robert Burnett assigned the lease to the defendant to hold from Sept. 29, 1817, for the residue of the term under and subject to the payment of the rents thereby reserved, and to the performance of the covenants therein contained on the part and behalf of Sir Robert Burnett, since deceased, his executors, administrators, and assigns. The defendant entered into and upon the demised premises, and it then became his duty, as assignee, to perform all and singular the rents and covenants in the lease during so much of the residue of the term as he, the defendant, should remain possessed of the demised premises as such assignee. Nevertheless, the plaintiffs said, the defendant, not regarding his said duty in that behalf, committed breaches of the covenants to repair, as a result of which the lessor instituted proceedings and obtained judgment against the plaintiffs for £1,165 damages. The plaintiffs also incurred costs amounting to £500 and other charges in defending the action, and they now claimed £2,000 from the defendant.

At the trial before Best, C.J., at the summer assizes for the county of Surrey, 1825, the plaintiffs proved that the original lease which had been granted by the lessor to Sir Robert Burnett had been delivered to the defendant, and they proved the execution of the counterpart by the testimony of the subscribing witness. The defendant's counsel then put in the lease itself, which was produced by the solicitor of one Daniel to whom the defendant had assigned the term by a deed reciting the lease. It was then insisted, on the authority of *Gordon* v. *Secretan* (1), that it was incumbent on the plaintiffs to prove the execution of the lease by calling the subscribing witness, but Best, C.J., was of opinion that, as the lease was produced on the part of the defendant who had taken a beneficial interest under it by accepting the assignment, proof of the execution of it by the subscribing witness was unnecessary. Best, C.J., was of opinion that, as the defendant had accepted the

assignment subject to the performance of the covenants contained in the lease, he was liable in damages to the plaintiffs for all those breaches of duty (which in the lessee would have been breaches of the covenants in the lease) committed during the time he, the defendant, continued assignee of the term.

A verdict having been found for the plaintiffs for £1,350, counsel for the defendant moved for a rule for a new trial and in arrest of judgment. The grounds upon which he applied for the new trial were, first, that there was a variance between the allegation in the declaration, and the proof; and, secondly, that the lease had not been duly proved. The grounds alleged for arresting the judgment were that, as between the lessee and the assignee, the law did not by implication raise any duty in the latter to perform the covenants in the lease, but that it required an express contract to render an assignee liable to the lessee for breaches of those covenants. It was also contended first, that no action was maintainable by the lessee against the assignee, there being no contract between them that the latter should indemnify the former against any breaches of covenant; and, secondly, assuming from the fact of the defendant's having accepted the premises assigned subject to the payment of the rent and the performance of the covenants, that the law would imply a covenant or promise to indemnify, then, either covenant or assumpsit was the proper form of action. The court were of opinion that the allegation in the declaration was sufficiently proved. But on the other two points they granted a rule nisi for a new trial, or for arresting the judgment.

Marryat, *Barnewall* and *Starr* for the plaintiffs, showed cause against the rule.
Serjeant Taddy and *Platt* for the defendant, supported the rule.

ABBOTT, C.J.—I am of opinion that this rule ought to be discharged. The ground of the application for a new trial was that, although the lease made to the testator of the plaintiffs was produced either by the defendant or a person claiming under him, it could not be used in evidence by the plaintiffs without calling the subscribing witness to prove the execution of that instrument. I am clearly of opinion that as against the present defendant it was unnecessary, both with reference to the subject-matter of the lease and with reference to the parties. It was proved at the trial that the plaintiffs' testator had executed a lease, that the plaintiffs, his executors, had assigned that lease to the defendant, and that the latter had executed a deed by which that lease was again assigned to one Daniel, which deed so executed by the defendant recited the lease which had been granted to the testator of the plaintiffs. That recital was, as against the defendant, abundant evidence of the existence of the original lease. Upon that short ground, I think the lease was sufficiently proved. Upon the other ground also, I think, that the evidence was sufficient, because, although the defendant had quitted possession before the lease expired, still he had held under the very lease during part of the term.

As to the motion in arrest of judgment, the facts appear to stand thus. A lease had been granted to Sir Robert Burnett whereby he had covenanted to pay rent and perform the other covenants contained in the lease. The plaintiffs (his executors) assigned that lease to Lynch, the defendant, and by the terms of that assignment Lynch was to hold subject not only to the payment of rent but also to the performance of the covenants. It is true he entered into no express covenant or contract that he would pay the rent and perform the covenants, but he accepted the assignment subject to the performance of the covenants, and we are first to consider whether any action will lie against him.

If we should hold that no action will lie, the consequence will follow that a man, having taken an estate from another subject to the payment of rent and the performance of the covenants, and having thereby induced an understanding in that other that he would pay the rent and perform the covenants, will be allowed to cast that burden upon the other person. Reason and common sense

show that that never could be intended, and if the law of England allowed any such consequence to follow, it would cease to be a rule of reason.

If some action will lie, the next question arises: What must be the form of the action? It has been contended that, if any action will lie, it must be an action of covenant. I think an action of covenant is not maintainable, for an action of covenant is of a technical nature. It cannot be maintained except against a person who, by himself or some other person acting on his behalf, has executed a deed under seal, or who (under some very peculiar circumstances, such as those mentioned in Co. LITT. 231 a) has agreed by deed to do a certain thing. Here the defendant has not engaged by deed to perform the covenants, and, consequently, covenant will not lie. Then will an action of assumpsit [breach of contract] lie? I think it would, but why? Because the defendant has, by taking the estate subject to the payment of rent and the performance of the covenants in the original lease, thereby made it his duty to pay the rent and perform the covenants, and if by neglecting that duty a burden is cast upon the person from whom he took the estate, it seems to me that the law will imply a promise as arising out of that duty and in that case the action of assumpsit will lie.

But it by no means follows that because a promise may be implied by law this action on the case, which is in terms founded on the breach of that duty from which the law implies a promise, may not also be maintainable. *Kinlyside* v. *Thornton* (2) is an authority from which it may be inferred that either assumpsit or case will lie. The only case which militates against the plaintiffs is that of *Jones* v. *Hill* (3), the facts of which were very similar to the present, but I think the attention of the court was not called to the true ground on which the plaintiffs' case was founded. It was contended for the plaintiffs that an action on the case was not maintainable for permissive waste. The court did not decide that point, but merely that it was impossible it should be waste to omit to put the premises into such repair as A. B. had put them into. *Kinlyside* v. *Thornton* (2) was there cited, but it was not argued that by the acceptance of the assignment it became the duty of the assignee to do the very thing, the omission to do which was made the subject of complaint. The case was not put on the ground that a duty had arisen. Here that ground has been taken, and I think that a duty did arise when the defendant accepted the assignment of the lease subject to the performance of the covenants, and that, as a breach of that duty has been committed, a special action on the case may be maintained. The rule for a new trial, and for arresting the judgment, must, therefore, be discharged.

BAYLEY, J.—I agree with my Lord Chief Justice upon both points. My opinion upon the first point is founded upon this, that the deed came out of the possession of a party who must be considered as identified with the defendant, and that it was a deed under which the defendant and the party claiming under him had taken all the interest which they professed to take. A distinction has been taken between this and the cases cited in argument on the ground that the defendant at the time when the deed was produced in this case had no longer any existing interest under the deed. I think that is immaterial. My opinion is that it is not competent to a party who has taken under a deed all the interest which that deed was calculated to give to dispute its due execution.

Upon the other point it is not necessary to decide whether assumpsit or covenant will lie, but I have no difficulty in saying that an action upon the case founded upon the tort will lie on the ground that on the facts stated in this declaration the law raises a duty in the defendant to perform the covenants, there has been a breach of that duty, and damage has accrued to the plaintiffs in consequence of that breach of duty. The defendant took the lease as the assignee of the plaintiffs, subject to the payment of the rent and the performance of the covenants. Sir Robert Burnett (or his representative) in the character of lessee was liable by express covenant to the lessor for the performance of the covenants in the lease.

The lessor had a right from time to time to claim from Sir Robert Burnett the rent and compensation for the non-performance of the covenants. As soon as the lessee assigned the lessor had his option to claim his rent or compensation for the non-performance of the covenants either from the lessee or his assignee. The lessee could not be hurt if it was claimed of him if he had his remedy over against the assignee, and the assignee could not be hurt because he had taken the property subject to the payment of rent and the performance of the covenants. If he has been guilty of negligence with reference to those conditions and the plaintiffs have been damnified by that negligence, they have thereby acquired a right of action. There is a duty from the defendant to the plaintiffs implied from the very nature and state of things which existed between the parties. That duty appears to me to be very accurately stated in the declaration where it is described as commensurate with the time during which the assignee had an interest in the premises.

It is unnecessary to go through the cases in which it has been decided, that although there be an express contract, a party is not bound to resort to that contract as the gist of the action, but he may declare on the tort, and say that the party has neglected to perform his duty. In *Dickon* v. *Clifton* (4), the plaintiff, an owner of a ship, declared that he had employed the defendant to be master and commander of the vessel, to receive on board at Brough, in the county of York, fifty-six quarters of malt, and to carry and convey the same by water thence to a place called H. in Yorkshire, and at H. to deliver the same to A. B. There can be no doubt that an action of assumpsit might have been maintained against the captain for not receiving and carrying the corn, or for not taking care of the cargo, but there the plaintiff described the contract in specific terms, and brought case against the defendant for negligence in the performance of his duty. That could only be because the express contract between the parties created a duty, for the breach of which an action of tort might be maintained.

The decision in *Bretherton* v. *Wood* (5), and other cases, are all founded upon the same ground. This is not an action upon the case in the nature of waste, but an action brought by a party to recover compensation in damages because the defendant has not performed that duty which between him and the plaintiffs he was bound to perform. They were in the relative situation of lessee and assignee: and the assignee having accepted the premises subject to the performance of the covenants, there was a duty imposed upon him by law to perform those covenants: there was a neglect of that duty, and a damage accruing therefrom to the plaintiffs. To recover a compensation for that damage, I think the action was maintainable.

HOLROYD, J. I think that the lease was properly received in evidence without proof of execution by the subscribing witness inasmuch as it came out of the hands of the defendant or of a person who claimed under the defendant and had enjoyed the premises under it. Coming from such parties, I think it might be taken as evidence without any other proof.

The other question lies in a very narrow compass. The plaintiffs, as the representatives of the testator, were subject to the payment of rent and the performance of the covenants contained in the lease. The declaration alleges that the defendant knew of those circumstances. The plaintiffs assigned the lease to the defendant subject to the payment of the rent and the performance of the covenants, and the defendant entered into possession. The consequence was that he thereby took away the tenancy from the original lessee and it became vested in him as assignee. He had the benefit of the estate, and then upon the maxim qui commodum sentit onus et sentire debet, he is liable. Unless there had been an express covenant the lessor could not sue the original lessee for a breach of the covenants committed after he had assigned. Then what is the effect of the assignment? The assignee by virtue of it stands in the situation of the lessee, and becomes bound to pay the rent and to perform the covenants. By accepting the assignment, he states that he is subject to the rent and the performance of the covenants. I think, therefore, that he is

bound to perform them not merely by a moral obligation, but by a legal obligation, created by the common law, from the facts stated in the declaration. The assignee standing in the situation of the original lessee is liable by the common law to all the duties which were cast upon the lessee by means of his covenants in the lease. If that be so, the consequence seems to follow that an action on the case will lie against the assignee when he neglects to discharge those duties. I think that is the proper remedy.

I have considerable doubt whether covenant would lie, but, even if it would, that would not take away from the plaintiffs the right to maintain an action upon the case. If neither case nor covenant is maintainable, the consequence would be that the plaintiffs, who have paid large damages for breaches of covenant committed after they assigned, would have no remedy, and the defendant, although he had the benefit of the estate, would not be bound either to pay rent or perform the covenants. It would be pregnant with great injustice if we were compelled so to decide. I think, however, that we are justified by the principles of the common law in holding that the defendant is liable in this form of action.

LITTLEDALE, J., agreed that sufficient evidence was given of the execution of the lease, for the reasons already stated by the court, and that damage resulting to the plaintiffs from a breach of duty by the defendant was a proper subject for an action on the case in tort.

In the course of his judgment his Lordship said: An action of covenant will lie by the lessee against the lessor upon the word "demise" in the lease; that word imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term, and, therefore, if the lessee be ousted during the term, an action of covenant will lie by him against the lessor.

Rule discharged.

EARL OF FALMOUTH *v.* THOMAS

[COURT OF EXCHEQUER (Lord Lyndhurst, C.B., Bayley and Bolland, BB.), November 12, 14, 1832]

[Reported 1 Cr. & M. 89; 3 Tyr. 26; 2 L.J.Ex. 57; 149 E.R. 326]

Sale of Land—Interest in land—Growing crops—Payment by incoming tenant for crops and labour and materials employed in production—Need for contract to be in writing.

By s. 4 of the Statute of Frauds, 1677 [repealed by the Law of Property Act, 1925, Sched. 7, and substantially re-enacted by s. 40 of that Act]: "No action shall be brought . . . upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith . . ."

A verbal agreement was made between the plaintiff and the defendant for the sale to the defendant, an incoming tenant, of certain crops then growing on the plaintiff's land, and for payment by the defendant to the plaintiff at a valuation for work and labour done and materials used in preparing the land for tillage. In an action by the plaintiff to recover for the crops, work and labour, and materials, and for an account stated,

Held: (i) the right to the crops and the benefit of the work and labour and materials were so incorporated with the land as to be inseparable from it and were both of them an interest in the land, and, therefore, the agreement relating to them not being in writing, it was not enforceable, and the action failed; (ii) the claim for an account stated, being based on the unenforceable contract, also failed.

Notes. The Statute of Frauds, s. 4, was repealed by the Law of Property Act, 1925, and was substantially re-enacted by s. 40 of that Act.

Applied: *Harvey* v. *Grabham* (1836), 5 Ad. & El. 61. Explained: *Jones* v. *Flint* (1839), 10 Ad. & El. 753; *Martyn* v. *Clue* (1852), 18 Q.B. 661, *Re Laycock* v. *Pickles* (1863), 4 B. & S. 497. Referred to: *Hallen* v. *Runder* (1834), 3 Tyr. 959; *Harman* v. *Reeve* (1856), 18 C.B. 587.

As to contracts required to be in writing, see 8 HALSBURY'S LAWS (3rd Edn.) 87 et seq.; and for cases see 12 DIGEST (Repl.) 133 et seq. For the Statute of Frauds, see 4 HALSBURY'S STATUTES (2nd Edn.) 658, and for the Law of Property Act, 1925, see ibid., vol. 20, p. 427.

Case referred to:

(1) *Teal* v. *Auty* (1820), 2 Brod. & Bing. 99; 4 Moore, C.P. 542; 129 E.R. 895; 12 Digest (Repl.) 186, *1274*.

Also referred to in argument:

Warn v. *Bickford* (1819), 7 Price, 550; 146 E.R. 1058; 40 Digest (Repl.) 409, *42*.

Knight v. *Keech* (1693), Skin. 344; 90 E.R. 153.

Mayfield v. *Wadsley* (1824), 3 B. & C. 357; 5 Dow. & Ry. K.B. 224; 3 L.J.O.S.K.B. 31; 107 E.R. 766; 12 Digest (Repl.) 141, *886*.

Thomas v. *Williams* (1830), 10 B. & C. 664; 5 Man. & Ry. K.B. 625; 8 L.J.O.S.K.B. 314; 109 E.R. 597; 12 Digest (Repl.) 141, *883*.

Chater v. *Beckett* (1797), 7 Term Rep. 201; 101 E.R. 931; 12 Digest (Repl.) 142, *892*.

Neal v. *Viney* (1808), 1 Camp. 471; 170 E.R. 1025, N.P.; 39 Digest (Repl.) 618, *1310*.

Harris v. *Mantle* (1789), 3 Term Rep. 307; 100 E.R. 591; 2 Digest (Repl.) 54, *285*.

Evans v. *Roberts* (1826), 5 B. & C. 829; 8 Dow. & Ry. K.B. 611; 4 L.J.O.S.K.B. 313; 108 E.R. 309; 2 Digest (Repl.) 36, *171*.

Smith v. *Surman* (1829), 9 B. & C. 561; 4 Man. & Ry. K.B. 455; 7 L.J.O.S.K.B. 296; 109 E.R. 209; 2 Digest (Repl.) 35, *164*.

Leeds v. *Burrows* (1810), 12 East, 1; 104 E.R. 1; 2 Digest (Repl.) 66, *376*.

Knowles v. *Michel* (1811), 13 East, 249; 104 E.R. 366; 12 Digest (Repl.) 186, *1273*.

Crosby v. *Wadsworth* (1805), 6 East, 602; 2 Smith, K.B. 559; 102 E.R. 1419; 2 Digest (Repl.) 34, *155*.

Poulter v. *Killingbeck* (1799), 1 Bos. & P. 397; 216 E.R. 973; 2 Digest (Repl.) 35, *158*.

Action on a verbal agreement for the sale by the plaintiff to the defendant of growing crops and for the payment by the defendant for work and labour done and materials used by the plaintiff in preparing the land for tillage, and for an account stated.

The plaintiff was possessed of a farm on which were certain growing crops and on which he had done certain work and labour, and used certain materials to make the land ready for tillage. In consideration that the plaintiff would let the farm to the defendant for fourteen years, the defendant verbally undertook to take the crops, and pay for them, and also to pay for the work, labour, and materials according to a valuation. The plaintiff let the farm, and left the crops upon it, and the defendant took possession of the farm and had the benefit of the work, labour, and materials; but, the plaintiff alleged, he did not make the payments which under the agreement he was liable to make.

Addison for the defendant, on a demurrer.

Follett for the plaintiff.

Cur. adv. vult.

A **LORD LYNDHURST, C.B.,** delivered the following judgment of the court.—The plaintiff insists upon three demands against the defendant—one for growing crops, one for work, labour, and materials, and the third for the mismanagement of a farm, and the questions are whether he is not prevented by the Statute of Frauds from recovering upon the first and second of these claims and whether the breach upon the third is not laid too generally.

B The first count of the declaration states that the plaintiff was possessed of a farm upon which were certain crops of corn and turnips, and on which he had done certain work and labour and expended certain materials in making it ready for tillage, of which work, labour, and materials he had not derived the benefit, and thereupon, in consideration that the plaintiff would let him the farm for fourteen years, the defendant undertook to take the crops, and pay for them, and for the C work, labour, and materials, according to a valuation. It is then averred that the plaintiff let the farm accordingly, and left the crops upon it, and the defendant took possession of the farm and crops and had the benefit of the work, labour, and materials. The second count is nearly similar. In the third and fourth counts it is stated that, in consideration that the plaintiff would agree to let the farm to the defendant for a term of fourteen years and would suffer him to enter and take the D crops to his own use and have the benefit of the work, labour, and materials, the defendant undertook to take the crops and allow the plaintiff for the same and for the work and labour and materials according to a valuation. It is then averred that the plaintiff did agree to let the farm for the said term, did leave the crops upon the premises, and suffered the defendant to enter and have the crops and the benefit of the work, labour, and materials, and the defendant did enter and take the crops E and had the benefit of the work, labour and materials.

To these four counts the defendant has pleaded that the crops and the benefit of the work and labour and materials, were not excepted or reserved out of the lettings or agreements to let, and that there was no agreement in writing in respect of the causes of action in those counts mentioned, or any memorandum or note thereof. F The effect of these pleadings is to raise the objection of the Statute of Frauds to the plaintiff's claim to recover on the four first counts of the declaration. By s. 4 of the statute no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing. The question is whether these counts are founded upon a contract for G an interest in land.

At the time when each of these contracts upon which the plaintiff sues is stated to have been made the crops were growing upon the land, the defendant was to have had the land as well as the crops, and the work, labour, and materials were so incorporated with the land as to be inseparable from it. The defendant would not have the benefit of the work, labour, and materials, unless he had the land, and H we are of opinion that the right to the crops and the benefit of the work, labour, and materials, were both of them an interest in the land, but if either of the two were properly an interest in land, this would form a sufficient objection to the special counts, for the crops and work and labour united, are the consideration in each count, and, if either part of the consideration fails, the plaintiff cannot be entitled to recover.

I The next claim in the declaration is contained in the indebitatus count, which states that the defendant was indebted in £200 for crops bargained and sold, and by the defendant, under and by virtue of that bargain and sale, before then accepted, had and received, and cut down and taken to his own use. To this the defendant has pleaded that the crops, at the time of the bargain and sale, were growing upon and affixed to certain lands of the plaintiff, then in his possession, and that just before the bargain and sale there was a treaty on foot between the plaintiff and the defendant by which it was proposed that the plaintiff should let the lands to the defendant for fourteen years and should take therewith the said crops; the defendant

assented to that treaty; and thereupon, in order to carry the treaty into execution, the said supposed bargain and sale was verbally contracted between the plaintiff and defendant, and that there was no agreement in writing of the said cause of action or any memorandum or note thereof. To this plea the plaintiff has demurred. He insists that, inasmuch as it is alleged and admitted that the defendant had these crops, he is liable to pay for them, and the Statute of Frauds is no bar, and he relies on *Teal* v. *Auty* (1) for that proposition. But, admitting that the defendant is to pay for the crops, he ought to pay for them, not upon the terms and footing of that bargain and sale, but upon a quantum meruit. The crops, at the time of the bargain and sale, were, upon these pleadings, an interest in the land, and to allow the plaintiff to recover upon this bargain and sale, and to have the price regulated by it would be in direct opposition to the statute, because it would be giving effect to an action upon a verbal contract for an interest in lands.

The next claim is for the work and labour and materials to which there is, in substance, a similar plea, and if the claim as to the crops cannot be supported it follows, a fortiori, that this also must fail. Upon the pleadings it was a contract for that which was, at the time of such contract, an interest in the land, and for that which never was and never could be separated from it. The last claim in respect of the crops and of the work and labour and materials is upon an account stated, and the defendant states that before the taking of the account there was a verbal agreement for the crops which were growing on the plaintiff's land and for the work and labour and materials in preparing a part of the plaintiff's land for tillage; that there was a treaty for the plaintiff's letting and the defendant's taking the land for fourteen years, to which the defendant assented; and that the money to be paid for the crops, and the work, labour and materials was the money concerning which the account was stated, and that there was no agreement in writing of and concerning the said cause of action or any memorandum or note thereof. To this plea the plaintiff has replied that before the account was stated the defendant had mown the crops and taken them to his own use, and had and received the amount of the work and labour and materials, and the defendant, though he admits he did cut down the crops, etc., and receive the amount of the work and labour, insists that he did not cut down the crops, or have the amount of the work and labour until after the stating of the account. The plaintiff's object, therefore, upon the account stated is to take the case out of the operation of the Statute of Frauds, and to charge the defendant upon a new contract, a contract which the law would imply from the defendant's taking the crops and receiving the benefit of the work, labour, and materials, but this object the defendant has defeated by showing that the account was stated when the case stood wholly upon the original contract and before the mowing of the crops, which was to raise a new contract, had occurred. The objection upon the Statute of Frauds applies to the count upon the account stated as well as to the other counts.

The only remaining question is upon the seventh count of the declaration, and the objection to that count is, that it is too general. That count is founded upon a promise in consideration of the defendant being tenant to the plaintiff of a certain farm to manage it in a good and husbandlike manner, and according to the custom of the country where the farm was. The breach was that he did not, but, on the contrary, managed it in a bad and unhusbandlike manner and contrary to the custom of the country where the farm was. The defendant has demurred specially on the grounds that the breach is too general, that the count does not show what the custom of the country is or what the defendant has committed contrary to the custom of the country, nor in what he has broken the custom, and that the defendant is not sufficiently informed, by that count, of the cause of action of which the plaintiff complains against him. The count is certainly general, and it might be safer for the plaintiff to amend, than to hazard the opinion of a court of error.

Judgment accordingly.

FORTESCUE *v.* BARNETT

[ROLLS COURT (Sir John Leach, M.R.), January 20, 1834]

[Reported 3 My. & K. 36; 3 L.J.Ch. 106; 40 E.R. 14]

Trust—Completely constituted trust—Enforcement by trustee—Deed of assignment of life policy delivered to trustee by settlor—Policy retained by settlor.

J. B. made a voluntary assignment by deed of a policy of assurance upon his life for £1,000 to trustees upon trust for the benefit of his sister and her children if she or they should outlive him. The deed was delivered to one of the trustees, and J. B. kept the policy in his own possession. No notice of the assignment was given to the assurance office, and J. B. afterwards surrendered to the assurance office for a valuable consideration the policy and a bonus declared upon it. Upon a bill filed by the surviving trustee of the deed to have the value of the policy replaced,

Held: on the delivery of the deed no act remained to be done by the grantor to give effect to the assignment of the policy, and he was bound to give security to the amount of the value of the policy assigned by the deed.

Notes. Explained: *Edwards* v. *Jones* (1836), 1 My. & Cr. 226; *Ward* v. *Audland* (1845), 8 Beav. 201. Considered: *Bizzey* v. *Flight* (1876), 24 W.R. 957. Applied: *Re King, Sewell* v. *King* (1879), 14 Ch.D. 179. Referred to: *Kekewich* v. *Manning* (1851), 1 De G.M. & G. 176; *Bridge* v. *Bridge* (1852), 16 Beav. 315; *Donaldson* v. *Donaldson* (1854), 23 L.T.O.S. 306; *Pearson* v. *Amicable Assurance Office* (1859), 27 Beav. 229; *Re Richardson, Weston* v. *Richardson* (1882), 47 L.T. 514; *Re Patrick, Bills* v. *Tatham*, [1891] 1 Ch. 82; *Re Griffin, Griffin* v. *Griffin*, [1899] 1 Ch. 408; *Re Williams, Williams* v. *Ball*, [1917] 1 Ch. 1

As to completely constituted trusts, see 38 HALSBURY'S LAWS (3rd Edn.) 836; and for cases see 43 DIGEST 629.

Cases referred to in argument:

Barlow v. *Heneage* (1702), Prec. Ch. 210; 2 Eq. Cas. Abr. 283; 24 E.R. 103; 17 Digest (Repl.) 225, *259*.

Bale v. *Newton* (1687), 1 Vern. 464; 1 Eq. Cas. Abr. 23; 23 E.R. 589; 40 Digest (Repl.) 589, *928*.

Scar v. *Ashwell* (1739), 3 Swan. 411, n.; 36 E.R. 928, L.C.; 40 Digest (Repl.) 589, *930*.

Bolton v. *Bolton* (1739), 3 Swan. 414, n.; 36 E.R. 930, L.C.; 40 Digest (Repl.) 589, *931*.

Ex parte Pye, Ex parte Dubost (1811), 18 Ves. 140; 34 E.R. 271, L.C.; 25 Digest (Repl.) 585, *251*.

Colman v. *Sarel, Sarel* v. *Colman* (1789), 3 Bro. C.C. 12; 1 Ves. 50; 29 E.R. 379, L.C.; 44 Digest (Repl.) 11, *41*.

Ellison v. *Ellison* (1802), 6 Ves. 656; 31 E.R. 1243, L.C.; 25 Digest (Repl.) 585, *250*.

Pulvertoft v. *Pulvertoft* (1811), 18 Ves. 84; 34 E.R. 249, L.C.; 25 Digest (Repl.) 268, *760*.

Action by which the plaintiff William Fortescue, the surviving trustee under a deed of assignment, sought an order that the defendant John Barnett, should replace or give security for the value of a life policy assigned to the trustees by such deed, but later surrendered by the defendant.

The defendant John Barnett, shortly after the marriage of his sister, Mary Barnett, with Henry White, executed an indenture dated Dec. 17, 1813, and made between himself of the first part, the said Henry White, since deceased, of the second part, Mary White, the wife of Henry White, of the third part, and the plaintiff William Fortescue, and Thomas White, deceased, of the fourth part, whereby, after reciting that the Equitable Assurance Society had, by a policy of assurance

dated Sept. 27, 1811, assured to be paid to the executors, administrators, and assigns of John Barnett after his decease £1,000 on payment of the annual premium of £25 11s., it was witnessed that in consideration of the marriage then lately solemnised between Henry White and Mary White, and for making some provision for the said Mary White and her child or children, if she, or any such child or children, should survive John Barnett, he, the said John Barnett, assigned and transferred to William Fortescue and Thomas White the said policy of assurance, and the sum of £1,000 thereby assured, and all interest and produce to become due or payable by virtue thereof, and all his right and interest therein, to hold to William Fortescue and Thomas White, their executors, administrators, or assigns upon trust, in case Mary White and all and every her child and children should happen to die in the lifetime of John Barnett, for John Barnett, his executors, administrators, and assigns, and to re-assign the same to him and them accordingly; but if Mary White, or any child or children of Mary White, should happen to outlive John Barnett, then in trust, that William Fortescue, and Thomas White, their executors, administrators, or assigns, should invest the said sum of £1,000, and all other money which should become due on the said policy, in the public stocks or funds upon the trusts therein declared for the benefit of Mary White and her child or children. The deed contained a covenant on the part of John Barnett for himself, his executors and administrators, to pay and keep up the annual premiums payable upon the policy.

This deed was delivered to Thomas White, one of the trustees named therein, and remained in his possession until his death in October, 1832; but the defendant Barnett retained possession of the policy of assurance. Shortly after the death of Thomas White, the deed was sent by one of his executors to William Fortescue, the surviving trustee, who, upon application at the office of the Equitable Assurance Society, was informed that no notice had ever been given to the society of the assignment of the policy; that in July, 1830, a bonus of £795, payable upon the death of John Barnett, had been declared on the policy, which bonus was surrendered by Barnett to the society in the same month of July, in consideration of the sum of £394 15s.; and that in November, 1832, Barnett surrendered the policy itself to the society, in consideration of the further sum of £326 13s.

The bill was originally filed by Fortescue against Barnett alone, for the purpose of compelling him to replace or give security for the value of the policy and bonus so surrendered, and of all bonuses which might have accued, or have been capable of being declared thereafter, if the policy had not been surrendered; but the defendant demurred to the bill for want of parties, and, the demurrer being allowed (1 Coop. temp. Cott. 367), Mrs. White and her children were made parties by amendment, leave having been given for that purpose.

The bill prayed that the defendant Barnett might be decreed to pay to the plaintiff, or otherwise secure upon the trusts of the indenture of Dec. 17, 1813, the sum of £1,795, being the amount of the sum secured by the policy, together with the bonus declared thereon, and such further sum as should be sufficient to answer all future bonuses which, according to the regulations of the Equitable Assurance Co., would have accrued due in respect of the policy, if it had not been surrendered.

The defendant Barnett, by his answer, stated that the settlement of the policy was a mere voluntary act on his part, and made out of his personal regard for his sister; and that he executed the settlement under the impression that he should have the control of the policy during his life, and power, if he thought fit, to revoke or alter the disposition of the same. He further stated that the policy had been surrendered after the death of Mrs. White's husband, and with her consent, in order to save the expense of the annual premium, and with the understanding that the amount of the premium should be annually paid to Mrs. White, which had, in fact, been done. The defendant further stated that, at the time of surrendering the policy, he executed a codicil to his will, whereby he made a provision for Mrs White and her children to the extent of £1,000, and that he put Mrs. White, at the

same time, into possession of a freehold estate of the value of £400, of which she had ever since received the rents and profits, and that he had devised such freehold estate to her eldest son by his will.

The question in the cause was whether the defendant was or was not bound to replace or give security for the value of the policy.

Bickersteth and *Willcock* for the plaintiff.

Rolfe for the widow, disclaimed any desire on her part to obtain relief in this suit, to which she was an unwilling party. The defendant had been her greatest benefactor, and she was satisfied that whatever steps he had taken in this transaction had been taken with a view to her benefit, and the interests of her children.

Pemberton and *W. C. L. Keene* for the defendant Barnett.

SIR JOHN LEACH, M.R.—In the case of a voluntary assignment of a bond, where the bond is not delivered, but kept in the possession of the assignor, this court would undoubtedly, in the administration of the assets of the assignor, consider the bond as a debt to the assignee. There is a plain distinction between an assignment of stock where the stock has not been transferred, and an assignment of a bond. In the former case the material act remains to be done by the grantor, and nothing is, in fact, done which will entitle the assignee to the aid of this court until the stock is transferred, whereas the court will admit the assignee of the bond as a creditor.

In the present case the gift of the policy appears to me to have been perfectly complete without delivery. Nothing remained to be done by the grantor, nor could he have done what he afterwards did to defeat his own grant if the trustees had given notice of the assignment to the assurance office. The question does not here turn upon any distinction between a legal and an equitable title, but simply upon whether any act remained to be done by the grantor which, to assist a volunteer, this court would not compel him to do. I am of opinion that no act remained to be done to complete the title of the trustees. The trustees ought to have given notice of the assignment; but their omission to give notice cannot affect the cestuis que trust. The defendant appears to have acted in this transaction with the purest intentions, but he has rendered himself amenable to the jurisdiction of this court, and he must give security to the amount of the value of the policy assigned by the deed of settlement. The plaintiff is entitled to costs.

His Honour decreed, "that the defendant, John Barnett, do enter into security to be answerable to all the parties who are or shall become entitled under the trusts of the indenture of Dec. 17, 1813, to the value of the policy of assurance effected in the Equitable Assurance Office, and bearing date Sept. 27, 1811, for £1,000 in the indenture mentioned, together with the bonuses, which, according to the rules and regulations of the said assurance office, have been declared, or might have been declared, or would hereafter have been [capable of being] declared on the said policy if the same had been kept up, and such security is to be settled by the Master in rotation. And it is ordered, that the said defendant, John Barnett, do pay the costs of the suit."

Order as above.

DOORMAN *v.* JENKINS

[COURT OF KING'S BENCH (Lord Denman, C.J., Taunton, Patteson and Williams, JJ.), November 20, 1834]

[Reported 2 Ad. & El. 256; 4 Nev. & M.K.B. 170; 4 L.J.K.B. 29; 111 E.R. 99]

Bailment—Gratuitous bailment—Need to prove gross negligence—Loss of money bailed—Money kept by bailee with his own money.

The defendant, a coffee-house proprietor, had the custody of money belonging to the plaintiff without reward. He placed the money, together with a much larger sum belonging to himself, in his cash-box which was kept in the tap-room of the house. The tap-room was open on a Sunday, but the other parts of the premises, which were inhabited by the defendant and his family, were not open. The cash box was stolen on a Sunday from the tap-room. In an action to recover the amount of the lost money the judge left it to the jury whether the defendant was guilty of gross negligence, telling them that it did not follow from the defendant's having lost his own money at the same time as the plaintiff's that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own. The jury having found for the plaintiff,

Held: it being admitted that, as the bailment was for the benefit of the bailor and no remuneration was given to the bailee the action would not be maintainable except on proof of gross negligence, the question of gross negligence had properly been left to the jury and there was evidence on which they might find for the plaintiff.

Notes. Referred to: *Balfe* v. *West* (1853), 13 C.B. 466; *Giblin* v. *McMullen* (1868), L.R. 2 P.C. 317; *Whitehouse* v. *Pickett*, [1908] A.C. 353; *Newman* v. *Bourne and Hollingsworth* (1915), 31 T.L.R. 209.

As to gratuitous bailment, see 2 HALSBURY'S LAWS (3rd Edn.) 97 et seq.; and for cases see 3 DIGEST (Repl.) 62 et seq.

Cases referred to:

(1) *Shiells* v. *Blackburne* (1789), 1 Hy. Bl. 158; 126 E.R. 94; 3 Digest (Repl.) 71, *111*.

(2) *Reece* v. *Righy* (1821), 4 B. & Ald. 202; 106 E.R. 912; 43 Digest (Repl.) 105, *940*.

(3) *Moore* v. *Mourgue* (1776), 2 Cowp. 479; 98 E.R. 1197; 1 Digest (Repl.) 484, *1268*.

Rule Nisi obtained by the defendant to show cause why a verdict for the plaintiff should not be set aside, a nonsuit entered or a new trial ordered in an action of assumpsit brought by the plaintiff to recover a sum of money which he had deposited with the defendant in order that the defendant might take up a bill of exchange of the plaintiff's. The plaintiff alleged that the defendant had not taken it up and had lost the money.

At the trial before LORD DENMAN, C.J., at Guildhall it appeared that the defendant was the proprietor of the Auction Mart Coffee House, which consisted of a coffee-room and several private apartments, together with a tap-room which had a bar in it. The plaintiff who frequented the coffee-house gave the defendant £32 10s. so that he might take up and pay for the plaintiff a bill of exchange. There was no consideration for the bailment or for the service. The defendant placed the money in his cash-box which was kept in the tap-room. The tap-room was open on a Sunday, but the other parts of the premises which were inhabited by the defendant and his family were not open on Sunday. The cash-box, with the plaintiff's money in it, and also about £200 belonging to the defendant, was stolen from the tap-room on a Sunday. The defendant did not pay the bill when presented, nor was the £32 10s. returned to the plaintiff.

A LORD DENMAN, C.J., told the jury that it did not follow from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and he added that the fact relied on was no answer to the action if they believed that the loss occurred from gross negligence; but his Lordship said that the evidence of gross negligence was not, in his opinion, satisfactory. The jury B found a verdict for the plaintiff. *Sir James Scarlett* for the defendant obtained a rule to show cause why the verdict should not be set aside, and a nonsuit be entered, or a new trial be had.

Sir John Campbell and *R. V. Richards* for the plaintiff, showed cause against the rule.

C *Sir James Scarlett* and *Comyn* for the defendant, supported the rule.

TAUNTON, J.—I have felt some doubt in this case—but, after the best consideration which I can give it, I think that the rule ought not to be made absolute. Counsel for the plaintiff properly admitted that, as this bailment was for the benefit of the bailor and no remuneration was given to the bailee, the action would not be maintainable except in the case of gross negligence. The sole question, therefore, D is whether there was any proof of such negligence. If there was, the application for a nonsuit at any rate cannot be granted; and it is almost (though not quite) equally clear that the defendant must be bound by the decision to which the jury has come.

A great deal has been said on the point whether the existence of gross negligence E is a question of law or fact. It is not necessary to enter into that as an abstract question. Such a question will always depend on circumstances. There may be cases where the question of gross negligence is matter of law more than of fact, and others where it is matter of fact more than of law. An action brought against an attorney for negligence turns on matter of law rather than fact. It charges the attorney with having undertaken to perform the business properly and alleges that, F from his failure so to do, such and such injuries resulted to the plaintiff. In nineteen cases out of twenty, unless the court told the jury that the injurious results did, in point of law, follow from the misconduct of the defendant, they would be utterly unable to form a judgment on the matter. Yet, even there, the jury have to determine whether, in point of fact, the defendant has been guilty of that particular misconduct. On the other hand, take the case of an action against a surgeon for G negligence in the treatment of his patient. What law can there possibly be in the question whether such and such conduct amounts to negligence That must be determined entirely by the jury. Without, therefore, laying down any abstract rule, we may, I think, with perfect safety say that, in the present case, the question was entirely for the jury. It is fact, not law.

The circumstances are extremely simple. The defendant receives money to be H kept for the plaintiff. What care does he exercise? He puts it, together with money of his own (which I think perfectly immaterial), into the till of a public-house. We might certainly have had more explicit evidence as to the exact state of the box; in what place it was; and what class of strangers frequented the room. If there was no negligence, if the box was locked up and put in a safe place and proper care taken of it, these were circumstances which the defendant had the best I means of knowing and, knowing them, he might have exonerated himself. In the absence, therefore, of evidence to that effect, I think that there was a prima facie case of gross negligence which required an answer on the defendant's part. The phrase "gross negligence" means nothing more than a great and aggravated degree of negligence, as distinguished from negligence of a lower degree. *Shiells* v. *Blackburne* (1) created at first some degree of doubt in our minds. It was said that the court in that case treated the matter as a question of law and set aside the verdict because the thing charged, the false description of the leather in the entry, did not amount to gross negligence; and, therefore, the jury had mistaken the law. I do not

view the case in that light. The jury there found that in fact the defendant had been guilty of negligence; but the court thought that they had drawn a wrong conclusion as to that fact. The case, therefore, does not stand against the conclusion to which I have come. It does not appear certainly from the report how the case was treated at the trial, nor what the judge said in summing-up; but I do not find it laid down as a rule that in every case the question of negligence is to be matter of law. The ordinary practice is to leave it to the jury whether such negligence has been proved as the plaintiff has charged in his declaration. If the negligence so charged be insufficient to give a right of action, the defendant may move in arrest of judgment.

PATTESON, J.—It is agreed on all hands that the defendant is not liable unless he has been guilty of gross negligence. The difficulty lies in determining what is gross negligence, and whether that is to be decided by the jury or the court. If the court is to decide it and no evidence has been given that satisfies the court, there ought to have been a nonsuit. If the jury was to decide, I cannot feel a doubt that there was some evidence for them. I agree that the onus probandi was on the plaintiff. It appeared, by the evidence of what the defendant had said, that the money committed to his charge was laid in a box in the tap-room, which room was open on a Sunday, though the rest of the premises were not. Under these circumstances, there can be no nonsuit for there was a sufficient case to go to the jury. Whether, in the abstract, the question of negligence be for the jury or the court, I think it unnecessary, as TAUNTON, J., says, to determine. The present, at all events, was a question of fact and, therefore, for the jury.

The general question I approach with much diffidence. I do not know anything more difficult than to say, in mixed questions of law and fact, what is for the court and what for the jury. In the present case, the principal doubt in my mind arose from *Shiells* v. *Blackburne* (1). The facts in that case were not disputed. It appeared that the defendant, being employed (without reward) to send out some dressed leather, entered it at the Custom House, together with some dressed leather of his own, as wrought leather, in consequence of which the whole was seized. Whether that amounted to gross negligence must have been a question for the jury. The report does not say how they were directed, nor whether the judge told them that, in his opinion, it was gross negligence. At first, I conceived that nothing appeared from the report except that the court thought it was not a case of gross negligence; but, on looking into the case, I find that the court thought that the jury had found the fact erroneously and sent the issue to another jury. So that, in the present case, the only remaining question is whether the judge left the question properly. At first, I understood that the question left had been whether the defendant had used ordinary and reasonable care which, although it may be a useful criterion in determining the question whether there has been gross negligence, is certainly not the same question; but it seems that his Lordship left it to them to say whether there had been gross negligence and that what he said respecting ordinary care was merely by way of illustration. We cannot, therefore, disturb the verdict. Whether I should have found the same verdict is quite immaterial.

WILLIAMS, J.—The only question before us is whether the judge should have said that the case was not made out on the part of the plaintiff or should have left it to the jury. If the judge be obliged to lay down a rule, it is extremely difficult to discover what that rule ought to be. Who can say where "gross negligence" begins? Can it be other than a question of fact? The case was properly left to the jury. The report of *Shiells* v. *Blackburne* (1) does not state how the case was submitted to the jury. In *Reece* v. *Rigby* (2), which was an action against an attorney for negligence, ABBOTT, C.J., left it to the jury to say whether, under the circumstances, the defendant had used reasonable care and diligence; he did not take it from their cognizance and pronounce his own opinion; and

the verdict was not disturbed. In *Moore* v. *Mourgue* (3), where the defendant was charged with negligence in insuring at a wrong office, LORD MANSFIELD states his own direction thus (2 Cowp. at p. 480):

> "My direction to the jury was general; that if they thought there was gross negligence, or the defendant had acted mala fide, they should find for the plaintiff."

In that case again we see that the judge did not take into his own hands, as a question of law, what was gross negligence and what not; and there the court above would not grant a new trial.

On the facts which were before the judge in the present case, it would have been impossible for him to pronounce a rule. It is a question of less general importance whether, under the particular circumstances, there was any evidence to go to a jury; but I think that there was. Whether there was enough to satisfy their minds properly is another question; one man's judgment is satisfied with a certain degree of evidence, another's mind with less; but I question if it can be said that the manner in which this money was left in the tap room was not loose custody. At all events, there was evidence for a jury.

LORD DENMAN, C.J.— It appeared to me that some degree of negligence was clearly proved in the first instance. I thought, and I still think, it impossible for a judge to take on himself to say whether negligence is gross or not. I agree to all the legal doctrine in *Shiells* v. *Blackburne* (1), which is, merely, that a bailee without reward is not liable to an action without proof of gross negligence. I do not find a word there to the effect that the judge is to say whether, in fact, negligence is gross or not. I certainly did not take the view which the jury did of this case, and I pressed as strongly as possible my opinion on them. Whether, if I had heard all that they said to each other and had possessed all their experience, I should have changed my opinion, I cannot say; but certainly the question was for them.

Rule discharged.

R. *v.* MONTAGUE AND OTHERS

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Trinity Term, 1825]

[Reported 4 B. & C. 598; 6 Dow. & Ry. K.B. 616; 3 Dow. & Ry. M.C. 292; 4 L.J.O.S.K.B. 21; 107 E.R. 1183]

Water—River—Public right of navigation—Methods of extinguishing Right to remove highway as nuisance to navigation.

A public right of navigation in a river or a creek may be extinguished either by an Act of Parliament or a writ of ad quod damnum and an inquisition thereon, or, under certain circumstances, by commissioners of sewers [now the Minister of Agriculture, Fisheries and Food on the application of a drainage board under the Land Drainage Act, 1930] or by natural causes, such as the receding of the sea or an accumulation of mud. Where a public road obstructing a channel, once navigable, has existed for so long a period that the state of the channel at the time when the road was made cannot be proved, it must be presumed that the right of navigation was extinguished in one of the modes before mentioned, and the road cannot be removed as a nuisance to the navigation.

Water—Public navigation—Flow and re-flow of tide.

Per BAYLEY, J.: It does not necessarily follow because the tide flows and re-flows in any particular place that it is, therefore, a public navigation, although of sufficient size.

Notes. Considered: *Sim E. Bak* v. *Ang Yong Huat*, [1923] A.C. 429. Referred to: *Colchester Corpn.* v. *Brooke* (1845), 7 Q.B. 339; *R.* v. *Hornsea* (1854), 18 J.P. 134; *Williams* v. *Eyton* (1858), 2 H. & N. 771; *Freeman* v. *Tottenham and Hampstead Junction Rail. Co.* (1865), 11 L.T. 702; *Ilchester* v. *Raishleigh* (1889), 61 L.T. 477.

As to rights of navigation in tidal waters, see 39 HALSBURY'S LAWS (3rd Edn.) 533 et seq.; and for cases see 44 DIGEST 105 et seq.

Cases referred to:

(1) *Lynn Corpn.* v. *Turner* (1774), 1 Cowp. 86; 98 E.R. 980; 44 Digest 84, *654*.

(2) *Miles* v. *Rose* (1814), 5 Taunt. 705; 1 Marsh. 313; 128 E.R. 868; 44 Digest 84, *654*.

(3) *Vooght* v. *Winch* (1819), 2 B. & Ald. 662; 106 E.R. 507; 44 Digest 119, *960*.

Rule Nisi obtained by the defendants for a new trial of an action, tried on indictment, for cutting a trench across a common and ancient King's highway leading from Hoo in Kent through Stoke in the same county into St. James in the Isle of Grain.

At the trial before GRAHAM, B., it was proved that the road in question was an embankment across Yantlet Creek which ran on the west side of the Isle of Grain and united the Thames and the Medway. The defendants cut down the embankment by order of the corporation of London, who contended that Yantlet was a public navigable stream and that the road improperly obstructed it. It was proved that from time to time during the last twenty years the road had been raised by the inhabitants of Stoke and Grain and had during all that time been made so high that no boats could pass over it at any time, but that, for thirty or forty years preceding, light boats drawing but little water had occasionally been able to pass over for half an hour before and after high water, and several instances of their having done so were spoken to by the witnesses. When the embankment or road had been removed, the remains of an ancient bridge were discovered; it appeared to have been of considerable dimensions both in height and width, but no evidence could be adduced as to the time when it was erected or when it fell to decay, nor to show for what purpose it was built, whether for the purposes of the navigation of the creek or merely to support the road from Stoke to the Isle

of Grain. It was contended for the defendants that the size of the arch being sufficient for navigation and greater than was necessary for the purposes of the road, it must be presumed to have been so constructed in order that it might not impede an existing navigation; and that, if there had at any time been a public navigation through the creek, it could not be legally put an end to without an Act of Parliament. GRAHAM, B., in summing up, assumed that there had been a public navigation through the creek, but said that it was probable that it had been obstructed by a natural deposit of silt and mud and that the bridge might, on that account, have been suffered to go to decay and the causeway made in lieu of it; the only evidence of actual navigation was by very small boats at certain periods of the tide, and the defendants could not at all events justify cutting away the embankment more than was necessary to open the navigation to such boats to the extent spoken of by the witnesses.

Under this direction the jury found the defendants guilty. The defendants subsequently obtained a rule nisi for a new trial on the ground of misdirection.

Marryat (with him *D. Pollock* and *Platt*) for the Crown, showed cause against the rule.

Gurney, *Bolland*, *Tindal*, *Law* and *Mirehouse* for the defendants, supported the rule.

BAYLEY, J.—I am of opinion that there ought not to be a new trial in this case. It has been urged that it ought to have been left to the jury to decide whether there had or had not been a public navigation through Yantlet creek; but the learned judge appears to have put the case even more favourably for the defendants, for the whole of his summing-up was founded on a supposition that at some far distant period there was such a navigation. Even if there had been a defect in the direction in that respect, we ought not to grant a new trial if we are satisfied on the evidence either that there never was a public navigation, or that it had been legally put an end to. It was for the defendants to make out that there once was a public navigation. It does not necessarily follow because the tide flows and re-flows in any particular place that it is, therefore, a public navigation, although of sufficient size.

In *Lynn Corpn.* v. *Turner* (1), which was error from the Common Pleas, it appeared that Turner brought case against the corporation of Lynn for not repairing and cleansing a certain creek or fleet called Dowshill Fleet, into which the tide of the sea was accustomed to flow and re-flow, as from time immemorial they had been used, whereby the sea was prevented from flowing therein, so that the creek was rendered unnavigable and the plaintiff obliged to carry his corn round about. The second count contained no allegation of special damage. Judgment by nihil dicit [default] and damages assessed on a writ of inquiry. For the plaintiff in error, it was contended that the second count was bad, for that the declaration showed the locus in quo to be a navigable river, that it was, therefore, public, and no individual could maintain an action for an injury to it without showing special damage. But LORD MANSFIELD said (1 Cowp. at p. 86):

> "How does it appear that this is a navigable river? The flowing and re-flowing of the tide does not make it so, for there are many places into which the tide flows which are not navigable rivers, and the place in question may be a creek in their own private estate."

Again, in *Miles* v. *Rose* (2), GIBBS, C.J., said (5 Taunt. at p. 706):

> "The flowing of the tide, though not absolutely inconsistent with a right of private property in a creek, is strong prima facie evidence of its being a public navigable river";

and HEATH, J., expressed the same opinion.

The strength of this prima facie evidence arising from the flux and re-flux of the tide must depend on the situation and nature of the channel. If it is a

broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time and by very small boats, it is difficult to suppose that it ever has been a public navigable channel. [His Lordship commented at length on the evidence to show the probability that there never had been a public navigation through the creek in question.] But even supposing this to have been at some time a public navigation, I think that, from the manner in which it has been neglected by the public and from the length of time during which it has been obstructed, it ought to be presumed that the rights of the public have been lawfully determined. Most probably the rights of the public (if they ever had any) arose from the flux and re-flux of the tides of the sea so as to make the channel navigable. If, then, the sea retreated or the channel silted up so as to be no longer navigable, why should not the public rights cease? If they arose from natural causes, why should not natural causes also put an end to them? But they might also be put an end to by Act of Parliament, or by writ of ad quod damnum and, perhaps, by commissioners of sewers, if there were any appointed for the district and they found that it would be for the benefit of the whole level.

For these reasons, it appears to me that, if this case were sent down for trial again, the jury would be bound to find either that there never was a public navigation through the locus in quo, or that it had been determined by some lawful means. The rule must, therefore, be discharged.

HOLROYD, J.—I also think that a proper verdict was found in this case. From the great length of enjoyment of the road across Yantlet Creek, every reasonable presumption is to be made that it was lawfully formed. The defence set up against the indictment is that there was a public right of navigation there and that the embankment was an obstruction to it. The evidence leads to a conclusion that there never was a public right of navigation; but, admitting it to have existed at some former period, another question arises, viz., whether it may not have been extinguished. It appears by the report of *Vooght* v. *Winch* (3) that I then stated that a public right of this description could only be determined by an Act of Parliament. I am bound to correct that opinion for, on looking into the authorities, I am satisfied that it may be done by a writ of ad quod damnum and an inquisition found thereupon by a jury. So, also, it may be extinguished by natural causes. In Comyns' Digest, Chimin (A 1.), it is said:

> "A navigable river is in the nature of a highway, and if the water alters its course, the way alters, per Thorp, 22 Ass. 93."

In that book, it is thus stated:

> "Etnota. Thorp saith, If a water be a high street, which water by its own force changes its course upon another soil, yet it shall have there the same high street as it had before in its ancient course, so that the lord of the soil cannot disturb the new course,"

which is not merely the dictum of Thorp, J., but he states it to have been so held in the case of *Nottingham*. It seems, therefore, that the right of way which existed on account of the navigation of the river ceased in the original channel when the river changed its course but followed the river to its new course.

If, then, the water of the sea recedes so that a stream formerly navigable ceases to be so, why should not the rights of the public be extinguished, particularly where other rights have been superinduced, as the right of way in the present case. The right of way might also be extinguished by writ of ad quod damnum. In Fitzherbert's Natura Brevium, 515, it is said:

> "If there be an ancient trench or ditch coming from the sea, by which boats and vessels use to pass to the town, if the same be stopped in any part by outrageousness of the sea, and a man will sue to the king to make a new trench.

and to stop the ancient trench, &c., they ought first to sue a writ of ad quod dammum to inquire what damage it will be to the king or others."

There is no doubt that such a public right may be extinguished by Act of Parliament. In favour of the long enjoyment of the road in its present state, I think that we are bound to presume that, if a right of public navigation ever existed, it was determined by one or other of the means to which I have alluded and, if that were so, the defendants were properly found guilty.

LITTLEDALE, J.—I am of the same opinion. There were two questions in this case: first, whether anciently this was a continuing subsisting navigation used by the public; and, secondly, whether that was put an end to by legal means. On looking through the evidence, I think that this never was a continuing subsisting navigation used by the public. But supposing it to have been so, then was it legally put an end to? That might be done by Act of Parliament, by writ of ad quod dammum and, I conceive, under certain circumstances by commissioners of sewers. I agree that, in order to quiet possessions, we ought to make all reasonable presumptions in favour of the existing state of things. But I am not disposed to act on the presumption either of an Act of Parliament, or a writ of ad quod dammum or proceedings by commissioners of sewers, unless there be some evidence to warrant that presumption. In the present case, it appears to me a more reasonable presumption that the passage, if it ever existed, was stopped up by natural causes, by the recess of the sea, or by an accumulation of silt and mud, which we know by experience is constantly going on in many harbours of this country, and by which they would eventually be choked up unless artificial means of cleansing them were adopted. For these reasons, I think that the verdict ought not to be disturbed.

Rule discharged.

KING *v.* SMITH

(COURT OF KING'S BENCH (Lord Tenterden, C.J.), December 12, 1829]

[Reported 4 C. & P. 108]

Partnership—Dissolution—Stipulation in deed of dissolution that one partner receive all debts due to firm—Right of other partner to maintain action to recover debt.

The plaintiff and his father were in partnership, and, while in partnership, they did business for the defendant amounting to £25. On dissolution of the partnership, the deed of dissolution stipulated that the father should receive all debts due to the firm. After the dissolution, the defendant accepted a bill of exchange for £25 drawn by the plaintiff. In an action by the plaintiff against the defendant on the bill of exchange,

Held: after the dissolution of partnership either partner might maintain an action to recover the partnership debt; this position was not affected by the stipulation in the deed; and, therefore, the plaintiff was entitled to succeed.

Notes. As to winding up of partnership business, see 28 HALSBURY'S LAWS (3rd Edn.) 573 et seq.; and for cases see 36 DIGEST (Repl.) 622 et seq.

Action of assumpsit by the plaintiff as drawer against the defendant as the acceptor of a bill of exchange for £25.

The defendant's handwriting was proved and the defence was that the bill was accepted without consideration; and to prove this it was shown that the plaintiff and his father, Mr. A. King, had been in partnership as attorneys and solicitors; and that, while in partnership, they had done business for the defendant to the amount of the bill in question. It was further proved that, before the date of the bill, the plaintiff and his father had dissolved partnership, and that, by the

deed of dissolution (which was put in), it was stipulated, that Mr. A. King should receive all debts due to the firm.

Hutchinson for the plaintiff.

Denman for the defendant.

LORD TENTERDEN, C.J. This is no answer to the present action. After a dissolution, either partner may give a release.

Denman.—There was no release here.

LORD TENTERDEN, C.J. Nor need there be. Either partner might receive the debt after the dissolution of the partnership, notwithstanding the stipulation in this deed that the father should receive all the debts; and I am of opinion that, as the plaintiff might receive the money, he might take a bill for it. As between the two partners this deed is binding, and the plaintiff will have to account for this money to his father. We continually see bills in equity to restrain one partner from receiving money due to the firm.

Verdict for plaintiff.

FLIGHT *v.* BOLLAND

[ROLLS COURT (Sir John Leach, M.R.), February 15, 19, March 17, 1828]

[Reported 4 Russ. 298; 38 E.R. 817]

Specific Performance—Contract Infant—Enforcement of contract - Lack of mutuality.

An infant cannot obtain an order for specific performance of a contract because of his personal incapacity to be sued on the contract and the consequent absence of mutuality of the remedy.

Notes. Referred to: *Pickering* v. *Bishop of Ely* (1843), 2 Y. & C. Ch. Cas. 249; *Norris* v. *Jackson* (1860), 1 John. & H. 319; *King* v. *Bellord* (1863), 11 W.R. 900.

As to specific performance where mutuality lacking, see 36 HALSBURY'S LAWS (3rd. Edn.) 269–271; and for cases see 44 DIGEST (Repl.) 18, 19.

Cases referred to in argument:

Howell v. *George* (1815), 1 Madd. 1; 56 E.R. 1; 44 Digest (Repl.) 69, *542*.

Lawrenson v. *Butler* (1802), 1 Sch. & Lef. 13; 44 Digest (Repl.) 19, **42*.

Warwick v. *Bruce* (1818), 2 M. & S. 205; affirmed sub nom. *Bruce* v. *Warwick* (1815), 6 Taunt. 118; 128 E.R. 978, Exch.; 28 Digest (Repl.) 502, *185*.

Martin v. *Mitchell*, *Martin* v. *Peile* (1820), 2 Jac. & W. 413; 37 E.R. 685; 44 Digest (Repl.) 50, *360*.

Hatton v. *Gray* (1684), 2 Cas. in Ch. 164; 1 Eq. Cas. Abr. 21, pl. 10; 22 E.R. 895; 12 Digest (Repl.) 172, *1119*.

Coleman v. *Upcot* (1707), 2 Eq. Cas. Abr. 45, pl. 9; 5 Vin. Abr. 527, pl. 17; 22 E.R. 39; 12 Digest (Repl.) 173, *1120*.

Buckhouse v. *Crossby* (1737), 2 Eq. Cas. Abr. 32, pl. 44; 22 E.R. 28, L.C.; 12 Digest (Repl.) 173, *1122*.

Owen v. *Davies* (1748), 1 Ves. Sen. 82; 27 E.R. 905, L.C.; 10 Digest (Repl.) 226, *1857*.

Selon v. *Slade*, *Hunter* v. *Selon* (1802), 7 Ves. 265; 32 E.R. 108, L.C.; 12 Digest (Repl.) 173, *1124*.

Western v. *Russell* (1814), 3 Ves. & B. 187; 35 E.R. 450; 44 Digest (Repl.) 22, *127*.

Clayton v. *Ashdown* (1714), 9 Vin. Abr. 393; 2 Eq. Cas. Abr. 516; 22 E.R. 453; 28 Digest (Repl.) 502, *183*.

Campbell v. *Leach*, *Leach and Thomas* v. *Campbell* (1775), Amb. 740; 27 E.R. 478, L.C.; 44 Digest (Repl.) 21, *113*.

Shannon v. *Bradstreet* (1803), 1 Sch & Lef. 52; 44 Digest (Repl.) 45, **146*.

Preliminary Objection by the defendant in a suit for specific performance.

The bill was filed by the plaintiff, as an adult, for the specific performance of a contract. After the suit was ready for hearing, the defendant, having discovered that the plaintiff was, at the time of the filing of the bill, and still continued, an infant, moved the court, that the bill might be dismissed with costs to be paid by the plaintiff's solicitor. Upon that occasion the vice-chancellor made an order that the plaintiff should be at liberty to amend his bill by inserting a next friend for the plaintiff; and the will was amended accordingly.

Upon the opening of the case, a preliminary objection was taken, that a bill on the part of an infant for the specific performance of a contract made by him could not be sustained.

Bickersteth and *Koe* supported the objection.

Pepys, *Morley* and *Stuart* for the plaintiff.

SIR JOHN LEACH, M.R. No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed that it is a general principle of courts of equity to interpose only where the remedy is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the Statute of Frauds where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant although not signed by the plaintiff. It must be admitted that such now is the settled rule of the court, although seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported, first, because the Statute of Frauds only requires the agreement to be signed by the party to be charged, and, next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons apply to the case of an infant. The act of filing the bill by his next friend cannot bind him, and my opinion, therefore, is, that the bill must be dismissed with costs, to be paid by the next friend.

Bill dismissed.

JUDSON *v.* ETHERIDGE

[Court of Exchequer (Lord Lyndhurst, C.B., Vaughan, Bolland and Gurney, BB.), Trinity Term, 1833]

[Reported 1 Cr. & M. 743; 3 Tyr. 954; 2 L.J. Ex. 300; 149 E.R. 598]

Lien - Work done—Horse delivered to bailee to be stabled and kept—Lien of trainer.

A person to whom a horse is delivered to be stabled, taken care of, fed and kept for remuneration, has no lien on the horse for the expense incurred in so doing.

Per Bolland, B.: Admitting that a trainer has a lien, it must be on the ground that he has done something for the benefit and improvement of the animal.

Notes. Explained: *Castellain* v. *Thompson*, *Thompson* v. *Castellain* (1862), 13 C.B.N.S. 105. Considered: *Re Southern Livestock Producers, Ltd.*, [1963] 3 All E.R. 801. Referred to: *Jackson* v. *Cummins* (1839), 5 M. & W. 342.

As to lien for work done, see 24 Halsbury's Laws (3rd Edn.) 152 et seq.; and for cases see 32 Digest (Repl.) 286 et seq.

Cases referred to:

(1) *Chapman* v. *Allen* (1632), Cro. Car. 271; 79 E.R. 836; 32 Digest (Repl.) 261, *71*.

(2) *Yorke* v. *Grenaugh* (1703), 2 Ld. Raym. 866; 92 E.R. 79; sub nom. *York* v. *Grindstone*, 1 Salk. 388; 29 Digest (Repl.) 26, *296*.

(3) *Jacobs* v. *Latour* (1828), ante p. 96; 5 Bing. 130; 2 Moo. & P. 201; 6 L.J.O.S.C.P. 243; 130 E.R. 1010; 32 Digest (Repl.) 274, *206*.

Also referred to in argument:

Wallace v. *Woodgate* (1824), ante p. 99; 1 C. & P. 575; Ry. & M. 193, N.P.; 32 Digest (Repl.) 271, *171*.

Warbrooke v. *Griffin* (1609), 2 Brownl. 254; 123 E.R. 927; sub nom. *Watbroke* v. *Griffith*, Moore, K.B. 876; 29 Digest (Repl.) 26, *308*.

Gelly v. *Clerk* (1607), cited in Moore, K.B. at p. 877.

Ex parte Deeze (1748), 1 Deac. 684, n.; 1 Atk. 228; cited in 4 Burr. at p. 2222; 26 E.R. 146, L.C.; 32 Digest (Repl.) 279, *261*.

Franklin v. *Hosier* (1821), 4 B. & Ald. 341; 106 E.R. 962; 41 Digest 944, *8357*.

Chase v. *Westmore* (1816), 5 M. & S. 180; 105 E.R. 1016; 32 Digest (Repl.) 260, *65*.

Bevan v. *Waters* (1828), 3 C. & P. 520; Mood. & M. 235, N.P.; 32 Digest (Repl.) 259, *54*.

Demurrer in an action of detinue for a gelding.

The defendant pleaded that the gelding was delivered by the plaintiff to him to be stabled and taken care of and fed and kept by him for the plaintiff for remuneration. At the time of the action, the defendant said that the plaintiff was indebted to him for £10 in that respect, which was still due and owing. Accordingly, the defendant had detained the gelding. The plaintiff demurred.

Mansel for the plaintiff, supported the demurrer.

Erle for the defendant, supported the plea.

LORD LYNDHURST, C.B.—The question is on the sufficiency of the plea. The plea states that the horse was delivered by the plaintiff to the defendant to be stabled and taken care of and fed and kept by the defendant for the plaintiff for remuneration and reward to be paid by the plaintiff to the defendant in that behalf. It then states that he plaintiff became indebted to the defendant in the sum of £10, being a reasonable and fair remuneration and reward for and in respect of the defendant having stabled and taken care of and fed and kept the horse under

and by virtue of the said delivery and bailment; and so justifies the detention until that sum should be paid. On this plea, the question is whether, on the state of facts disclosed, the defendant has or has not a lien on the horse. I am of opinion that he has no lien. The present case is distinguishable from the cases of workmen and artificers and persons carrying on a particular trade who have been held to have a lien by virtue of labour performed in the course of their trade on chattels bailed to them. The decisions on the subject seem to be all one way. In *Chapman* v. *Allen* (1), it was decided that a person receiving cattle to agist had no lien. In *Yorke* v. *Grenaugh* (2), it was held, not merely by HOLT, C.J., but by the whole court in their decision, that a livery-stable keeper had no lien. As to *Jacobs* v. *Latour* (3), that, so far from establishing the right to lien, confirms the former decisions; for BEST, C.J., expressly draws the distinction between a trainer, who bestows his skill and labour, and a livery-stable keeper—between horses taken in by a trainer and altered in their value by the application of his skill and labour, and horses standing at livery without such alteration. When the case came on before the Court of Common Pleas, that distinction seems to have been supported. It appears to me, therefore, that the present case is decided by the concurrence of all the authorities.

VAUGHAN, B.—I am of opinion that it is clear from the authorities on this subject that the defendant had no right to detain the horse in question, and consequently, that our judgment must be for the plaintiff.

BOLLAND, B.—In deciding against the right of lien in this case we break in on no former decisions. Admitting that a trainer has a lien, it must be on the ground that he has done something for the benefit and improvement of the animal. The doctrine might, perhaps, be extended further so as to embrace the case of a breaker, into whose hands a young horse is placed to be broken in. The breaker makes it a different animal. The chattel is improved by the application of his labour and skill. In the present case, it does not appear that anything was to be done to the animal to improve it or render it a different animal by the application of the skill and labour of the bailee.

GURNEY, B., concurred.

Judgment for plaintiff.

OUGHTON *v.* SEPPINGS

[Court of King's Bench (Lord Tenterden, C.J., Bayley and Littledale, JJ.), Trinity Term, 1830]

[Reported 1 B. & Ad. 241; 8 L.J.O.S.K.B. 394; 109 E.R. 776]

Money Had and Received — Competency of action — Wrongful seizure and sale of goods by sheriff—Action by owner against sheriff's officer.

The defendant, a sheriff's officer, had wrongfully seised under a fi. fa. against W. a horse belonging to the plaintiff. The horse was sold by the sheriff and the money paid to the defendant. The plaintiff brought an action for money had and received against the defendant to recover the amount. It was proved that the horse had belonged to the plaintiff's husband and that after his death the plaintiff had provided for its keep. No probate of will or letters of administration were produced.

Held: this was sufficient evidence against a wrongdoer to entitle the plaintiff to recover in an action for money had and received.

Notes. Considered: *White* v. *Mullett* (1851), 6 Exch. 713.

As to money had and received and the right to elect to sue in tort, see 8 Halsbury's Laws (3rd Edn.) 247 et seq.; and for cases see 12 Digest (Repl.) 609 et seq. As to executors' power to maintain proceedings, see 16 Halsbury's Laws (3rd Edn.) 133; and for cases see 23 Digest (Repl.) 56 et seq.

Case referred to in argument:

Pinney v. *Pinney* (1828), 8 B. & C. 335; 2 Man. & Ry. K.B. 436; 6 L.J.O.S.K.B. 353; 108 E.R. 1067; 23 Digest (Repl.) 54, *419*.

Rule Nisi obtained by the defendant to enter a nonsuit in an action by the plaintiff for money had and received. The defendant pleaded the general issue.

At the trial before Garrow, B., at the Norfolk Summer Assizes, 1829, it appeared that on May 28, 1829, the defendant, a sheriff's officer, received a warrant from the sheriff of Norfolk to levy a sum of money on the goods of Winslove. He took a pony, cart and harness which Winslove was using at the time of seizure, his name was painted on the cart. Winslove lived as a lodger with the plaintiff. She claimed the pony as hers, and gave notice to the sheriff, and the defendant, that she would bring an action; but it was sold by the sheriff under the execution, and the defendant admitted that he had received £8 10s., the sum which it produced at the sale. Winslove was called as a witness on the part of the plaintiff and he proved that he had purchased the pony for her at her request, and that he had paid for it with money which she had provided. It appeared, however, that at the time when the pony was purchased, and for several months afterwards, the husband of the plaintiff was alive, but that after his death the plaintiff fed the pony, and paid bills for its hay, and shoeing, though it was used as generally by Winslove as by the plaintiff. No probate of will, or letters of administration, were produced.

It was objected on the part of the defendant, that, assuming even that the plaintiff might have maintained trespass for the taking of the horse, she could not maintain the present form of action, which was founded on a contract, that the pony having been the property of the husband, passed on his death to his personal representative, and it had not been shown that the plaintiff was either executrix or administratrix. The learned judge thought that the plaintiff might waive the tort, and bring this action against the defendant, who had admitted that he had received the proceeds of the sale; and he directed the jury to find for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi was subsequently obtained.

Serjeant Storks for the plaintiff, was not called on to show cause against the rule.

Austin for the defendant, supported the rule.

LORD TENTERDEN, C.J. There was evidence here, though perhaps slight, that the plaintiff was in possession of the pony. If she was in possession at the time when it was seized, she might clearly have maintained trespass against a wrongdoer; and if she might maintain trespass, she may waive the tort, and maintain this action to recover the money which was produced by the sale of the horse, and which the defendant has admitted he received.

BAYLEY, J.—It appears that the plaintiff was acting in the character of owner of the pony, for she fed it. As against a wrongdoer, that is prima facie evidence of title. If she had sought to recover the produce of the chattel against a person who had a conflicting title to it, she ought to have gone further; but as against a mere wrongdoer, not claiming any title whatever to the chattel, I think the evidence of possession was sufficient. The plaintiff was either rightful executrix or administratrix, or executrix de son tort. In either case she had a sufficient title to enable her to maintain this action for money had and received against a person who wrongfully retained in his hands the proceeds of a chattel belonging to her in one of those characters.

LITTLEDALE, J., concurred.

Rule discharged.

HOWELL *v.* YOUNG

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), February 14, 1826]

[Reported 5 B. & C. 259; 2 C. & P. 238; 8 Dow. & Ry. K.B. 14; 4 L.J.O.S.K.B. 160; 108 E.R. 97]

Limitation of Action—Negligence amounting to breach of contractual duty—Time running from date of negligence—Plaintiff negligently advised to lend on insufficient security—Subsequent discovery of insufficient security.

In 1814 the plaintiff agreed to lend to O. £3,000 at interest if certain premises should be a sufficient security for the loan, and he employed the defendant, an attorney, to ascertain whether the premises would be a sufficient security. The defendant, without exercising due care, stated that the premises would be a sufficient security, whereupon the plaintiff lent the money to O. Interest was paid regularly until 1820, when the plaintiff discovered that the security was insufficient. In an action by the plaintiff against the defendant for negligence,

Held: the cause of action was the misconduct or negligence of the defendant in taking an insufficient security; the period of limitation ran from the time when the defendant was guilty of that misconduct, and not from the time when the plaintiff discovered that the security was insufficient; and, therefore, the action was barred.

Notes. For the period of limitation for actions founded on simple contract or tort, see the Limitation Act, 1939, s. 2 (1): 13 HALSBURY'S STATUTES (2nd Edn.) 1160.

Considered: *Blyth* v. *Fladgate*, *Morgan* v. *Blyth*, *Smith* v. *Blyth*, [1891] 1 Ch. 337. Applied: *Archer* v. *Cotton & Co., Ltd.*, [1954] 1 All E.R. 896. Referred to: *Philpott* v. *Kelley* (1835), 3 Ad. & El. 106; *Smith* v. *Fox* (1848), 6 Hare, 386; *Re Triston* (1850), 1 L.M. & P. 74; *Re Manby and Hawksford, Norton* v. *Cooper* (1856), 26 L.J.Ch. 313; *Violett* v. *Sympson* (1857), 27 L.J.Q.B. 138; *Gibbs* v. *Guild* (1881), 8 Q.B.D. 296; *Bean* v. *Wade* (1885), 2 T.L.R. 157; *Hughes* v. *Twisden* (1886), 55 L.J.Ch. 481; *Re Somerset, Somerset* v. *Poulett*, [1894] 1 Ch. 231; *Conquer* v. *Boot*, [1928] All E.R. Rep. 120; *Cartledge* v. *E. Jopling & Sons, Ltd.*, [1963] 1 All E.R. 341; *Clark* v. *Kirby-Smith*, [1964] 2 All E.R. 835.

As to accrual of action in cases of negligence amounting to breach of contractual duty, see 24 HALSBURY'S LAWS (3rd Edn.) 213, 214, and 223, 224; and for cases see 32 DIGEST (Repl.) 402–404.

Cases referred to:

(1) *Bree* v. *Holbech* (1781), 2 Doug. K.B. 654; 99 E.R. 415; 32 Digest (Repl.) 604, *1878*.

(2) *Short* v. *McCarthy* (1820), 3 B. & Ald. 626; 106 E.R. 789; 32 Digest (Repl.) 402, *268*.

(3) *Fetter* v. *Beale* (1701), Holt, K.B. 12; 1 Ld. Raym. 339; 1 Salk. 11; 90 E.R. 905; 1 Digest (Repl.) 18, *139*.

(4) *Gillon* v. *Boddington* (1824), 1 C. & P. 541; Ry. & M. 161, N.P.; 19 Digest (Repl.) 202, *1421*.

(5) *Brown* v. *Howard* (1820), 2 Brod. & Bing. 73; 4 Moore, C.P. 508; 129 E.R. 885; 32 Digest (Repl) 394, *213*.

Also referred to in argument:

Battley v. *Faulkner* (1820), 3 B. & Ald. 288; 106 E.R. 668; 32 Digest (Repl.).

Scott v. *Shepherd* (1773), 2 Wm. Bl. 892; 3 Wils. 403; 96 E.R. 525; 36 Digest (Repl.) 23, *100*.

Roberts v. *Read* (1812), 16 East, 215; 104 E.R. 1070; 38 Digest (Repl.) 138, *971*.

Rule Nisi obtained by the plaintiff for a new trial in an action on the case against an attorney for negligence.

The declaration stated that the plaintiff had contracted with J. Olive and R. Olive, to lend them the sum of £3,000, at interest, the repayment of that sum, with interest, to be secured by a warrant of attorney to confess judgment made by J. and R. Olive; the sum of £2,000, with interest, to be further secured by a mortgage of certain freehold premises of the said J. and R. Olive; and the sum of £1,000 to be further secured by a mortgage of certain leasehold premises of J. and R. Olive, provided such warrant of attorney and mortgages should be found to be a good, valid, and sufficient security for the same; and that the plaintiff retained and employed the defendant for reasonable fees and reward to him in that behalf, to ascertain whether the said warrant of attorney and mortgages would be a sufficient security for the repayment of the said sum of £3,000, with interest; and in case the same should appear sufficient, to obtain the proper deeds and writings to secure the repayment of the said sum of £3,000. It was alleged that the defendant accepted such retainer and employment; that it became and was his duty to use due and proper care and diligence to ascertain whether the said warrant of attorney and mortgages would be a sufficient security for the repayment of the said sum of £3,000, with interest; and in case the same should appear sufficient, to obtain the proper deeds and writings to secure the repayment of that sum.

But, it was alleged, the defendant did not use due or proper care and diligence to ascertain whether the said warrant of attorney and mortgages would be a sufficient security; and falsely and deceitfully represented and asserted, and caused and procured the plaintiff to believe that the said warrant of attorney and mortgages would be a good, valid, and sufficient security for the repayment of the sum of £3,000, with interest; whereupon the plaintiff, believing that the said warrant of attorney and mortgages would be a valid and sufficient security for the repayment of the said sum of £3,000, with interest, lent to the said J. and R. Olive £3,000, upon security of the said warrant of attorney and mortgages. The declaration then described the warrant of attorney and the mortgages; and stated that they were prepared by the defendant by virtue of his retainer and employment, and accepted by the plaintiff as a sufficient security for the repayment of the said sum of £3,000, with interest, in consequence of such representation and assertion of the defendant, and that they were not a sufficient security. As a result the plaintiff had wholly lost the interest due and payable on the said sum of £3,000 amounting to £1,000, and was likely wholly to lose the said principal sum of £3,000.

The defendant denied liability and pleaded that the cause of action mentioned in the declaration did not accrue within six years.

At the trial before BURROUGH, J., at Gloucester Summer Assizes, 1825, it appeared that the defendant, who was an attorney, had been retained by the plaintiff in 1814 to ascertain whether the mortgages mentioned in the declaration were a valid and sufficient security for £3,000 and interest. At that time the defendant represented that they were so. The mortgages in fact afterwards turned out to be an insufficient security for that sum, but that fact was not discovered by the plaintiff until 1820. The interest was regularly paid until that time. BURROUGH, J., was of opinion that the Statute of Limitations was a bar to the action, but it was insisted that there was fraud upon the part of the defendant, and that the Statute of Limitations only ran from the time when the fraud was discovered. *Bree* v. *Holbech* (1) was cited. The learned judge allowed the cause to proceed, and finally directed the jury to find for the plaintiff if they were of the opinion that the plaintiff had been induced by the fraud of the defendant to advance the money, otherwise for the defendant.

The jury found a verdict for the defendant. The plaintiff in last Michaelmas Term obtained a rule nisi for a new trial upon two grounds: (i) that upon the question of fraud the verdict was against the weight of evidence; and, (ii), that in this action the Statute of Limitations ran, not from the time when the insufficient security was taken, but when the special damage alleged in the declaration, viz., the loss of interest, accrued. The learned judge reported that he was satisfied with the verdict found by the jury.

Curwood, *Maule* and *Carrington* for the plaintiff, supported the rule.

Taunton, *Ludlow* and *Campbell* for the defendant, were not called on to show cause against the rule.

BAYLEY, J.—This is a case of no difficulty whatever. The only question is, What is the cause of action disclosed in this declaration? It appears to me that the misconduct of the defendant is the gist of the action. If the allegation of special damage had been wholly omitted, the plaintiff would have been entitled to a verdict for nominal damages. The plaintiff in this action is entitled to recover a compensation in damages for the injury resulting to him from the misconduct of the defendant. The special damage resulted from that misconduct; but it constituted part only of the injury sustained by the plaintiff, and it is not of itself a cause of action. The declaration is framed so as to show that the misconduct of the defendant is the cause of action. It states that the plaintiff had contracted to lend £3,000 at interest to be secured by a warrant of attorney and mortgages of specific property there described, provided the warrant of attorney and the mortgages should turn out to be a valid and sufficient security for the same; that the plaintiff retained the defendant (he being an attorney) to ascertain whether they would be a sufficient security; and that it became the duty of the defendant to use due care and diligence to ascertain whether they would be so or not. It then states that the defendant did not use due care and diligence in that respect, but omitted so to do; and, on the contrary, represented to the plaintiff that the warrant of attorney and mortgages would be a sufficient security, whereupon the plaintiff advanced the money; and that the warrant of attorney and mortgages were not a sufficient security, but were invalid and insufficient securities.

If the declaration had stopped there, a sufficient cause of action is stated. There is an acceptance of the retainer by the defendant, a duty resulting therefrom, and a breach of that duty. But the declaration goes on to state: "By reason whereof the plaintiff has wholly lost the interest due on the sum of £3,000, and is likely wholly to lose the said principal sum of £3,000." Does the introduction of that allegation vary the case? In an action for words which are actionable in themselves, a special damage is frequently alleged in the declaration, although it is not the ground of the action, and the plaintiff may recover without proving the special damage. In such case the allegation of special damage is a mere explanation of the manner in which

the conduct of the defendant has becomes injurious to the plaintiff. So in this case, the purpose for which the allegation is introduced is precisely similar. Where, indeed, words are not actionable of themselves, but become so by reason of the consequential damage, then it must be alleged and proved because it constitutes the cause of action.

In an action of assumpsit, the Statute of Limitations begins to run, not from the time when the damage results from the breach of the promise, but the time when the breach of promise takes place. *Short* v. *M'Carthy* (2), which is very analogous to the present case, is an authority in point. There the declaration in assumpsit stated as a breach of the promise, that the defendant did not diligently and sufficiently make a search at the Bank of England to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do. The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff until within the six years. The Statute of Limitations having been pleaded, it was held, that upon this form of declaration the plaintiff was not entitled to recover on the ground that the cause of action accrued at the time of the breach of duty or promise by the defendant, and not at the time of its discovery by the plaintiff; and that the statute began to run from the time when the defendant ought to have made the search, which it was his duty to do.

It appears to me that there is no substantial distinction between an action of assumpsit founded upon a promise which the law implies, that a party will do that which he is legally liable to perform, and an action on the case which is founded expressly upon a breach of duty. Whatever be the form of action, the breach of duty is substantially the cause of action. That being so, the cause of action accrued at the time when the defendant in this case took the bad and insufficient security, that was more than six years before the commencement of the action, which is consequently barred by the Statute of Limitations. The rule for a new trial must, therefore, be discharged.

HOLROYD, J. I am of opinion that the Statute of Limitations is a complete bar to this action. The cause of action is the misconduct or negligence of the attorney. The Statute of Limitations is a bar to the original cause of action, and to all the consequential damages resulting from it, unless it can be shown that those damages, or any part of them, constitute a new cause of action which accrued within six years. I think it makes no difference in this respect whether the plaintiff elects to bring an action of assumpsit founded upon a breach of promise, or a special action on the case founded upon a breach of duty. The breach of promise or of duty took place as soon as the defendant took the insufficient security. Whether the plaintiff, therefore, elect to sue in one form of action or another, the cause of action, which in either form is substantially the same, accrued at the same moment of time. The breach of duty, therefore, constituting a cause of action, it follows that the Statute of Limitations is a bar to this action, unless the special damage alleged in the declaration constitute a new cause of action.

Fetter v. *Beale* (3) is an authority to show that the special damage alleged in this case does not constitute any fresh ground of action, but that it is merely the measure of the damage which results from the original cause of action. There the declaration stated that the defendant beat the plaintiff's head against the ground, and that he brought an action of assault and battery for that and recovered; and that since the recovery by reason of the same battery, a piece of his skull had come out. The defendant pleaded in bar the recovery mentioned in the declaration; and averred it to be for the same assault and battery. The plaintiff demurred, and it was urged that this subsequent damage was a new matter which could not be given in evidence in the first action, when it was not known; and it was compared to the case of a nuisance, where every new dropping is a new act. But Holt, C.J., said (1 Salk. at p. 11):

"Every new dropping is a new nuisance, but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial."

So, here the loss of interest does not constitute a fresh ground of action, but a mere measure of damages. There is no new misconduct or negligence of the attorney, and consequently there is no new cause of action. What is said by HOLT, C.J., explains the principle of the decision in *Gillon* v. *Boddington* (4). There, although the excavation was made in the life of the father, it was continued after his death, and after the title of the remainderman had accrued. The continuance of the excavation was a continuing nuisance, and constituted a new cause of action. It was, therefore, properly decided in that case, that the remainderman was entitled to recover damages for an injury to him arising from the falling of a wall after the death of his father, but here there was no new misconduct of the attorney. As the consequences of the battery in *Fetter* v. *Beale* (3) did not constitute a fresh ground of action, so the consequential damage resulting from the misconduct of the attorney in this case does not constitute any new ground of action. In that case LORD HOLT was of opinion that the jury upon the trial in the first action must have taken into their consideration not merely the actual loss which the plaintiff had then sustained, but the probable loss which the plaintiff was likely to suffer in consequence of the injury. So here, if the action had been brought immediately after the insufficient security had been taken, the jury would have been bound to give damages for the probable loss which the plaintiff was likely to sustain from the invalidity of the security.

It appears to me, therefore, that the subsequent special damage alleged in this declaration did not constitute any fresh cause of action. That being so, the cause of action did not accrue within six years, and the rule, therefore, must be discharged.

LITTLEDALE, J., concurred.

BAYLEY, J., referred to *Brown* v. *Howard* (5).

Rule discharged.

HOWES *v.* BALL

[Court of King's Bench (Lord Tenterden, C.J., Bayley, Holroyd and Littledale, JJ.), November 21, 1827]

[Reported 7 B. & C. 481; 1 Man. & Ry. K.B. 288; 6 L.J.O.S.K.B. 106; 108 E.R. 802]

Lien—Seller's lien—Agreement for sale of coach to be paid by instalments—Failure by buyer to pay—Death of buyer—Right of seller to detain coach as against buyer's administratrix.

The plaintiff's husband bought a coach from the defendant, agreeing that he would pay for it by four bills and that the defendant would have a claim on the coach until the debt was paid. The bills were given, but the first one was dishonoured on the date it became due, at which time the plaintiff's husband had died. Later, the plaintiff, who was his administratrix, sent the coach to the defendant to be repaired. The defendant detained the coach on the ground that the bills had not been paid.

Held: the agreement between the plaintiff's husband and the defendant operated as a personal licence from the plaintiff's husband to the defendant to take the coach if the bills were not paid; it was not transferable, and, the coach having vested in the plaintiff by operation of law, the defendant was not entitled to detain it.

Notes. Distinguished: *Walker* v. *Clyde* (1861), 10 C.B.N.S. 381. Referred to: *Stainbank* v. *Shepard* (1853), 13 C.B. 418; *Congreve* v. *Evetts* (1954), 10 Exch. 298; *Castrique* v. *Imrie* (1861), 7 Jur. N.S. 1076; *Donald* v. *Suckling* (1866), L.R. 1 Q.B. 585; *Sewell & Nephew* v. *Burdick*, [1881–5] All E.R. Rep. 223.

As to seller's lien, see 34 Halsbury's Laws (3rd Edn.) 122 et seq.; and for cases see 39 Digest (Repl.) 743 et seq.

Cases referred to in argument:

Madden v. *Kempster* (1807), 1 Camp. 12, N.P.; 32 Digest (Repl.) 258, 43.

Whitehead v. *Vaughan*, cited in Cooke's Bankrupt Laws (8th Edn.) 547.

Rule Nisi obtained by the defendant to enter a nonsuit in an action of trover for a stage-coach. The defendant denied liability.

At the trial before Lord Tenterden, C.J., at the London sittings after Hilary Term, 1827, it appeared that in April, 1826, the plaintiff's husband (since deceased) bought a stage-coach from the defendant, and the following agreement was signed by them both:

"I, John Howes, do hereby agree to give Thomas Ball the sum of £100 for a new stage-coach; in payment of which, to give Thomas Ball four bills of £25 each; and, further, I John Howes do agree that Thomas Ball do have and hold a claim upon the coach until the debt be duly paid."

The four bills were given at different dates, the first of which became due in October, 1826, and was dishonoured. John Howes was then dead; but the plaintiff had taken out administration to him and continued to carry on the business of a stage-coach keeper. In November, 1826, some of the wheels belonging to the coach being in want of repair, they were left at the defendant's shop, and, on Nov. 10, 1826, those repairs being completed, the plaintiff's servant drove the coach to the shop door in order to have those wheels put on. The defendant desired him to drive into the yard and take his horses from the coach, saying that it required some other repairs, which was not true. The servant accordingly drove into the yard and took off his horses, and then the defendant said that he meant to keep the coach until the four bills, of which one only was then due, were paid, and he chained the wheels together in order to prevent him from taking the coach away.

LORD TENTERDEN, C.J., thought that the defendant was not justified in thus taking possession of the coach and directed a verdict for the plaintiffs, but gave the defendant leave to move to enter a nonsuit. A rule nisi for that purpose was granted.

Sir James Scarlett and *R. V. Richards* for the plaintiff, showed cause against the rule.

Gurney and *Chitty* for the defendant, supported the rule.

Cur. adv. vult.

LORD TENTERDEN, C.J., delivered the judgment of the court in which he stated the facts, and continued: Taking into consideration the agreement, the fact of the delivery of the bills by Mr. Howes to the defendant and of the delivery of the coach by the defendant to Mr. Howes at the same time, we think that the transaction amounted to a sale of the coach, so as to transfer the property in it from the defendant to Mr. Howes. That being so, the question is whether, after such a transfer of the property, the seller can have any valid claim on the property so transferred. Hypothecation is not allowed by the law of England, although in some parts of the Continent, not many years ago, it was allowed. The utmost effect, therefore, that can be given to this instrument is to construe it as a licence given by Mr. Howes to the defendant to resume possession of and retain the coach, in case Mr. Howes did not pay the bills. Construing it as a licence, it is a personal licence, not available against any person to whom Mr. Howes might transfer the property. It could not, therefore, be available against his administrator, to whom the property came by operation of law. If Mr. Howes had lived and the coach, on non-payment of the bills, had been taken out of his possession and he had brought an action, the defendant might, in bar of that, have relied on the instrument. But as the licence was a mere personal licence, not transferable, supposing the property had been transferred by the act of the party or by operation of law, we are of opinion that the defendant was not entitled to take and detain the coach. The rule for entering a nonsuit must, therefore, be discharged.

Rule discharged.

CHAPMAN AND ANOTHER *v.* WALTON

[COURT OF COMMON PLEAS (Tindal, C.J., and other judges), June 6, 1833]

[Reported 10 Bing. 57; 3 Moo. & S. 389; 2 L.J.C.P. 210; 131 E.R. 826]

Evidence—Expert witnesses—Evidence of insurance brokers as to standards of skill and care.

In an action for negligence against a broker for failing to alter insurance policies in a way which would have covered the circumstances in which a ship carrying the insured goods was lost, the broker sought to call as witnesses a number of other brokers to say, on looking at the policies, the invoices and a letter given to the broker relating to the variation of the voyage, what alterations a skilful broker ought to have made in the policies.

Held: the evidence of the brokers was admissible.

Notes. Considered: *The Lancastrian* (1916), 32 T.L.R. 655. Referred to: *Savory & Co.* v. *Lloyds Bank, Ltd.* (1932), 48 T.L.R. 344.

As to degree of care and skill required of a broker, see 22 HALSBURY'S LAWS (3rd Edn.) 48, 49; and for cases see 29 DIGEST (Repl.) 99. As to admissibility of expert evidence, see 15 HALSBURY'S LAWS (3rd Edn.) 321–323; and for cases see 22 DIGEST (Repl.) 508, 509.

Cases referred to:

(1) *Beckwith* v. *Sydebotham* (1807), 1 Camp. 116, N.P.; 29 Digest (Repl.) 224, *1660.*

(2) *Ramadge* v. *Ryan* (1832), 9 Bing. 333; 2 Moo. & S. 421; 2 L.J.C.P. 7; 131 E.R. 640; 22 Digest (Repl.) 505, *5600.*

(3) *Rickards* v. *Murdock* (1830), 10 B. & C. 527; L. & Welsb. 132; 5 Man. & Ry. K.B. 418; 8 L.J.O.S.K.B. 210; 109 E.R. 546; 29 Digest (Repl.) 203, *1434.*

(4) *Lindenau* v. *Desborough* (1828), 8 B. & C. 586; 108 E.R. 1160; sub nom. *Von Lindenau* v. *Desborough*, 3 C. & P. 353; 3 Man. & Ry. K.B. 45; 7 L.J.O.S.K.B. 42; 29 Digest (Repl.) 64, *181.*

(5) *Berthon* v. *Loughman* (1817), 2 Stark. 258, N.P.; 29 Digest (Repl.) 203, *1433.*

(6) *Durrell* v. *Bederley* (1816), Holt, N.P. 283, N.P.; 29 Digest (Repl.) 63, *180.*

(7) *Carter* v. *Boehm* (1766), 3 Burr. 1905; 1 Wm. Bl. 593; 97 E.R. 1162; 29 Digest (Repl.) 42, *3.*

Also referred to in argument:

Gabay v. *Lloyd* (1825), 3 B. & C. 793; 5 Dow. & Ry. K.B. 641; 3 L.J.O.S.K.B. 116; 107 E.R. 927; 29 Digest (Repl.) 92, *385.*

Smith v. *Wilson* (1832), 3 B. & Ad. 728; 1 L.J.K.B. 194; 110 E.R. 266; 17 Digest (Repl.) 42, *506.*

Rule Nisi obtained by the plaintiffs, assignees of one Richardson, a bankrupt, to set aside the verdict for the defendant, an insurance broker, in an action of assumpsit brought to recover compensation against the defendant for negligence in the execution of his duty as a policy broker.

The declaration set out five policies of assurance made by the defendant, as agent of the bankrupt on goods to be shipped by the *Sprightly*, on a voyage from London to St. Thomas, with leave to call at Madeira and Teneriffe. It was alleged in the declaration that the goods mentioned in the policies and declarations thereon, amounting in value to £1,753 15s. 4d. had been shipped to be conveyed on the voyage, and that the bankrupt was interested therein to the amount of all sums insured; that the ship sailed on the voyage, and arrived at Madeira, and there unloaded goods insured by the first and second policies, declared to be of the value of £752 14s. 6d.; of all which facts the defendant had notice; that the

bankrupt being desirous that the policies should be altered, and that the ship might proceed to the Canaries, had retained and employed the defendant as an insurance broker for reward "to cause and procure the said several policies of insurance to be so respectively altered, by and with the consent of the said several insurers respectively, that such policies of insurance might respectively contain a liberty for the said ship or vessel, with the remainder of the said goods so by the said policies of insurance respectively insured as aforesaid on board thereof, to proceed to and call at, among other places, the said islands called the Canaries, for all purposes as part of the voyage to be included in the said several policies."

It was further stated that the defendant accepted the retainer and employment, and undertook and promised the bankrupt to use due care and diligence to procure the policies to be so altered with the consent of the insurers; that if the defendant had used due diligence he might have procured the alterations; that he did not use such diligence, and that by his neglect the policies remained unaltered; that the ship sailed from Madeira, and proceeded to one of the Canaries, called Grand Canary, out of the voyage mentioned in the policies; and that the ship and remainder of the goods were there lost by the perils of the sea; that if the policies had been altered, the insurers would have been liable to pay the loss; but that, by reason of the premises, they were not liable, and had refused to pay, whereby the plaintiffs had been deprived of the benefit which they would have gained from the policies, if altered.

At the trial before TINDAL, C.J., it appeared on the evidence, that the defendant had been employed as a policy broker by Richardson, the bankrupt, before his bankruptcy, and in that character had caused to be effected five different policies of assurance on goods of the bankrupt on board the *Sprightly*, in which the voyage was described "at and from London to St. Thomas's, with leave to call at Madeira and Teneriffe." On Feb. 16, 1831, the bankrupt received a letter from Walsh the supercargo on board the *Sprightly*, then being at Funchal in Madeira, and dated Jan. 24. This letter was as follows:

> "I have now nearly completed, and expect to sail tomorrow, or next day at furthest, for the Canaries, from whence, as I have taken more wines here than I at first contemplated, it is my intention, for your government, to visit one or more of the West India Islands—say Barbados, St. Kitts, and St. Thomas; in one or other of which I am told I cannot fail of meeting a market for the wines, and such other part of the cargo as I do not dispose of in the Canaries. I have not sold a single package of linens, but could have disposed of a much larger quantity of cottons. With respect to the linens I have no fear, as in the Canary any reasonable quantity is desirable."

The bankrupt immediately took the letter to the defendant, telling him "that the voyage was altered, and that he left him this letter to do the needful with it." The defendant accordingly, within a week afterwards, caused alterations to be made by the several underwriters on their respective policies, by adding leave from the underwriters that the *Sprightly* might proceed to St. Kitts and Barbados for all purposes. There were some slight variations in the terms of the alterations in the different policies, not material to the present inquiry.

The vessel was lost at the Grand Canary Island, to which she had afterwards sailed; and actions having been brought, which turned out unsuccessful, by reason of the voyage on which the ship was lost not being covered by the alterations, the assignees brought the present action against the defendant for the non-performance of the duty which he had contracted to perform as policy broker; contending that under the letter of Jan. 24, 1831, which formed his instructions for the alteration of the policies, it was the defendant's duty to have included in such alteration "liberty to proceed to or touch at any of the Canary Islands." After the plaintiffs had closed their case, the defendant's counsel called several

policy brokers, and putting the five policies, and the bills of lading and invoices of the goods, and also the letter of Jan. 24, 1831, into their hands, the witnesses were then asked, what alterations of the policies ought a skilful insurance broker to have procured, in their judgment, having these documents in his possession, and being instructed to do the needful: to which question they replied in substance, that they thought a policy broker would have done ample justice to the instructions by procuring the alterations as made.

The cause went to the jury, who found their verdict for the defendant.

Serjeant Wilde for the plaintiff moved to set it aside, on the ground that such evidence ought not to have been received.—Upon matters of science it has been the practice to receive in evidence the opinion of scientific men: *Beckwith* v. *Sydebotham* (1); but the opinion of professional men as to the construction of a letter or the propriety of the conduct of an individual in professional matters, has never been admitted: *Ramadge* v. *Ryan* (2). In *Rickards* v. *Murdock* (3)—the authority on which the evidence in question was received—an insurance was effected in pursuance of directions contained in a letter received from New Holland [Australia], some of which were not disclosed to the insurers, and it was held that underwriters might be called to say whether the particulars not communicated were material. The materiality, however, of a disclosure to be made to an underwriter is a question of fact, upon which the opinion of persons skilled in the business of insurance has always been deemed admissible evidence: *Lindenau* v. *Desborough* (4); *Berthon* v. *Lougham* (5); *Durrell* v. *Bederley* (6); 12 VINER'S ABRIDGMENT, P. a. 11, Merchant insurer. Here the opinion given related only to the construction of a letter, which without explanation sufficiently pointed out the course to be taken by the defendant.

In *Carter* v. *Boehm* (7), where it was held that the opinions or fears of a party insuring need not be disclosed, LORD MANSFIELD said (3 Burr. at p. 1918):

> "We all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any precedent or usage. It is an opinion, which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause; and, therefore, it is improper and irrelevant in the mouth of a witness."

The judgment of GIBBS, C.J., *in Durrell* v. *Bederley* (6), agrees with this. He says (Holt, N.P. at pp. 285, 286):

> "I am of the opinion that the evidence of the underwriters, who were called to give their opinion of the materiality of the rumours, and of the effect they would have had upon the premium, is not admissible evidence. . . . It is not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless."

A rule nisi was granted.

Serjeant Jones, for the defendant, showed cause against the rule.
Serjeant Wilde, for the plaintiffs, supported the rule.

Cur. adv. vult.

June 6, 1833. **TINDAL, C.J.,** delivered the following judgment of the court.—This was an action of assumpsit, brought to recover a compensation against the defendant, for the want of proper care and skill in the execution of his duty as a policy broker, that is to say, in not having procured the proper alterations to be made in certain policies of insurance, according to the instructions which he had received, by reason whereof, after a total loss, the underwriters could be made responsible on the policies upon the ground of deviation.

HIS LORDSHIP stated the facts as above set out, and continued: The question argued before us has been whether such evidence was admissible. It is objected on

the part of the plaintiffs that to allow this question to be put to the witnesses is, in effect and substance, to allow them to be asked what is the meaning of the letter; that is to ask them whether the letter told the defendant that the vessel was going to the Canaries; whereas the letter ought to be allowed to speak for itself; or if there was any doubt upon the meaning it ought to be determined by the court and jury, and not by the evidence of insurance brokers or any other witnesses.

It may be admitted, that if such were the real nature of the question, the evidence offered would have been inadmissible. But we think, upon reference to the issue between the parties it was different. The action is brought for the want of reasonable and proper care; skill, and judgment shown by the defendant under certain circumstances in the exercise of his employment as a policy broker. The point, therefore, to be determined is, not whether the defendant arrived at a correct conclusion upon reading the letter, but whether, upon the occasion in question, he did or did not exercise a reasonable and proper care, skill and judgment. This is a question of fact, the decision of which appears to us to rest upon this further inquiry, viz., whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant.

The defendant did not contract that he would bring to the performance of his duty, on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it: and it appears to us, that it is not only an unobjectionable mode, but the most satisfactory mode of determining this question, to show by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion as the defendant. If nine brokers of experience out of ten would have done the same as the defendant under the same circumstances, or even if as many out of a given number would have been of his opinion as against it, he who only stipulates to bring a reasonable degree of skill to the performance of his duty, would be entitled to a verdict in his favour. There is no hardship upon the plaintiffs by this course of proceeding, for they might have called members of the same profession or trade to give opposite evidence, if the facts would have warranted it; and the jury would then have decided upon such conflicting testimony, according to the relative skill or experience of the witnesses of either side, or according to the strength of the reasons which were advanced by the witnesses in support of their respective opinions.

If this is the point to be decided, as we all think it is, neither the judge nor the jury can, upon reading the letter, arrive at any conclusion upon the question. If the letter, indeed, had contained an express or explicit order to obtain leave to touch at the Canaries, there would have been no question at all: evidence as to the conduct of other men, on reading such a letter, would never have been received, because perfectly useless if received. But it is not a simple abstract question, as is supposed by the plaintiffs, what the words of the letter mean: it is what others conversant with the business of a policy broker would have understood it to mean, and how they would have acted upon it under the same circumstances. The time of year at which the voyage is performed; the nature of the cargo on board; the objects of the voyage, as disclosed in the letter; above all, the circumstance that the original voyage described in the policy itself comprehended Teneriffe, the greatest and most important of the Canary Islands, would all operate in the minds of experienced men in determining whether it was intended the alteration should include a liberty to touch and stay at the Canaries in general. This conclusion, it appears to us, neither judge nor jury could arrive at from the simple perusal of the letter, unassisted by evidence; because they would not have the experience upon which a judgment could be formed. The decision in this case appears to be consistent with the principle laid down by HOLROYD, J., in *Berthon* v. *Loughman* (5), that a witness conversant in the subject of insurance might give his opinion, as a matter of judgment, whether particular facts, if disclosed, would make a difference as to the amount of the premium, a principle

which has been confirmed by the later case of *Rickards* v. *Murdock* (3); and it is difficult to reconcile the opinion given by GIBBS, C.J., in *Durrell* v. *Bederley* (6) with the judgment of the Court of King's Bench in the case last referred to.

We think, therefore, both on principle and on the authority of the decided cases, the evidence was properly admitted.

Rule discharged.

LAUGHER *v.* POINTER

[COURT OF KING'S BENCH (Abbott, C.J., Littledale, Holroyd and Bayley, JJ.), February 2, 1825, Trinity Term, 1826]

[Reported 5 B. & C. 547; 8 Dow. & Ry. K.B. 556; 4 L.J.O.S.K.B. 309; 108 E.R. 204]

Master and Servant—Relationship of master and servant—Temporary servant—Horses and driver hired by owner of carriage for one day—Negligence of driver causing damage—Liability of carriage owner.

The defendant, the owner of a carriage, hired from the keeper of a stable a pair of horses to draw the carriage for a day, and at his request the stable-keeper also provided a driver. Through the negligence of this driver a horse belonging to the plaintiff was injured. In an action by the plaintiff for damages for the negligence of the driver who, he alleged, was in law the servant of the defendant,

Held by LITTLEDALE, J., and ABBOTT, C.J., that in the circumstances the driver was not the defendant's servant and so the defendant was not liable (per LITTLEDALE, J.) because, while the rule of law might be that the owner of real property must take care that his property was so used and managed that other persons were not injured whether the property be used or managed by his own servants or by contractors or their servants, if the owner of personal, movable property employed another to do work respecting that property and that other furnished a servant to do the work, that servant was not to be considered as being the servant of the owner of the property; (per ABBOTT, C.J.) on the grounds stated by LITTLEDALE, J., and further, because a stable-keeper, like the coachman of a hackney carriage and the waterman of a Thames wherry, was ready to attend the call of anyone wishing to employ him.

Held, contra, by HOLROYD, J., and BAYLEY, J., that the plaintiff was entitled to succeed (per HOLROYD, J.) because at the time of the act of negligence the driver was driving under the authority, orders, and general direction of the defendant, for the defendant's profit, benefit, and pleasure, and so was in law to be considered the defendant's servant; (per BAYLEY, J.) because the general rule was that a person who employed another was responsible for him, and, if the defendant left it to the stable-keeper to appoint a driver, he was in the same position as if he had employed the driver himself, and, therefore, the driver was in his temporary service.

Notes. Followed: *Smith* v. *Lawrence* (1828), 2 Man. & Ry. K.B. 1; *Quarman* v. *Burnett*, [1835–42] All E.R. Rep. 350. Applied: *Milligan* v. *Wedge* (1840), 12 Ad. & El. 737; *White* v. *Jameson* (1874), L.R. 18 Eq. 303. Followed: *Jones* v. *Liverpool Corpn.* (1885), 14 Q.B.D. 890. Applied: *The Quickstep* (1890), 15 P.D. 196. Distinguished: *Jones* v. *Scullard*, [1898] 2 Q.B. 565. Considered: *Bull* v. *West African Shipping, etc., Co.*, [1927] A.C. 686. Applied: *Wilchick* v. *Marks*, [1943] All E.R. Rep. 73. Referred to: *Brady* v. *Giles* (1835), 1 Mood. & R. 494; *Fenton* v. *City of Dublin Steam Packet Co.* (1838), 8 Ad. & El. 835; *McLaughlin* v. *Pryor* (1842), 4 Man. & G. 48; *Rapson* v. *Cubitt* (1842), 9 M. & W. 710; *Allen* v. *Hayward* (1845), 7 Q.B. 960; *Rich* v. *Basterfield* (1847), 4 C.B. 783; *Machu* v.

London and South Western Rail. Co. (1848), 2 Exch. 415; *Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *London and North Western Rail. Co.* (1849), 4 Exch. 244; *Gayford* v. *Nicholls* (1854), 2 C.L.R. 1066; *Dalyell* v. *Tyrer* (1858), E.B. & E. 899; *Tobin* v. *R.* (1864) 16 C.B.N.S. 310; *Omoa Coal and Iron Co.* v. *Huntley* (1877), 2 C.P.D. 464; *Chibnall* v. *Paul & Son* (1881), 29 W.R. 536; *Hughes* v. *Perciral* (1883), 49 L.T. 189; *Donovan* v. *Laing, Wharton and Down Construction Syndicate*, [1891–4] All E.R. Rep. 216; *Dewar* v. *Tasker* (1906), 95 L.T. 87; *Pollard* v. *Goole and Hull Steam Towing Co.* (1910), 3 B.W.C.C. 360; *Honeywill and Stein, Ltd.* v. *Larkin Bros. (London's Commercial Photographers), Ltd.*, [1933] All E.R. Rep. 77; *Eggington* v. *Reader*, [1936] 1 All E.R. 7; *Hewitt* v. *Bonvin*, [1940] 1 K.B. 188; *Balfour* v. *Barty-King*, [1956] 2 All E.R. 555.

As to the relationship of master and servant, see 25 HALSBURY'S LAWS (3rd Edn.) 447 et seq.; and for cases see 34 DIGEST (Repl.) 16 et seq.

Cases referred to:

(1) *Bush* v. *Steinman* (1799), 1 Bos. & P. 404; 126 E.R. 978; 34 Digest (Repl.) 205, *1436*.

(2) *Fletcher* v. *Braddick* (1806), 2 Bos. & P.N.R. 182; 127 E.R. 593; 41 Digest 260, *1024*.

(3) *Nicholson* v. *Mounsey and Symes* (1812), 15 East, 384; 104 E.R. 890; 41 Digest 796, *6550*.

(4) *Sammell* v. *Wright* (1805), 5 Esp. 263, N.P.; 34 Digest (Repl.) 173, *1226*.

(5) *Dean* v. *Branthwaite* (1803), 5 Esp. 35, N.P.; 34 Digest (Repl.) 20, *28*.

(6) *Stone* v. *Cartwright* (1795), 6 Term Rep. 411; 101 E.R. 622; 1 Digest (Repl.) 452, *1034*.

(7) *Sly* v. *Edgley* (1806), 6 Esp. 6, N.P.; 34 Digest (Repl.) 201, *1409*.

(8) *Littledale* v. *Earl of Lonsdale* (1792), unreported; affirmed sub nom. *Earl of Lonsdale* v. *Littledale* (1793), 2 Hy. Bl. 267; 2 Anst. 356, Ex. Ch.; affirmed (1794), 5 Bro. Parl. Cas. 519; 2 Hy. Bl. 299, H.L.

(9) *Leslie* v. *Pounds* (1812), 4 Taunt. 649; 128 E.R. 485; 31 Digest (Repl.) 381, *5087*.

(10) *Chilcot* v. *Bromley* (1806), 12 Ves. 114; 33 E.R. 44; 44 Digest 902, *7618*.

(11) *Lotan* v. *Cross* (1810), 2 Camp. 464; 170 E.R. 1219, N.P.; 3 Digest (Repl.) 118, *381*.

(12) *Hall* v. *Pickard* (1812), 3 Camp. 187, N.P.; 3 Digest (Repl.) 118, *382*.

(13) *Boson* v. *Sandford* (1689), 2 Salk. 440; 91 E.R. 382; 34 Digest (Repl.) 157, *1093*.

(14) *Lane* v. *Cotton* (1701), 12 Mod. 472, 488; 1 Ld. Raym. 646; 1 Salk. 17; 88 E.R. 1458; 34 Digest (Repl.) 232, *1706*.

(15) *Croft* v. *Alison* (1821), 4 B. & Ald. 590; 106 E.R. 1052; 34 Digest (Repl.) 179, *1268*.

(16) *Houghton's Case* (circa 1810), cited in 8 Dow. & Ry. at p. 577; 36 Digest (Repl.) 104, *515*.

Rule Nisi obtained by the plaintiff to set aside a nonsuit and for a new trial in an action on the case brought to recover compensation in damages for an injury done to the plaintiff's horse by the negligent driving of a carriage against it.

The plaintiff, in his declaration, alleged that he (the plaintiff) was possessed of a horse, and the defendant was possessed of a carriage and two horses harnessed to and drawing the same, which carriage and horses were under the care, government, and direction of a person, being the servant of the defendant in that behalf who was driving the same, and that the defendant, by his said servant, so negligently and improperly drove and directed his carriage and horses that the carriage struck the plaintiff's horse injuring him, for which the plaintiff claimed damages.

At the trial before ABBOTT, C.J., at the London sittings after Michaelmas Term, 1823, it appeared in evidence that the defendant, a gentleman usually residing in the country, being in town for a few days with his own carriage, sent in the

usual way to a stable-keeper for a pair of horses for a day. The stable-keeper sent the pair of horses and a person to drive the same. The defendant did not select the driver, nor had he any previous knowledge of him, but the stable-keeper sent a person whom he chose for the purpose. The driver had no wages from his master and no power to demand anything, but he depended upon receiving a gratuity from the persons whose carriages he drove, and the defendant gave him 5s. as a gratuity for his day's work. The LORD CHIEF JUSTICE thought that the evidence did not support the declaration, and directed a nonsuit, and later a rule nisi for a new trial was granted to the plaintiff.

Tindal, for the defendant, showed cause against the rule.

Abraham, for the plaintiff, supported the rule.

Cur. adv. vult.

The judges not being agreed in opinion, proceeded to give judgment seriatim.

LITTLEDALE, J.—This was an action brought to recover compensation in damages occasioned to a horse belonging to the plaintiff, which, as he said, sustained an injury by the negligent conduct of the defendant's servant in driving a carriage and horses of the defendant. The cause was tried before the Lord Chief Justice of the Court of King's Bench, and the plaintiff was nonsuited. A rule nisi was afterwards obtained to set aside the nonsuit, and, the judges of the court not being agreed in opinion and the case being one of difficulty and of extensive consequences, it was argued in Serjeants' Inn before all the judges, except the Lord Chief Baron of the Exchequer. There being a difference of opinion among the other judges, it now remains for the judges of this court to deliver their judgment upon the case.

The plaintiff was the owner of the horse that was injured. The defendant was owner of the carriage, and he, having occasion to use it, applied to a jobman who supplied him with a pair of horses and a coachman for a day. The jobman did not give anything to the coachman for the day's work, but the defendant paid him 5s.

The 5s. was not, however, paid in pursuance of any contract or engagement either with the jobman or the coachman, but was merely given as a gratuity to the coachman who had no employment relative to any business of the defendant except the driving of the carriage in question. In the course of driving the carriage, the coachman by his negligent conduct occasioned the injury, and the question for the consideration of the court is whether the defendant be liable. According to the rules of law, every man is answerable for injuries occasioned by his own personal negligence, and he is also answerable for acts done by the negligence of those whom the law denominates his servants, because such servants represent the master himself, and their acts stand upon the same footing as his own. In the present case the question is whether the coachman, by whose negligence the injury was occasioned, is to be considered a servant of the defendant.

For the acts of a man's own domestic servants there is no doubt but the law makes him responsible, and, if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability. The reason is that such a servant is hired by the master either personally or by those who are entrusted by the master with the hiring of servants, and he is, therefore, selected by the master to do the business required of him.

This rule applies not only to domestic servants who may have the care of carriages, horses, and other things in the employ of the family, but extends to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to appoint and select the crew. The crew thus become appointed by the owner and

are his servants for the management and government of the ship, and if any damage happens through their default it is the same as if it happened through the immediate default of the owner himself. So the same principle prevails if the owner of a farm has it in his own hands and he does not personally interfere in the management, but appoints a bailiff or hind who hires other persons under him, all of them being paid out of the funds of the owner and selected by himself or by a person specially deputed by him. If any damage happen through their default, the owner is answerable, because their neglect or default is his as they are appointed by and through him. So in the case of a mine, the owner employs a steward or manager to superintend the working of the mine and to hire under workmen, and he pays them on behalf of the owner. These under workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing any acts on account of their employer.

The present case, however, is not that of a man employing his own immediate servants, either domestic servants or others, engaged by him to conduct any business, or employment, or occupation carried on by him. For the jobman was a person carrying on a distinct employment of his own, in which he furnished men and let out horses to hire to all such persons as chose to employ him. This coachman was not hired to the defendant. He had no power to dismiss him. He paid him no wages. The man was only to drive the horses of the jobman. It is true the master paid him no wages, and the whole which he got was from the person who hired the horses, but that was only a gratuity. It is the case with servants at inns and hotels. Where there is a great deal of business they frequently receive no wages from the owner of the inn or hotel and trust entirely to what they receive from the persons who resort to the inn or hotel, and yet they are not the less the servants of the innkeeper. They are not servants upon wages, but servants upon expectation of gratuities. Therefore, if the defendant is in this case to be answerable for the acts of the driver provided by the jobman, it must be upon this principle that, if a man, either for his benefit or pleasure, employs an agent to conduct any business, such agent is to be looked upon in the same light as if he was the immediate servant of the employer, and that the owner of the property, by employing such an agent to transact his business, confides to him the choice of the under-workmen. Then the principle must go on to this, that such agent and under-workmen are to be considered in the same light as the foreman or manager of a person in conducting his business, and as the workmen selected by such foreman or manager, and that it makes no difference to persons who receive an injury in what light the offending party stands to the principal, whether as an under-workman employed by an agent or an under-workman employed by the foreman of the principal, and that the only thing to be looked to is whether in the end the principal pays for the employment in the course of which the injury is occasioned.

But I think that, upon principle, this rule cannot be carried so far. In *Bush* v. *Steinman* (1), indeed, HEATH, J., expresses it as his opinion that, if a person hires a coach upon a job and a job coachman is sent with it and does any injury, the hirer of the carriage is answerable. That is certainly entitled to great weight, as being the opinion of a very able judge. It was, however, only an obiter dictum, and in a case where, like the present, there is a difference of opinion among the judges the question must, if possible, be determined upon principle and decided cases. If a man charters a ship for a voyage or for time and the master and mariners are appointed by the owner, this ship is employed for the benefit and for transacting the business of the charterer just the same as if he had a ship of his own employed in the same service, and it might be said that he deputes to the owner the selection of the master and mariners, but in such a case the law has never considered the charterer liable to third persons for the negligence of the master and mariners. In *Fletcher* v. *Braddick* (2) the owners had chartered the vessel to the commissioners of the navy who were to put an officer on board under whose direction the master was to act, and, though there was a king's pilot on

board, yet the owners were nevertheless held liable for running down the plaintiff's ship. In *Nicholson* v. *Mounsey* (3), a captain of a man-of-war was held not liable for the default of the lieutenant whose watch it was when an injury was committed. Suppose a man has a ship or a carriage or other thing to repair, and he, instead of having the repairs done on his own premises and by his own servants, sends it out to be repaired by a person who exercises the public employment under which it would be repaired, and any damage happens in the course of the repair by the negligence of the persons employed, these are employed by a person who may be considered the agent of the principal, and yet the law would not hold the principal liable. If a man hires a carriage and horses to travel from stage to stage, the carriage and horses are employed for the benefit or pleasure of the traveller, instead of using his own which he may not do either from inability to keep horses or a desire for expedition, and yet the law has never considered the traveller liable. There is no difference in principle between a man's travelling by the stage or travelling by the day. In one case and the other the traveller is using the carriage and horses for his benefit; he pays so much by the day instead of so much by the mile; he pays the coachman a gratuity in one case and the postillion in the other case, and yet the traveller has never been held liable.

As to this latter point, there are some decisions in point. *Sammell* v. *Wright* (4), where the horses were hired to go to Windsor, and the owner of the horses was held liable because they were under the care and direction of his servants. The carriage belonged to the traveller who was the Marchioness of Bath. *Dean* v. *Branthwaite* (5) arose on a dispute between the owner of the carriage and the owner of the horses which were hired to go to Epsom. LORD ELLENBOROUGH says that a person who hires horses under such circumstances has not the entire management and power over them, but that they continue under the control and power of the stable-keeper's servants who were entrusted with the driving, and that he would be answerable for any accident occasioned by the post-boy's misconduct on the road. Then he mentions a case which had occurred of that kind. In this case, also, the party travelling had his own carriage. The same rule would apply to a hackney-coach; a man, instead of hiring his own carriage and servants, employs a hackneyman to drive him. There it is for the profit or convenience of the person riding in the coach, and yet the person so riding is not liable.

The cases referred to before LORD ELLENBOROUGH only show, indeed, the owner of the horses to be liable, but it may be said the traveller is liable also. I think not. The coachman or postillion cannot be the servant of both. He is the servant of one *or* the other, but not the servant of one *and* the other; the law does not recognise a several liability in two principals who are unconnected. If they are jointly liable you may sue either, but you cannot have two separately liable. You must bring your action either against the principal or the person who commits the injury: *Stone* v. *Cartwright* (6). There it was held that an action for an injury sustained through the improper working of a mine must be brought against the owner of the mine or against the workmen who did the injury, but that it could not be brought against an agent who hired the workmen. The allowing two principals to be severally liable would tend to a multiplicity of actions because, if the traveller was liable, he might have an action against the stable-keeper for supplying improper drivers and horses, and then the stable-keeper might have an action against his own drivers. If, indeed, several persons are concerned in a trespass or other tortious act they are liable jointly or severally at the election of the party injured, but the several liability arises from the joint liability and from the rule of law that a party injured need not sue all who are guilty of the wrongful act, but what I say is that two persons cannot be made separately liable at the election of the party suing unless in cases where they would be jointly liable, and there cannot be any ground for saying that the hirer of the horses and the jehu would be jointly liable.

There are, however, cases which have been determined upon principles not altogether consonant to what I have before considered are those upon which the liabilities of parties should be determined, where persons have been held liable for the negligence of individuals who were not their own immediate servants, but the servants of agents whom they had employed to do their work. In *Bush* v. *Steinman* (1) the owner of a house had employed a surveyor to do some work upon it, there were several sub-contracts, and one of the workmen of the person last employed put some lime on the road in consequence of which the carriage of the plaintiff was overturned. It was held that the owner of the house was liable, though the person who occasioned the injury was not his own immediate servant. So in *Sly* v. *Edgley* (7) a person had employed a bricklayer to make a sewer who left it open and in consequence the plaintiff fell in and broke his leg. The person who employed the bricklayer was held liable upon the principle of respondeat superior, that he had employed the bricklayer and was answerable for what he had done. These cases appear to establish that in these particular instances the owner of the property was held liable, though the injury were occasioned by the negligence of contractors or their servants and not by the immediate servants of the owner.

But, supposing these cases to be rightly decided, there is the material distinction that there the injury was done upon or near and in respect of the property of the defendants of which they were in possession at the time. The rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others. But as to *Bush* v. *Steinman* (1), there are some observations to be made. EYRE, C.J., in the first place at nisi prius was of opinion the action was not maintainable, and when the case came before the court, he says in the beginning of his judgment (1 Bos. & P. at pp. 406, 407) that he finds

> "great difficulty in stating with accuracy the grounds on which it is to be supported. The relation of master and servant as commonly exemplified in actions brought against the master is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large and loose."

In the conclusion he also says that he still feels difficulty in stating the precise principle on which the action is founded. This case, therefore, does not rest upon the same basis as it would if no such doubt had been expressed. The case is mainly grounded upon *Littledale* v. *Earl of Lonsdale* (8), but in that case the defendant had a foreman or steward paid by him and he engaged all the under-workmen who were paid out of the funds of the defendant. All the machinery and utensils belonged to the defendant, and all the persons employed were his own immediate servants, just as much as his domestic servants engaged and hired by his house steward.

There is the case of *Leslie* v. *Pounds* (9), which has some resemblance to the last cases. LORD MANSFIELD, C.J., says that it is a very singular case. The tenant of a house was bound to repair it, but the landlord superintended the repairs, and, on being remonstrated with by the commissioners of pavement as to the dangerous state of the cellar, had promised to take care of it and had put up some temporary boards as a protection to the public. These boards proved to be

insufficient, and an accident having happened, he was held liable. That was decided on the ground of the defendant's personal interference about his own property.

It may be said that the defendant in the present case was owner of the carriage, and, therefore, the principles of these latter cases apply, but, admitting these cases, the same principle does not apply to personal movable chattels as to the permanent use and enjoyment of land or houses. Houses and land come under the fixed use and enjoyment of a man for his regular occupation and enjoyment in life, and the law compels him to take care that no persons come about his premises who occasion injury to others. The use of a personal chattel is merely a temporary thing, the enjoyment of which is in many cases trusted to the care and direction of persons exercising public employments, and the mere possession of that where the care and direction of it is entrusted to such persons who exercise public employments and in virtue of that furnish and provide the means of using it, is not sufficient to render the owner liable. Movable property is sent out into the world by the owner to be conducted by other persons; the common intercourse of mankind does not make a man or his own servants always accompany his own property; he must in many cases confide the care of it to others who are not his own servants, but whose employment it is to attend to it. In the instances of various kinds of carriages, they are frequently, in the common intercourse of the world, confided to the care of persons who provide the drivers and horses, and it is not considered that the drivers necessarily belong to the owner of the carriage. I think that there cannot be any difference in point of law as to the liabilities of these persons arising from the mere ownership of the carriage, and that the ownership of the carriage makes him no more responsible than it would do if it had been sent to be repaired by a coachmaker who, in the course of repair, had occasioned damage to other persons, but, if the injury arises from the driver, it is he, or the person who appoints him, that is to be responsible.

It may be said that, according to this doctrine, a person who hired job-horses and a coachman for a year would not be answerable for the negligence of the coachman. If the coachman remain the mere servant of the jobman, not otherwise employed in the service of the hirer, I think the hirer would not be liable for whatever time he hired the coachman and horses, but where the coachman is hired for a year it will very often happen that he is employed in other services besides the mere attention to the coach and horses, and if, by such circumstances, he becomes the servant of the hirer besides being the servant of the jobman, the case might then admit of a different consideration. In *Chilcot* v. *Bromley* (10), a testator bequeathed to all his servants £500 each, and it was held that a coachman supplied by a jobmaster together with a carriage and horses which were hired by the year was not entitled to be considered a servant.

The present, however, is not the case of a servant employed for a year or a month, and upon the whole of the circumstances of this case, I am of opinion that this defendant is not liable for the damage that has occurred, and that the rule for setting aside the nonsuit should be discharged. There are many cases where questions have arisen upon the liabilities of postmasters, of captains of ships of war, and of owners of ships who have taken pilots, and of factors who have acted for their principals, and others, as to what degree of possession is kept by the owner. These I have not thought it necessary to notice, because I think the sole question here is whether, if a man employs another to do work respecting personal movable property, and that other furnishes a servant, that servant is to be considered in the same light as a servant appointed by the person himself.

HOLROYD, J.—This was an action on the case to recover compensation in damages for an injury done to the plaintiff's horse by the negligent driving of a barouche or carriage and horses. It appeared in evidence that the defendant, at the time when the accident happened, was riding in a barouche, being his carriage, which was drawn by a pair of horses driven by a person pursuant to the

defendant's orders. The driver and horses being hired by the defendant of one Bryant for a day to go where the defendant pleased, for hire to be paid by the defendant to Bryant, and for which driving the defendant afterwards voluntarily paid the driver a gratuity of 5s.

The question on the trial was whether the defendant under such circumstances was by law answerable in this action for the negligence of the driver as his servant in such driving. It was contended in the argument, not only that the defendant was not responsible for the driver, but that the plaintiff could not recover on this declaration, each count of which contained as a material allegation that the act was done by the defendant's servant, whereas the driver could not be considered as his servant. But my mind has come to the conclusion that the defendant is responsible for the driver's negligence, and responsible too upon this declaration, the driver being to be considered, in my opinion, for this purpose as in law his servant. It appears to me that the defendant stands in the same situation of responsibility as if the horses had been driven by Bryant himself, or as if they had been driven by a person chosen by the defendant himself, for the driving is equally under the authority and orders of the defendant, and equally for his profit, benefit or pleasure. The driver is, I think, equally the defendant's servant for that purpose, whether the driver be Bryant himself, the person directly hired and employed by the defendant, or another person selected and appointed by the defendant himself, or a person selected and appointed by Bryant under the authority or permission of the defendant. The question is not whether Bryant, as the owner of the horses and the immediate master of the driver, might or might not have been made responsible for the driver's negligence, nor is this the case of a letting for a particular purpose only such as going to a particular place, as in *Dean* v. *Branthwaite* (5), and *Sammell* v. *Wright* (4), where the hirer was considered not to have the entire management and control over the things so hired, from which cases the present is distinguishable because the present hiring was for no such particular purpose, but to go with the carriage where the defendant chose and to be under his general authority and orders in that respect for a certain time. By such a letting for a certain time the defendant became possessed in law of the horses so let to him while he was using them under such letting. It would be so clearly if they had not been retained in the custody of a driver provided by Bryant according to the doctrine of LORD ELLENBOROUGH in *Lotan* v. *Cross* (11), where he says: "show a letting [i.e., of the chaise] for a certain time to Brown, and the possession would be in him," and in *Hall* v. *Pickard* (12), where, by the horses being let to hire to Dr. Carey for a certain term, he, and not the owner, was deemed to be the person in possession of them, as he (Dr. Carey) had a right to retain them till that time was expired, though in that case indeed Dr. Carey is stated to have been driving them by his own servants when the mischief was done.

But in the present case, although the horses were continued in the custody of a driver provided by Bryant, yet, as the horses and the driver were to be for the use and subject to the general directions of the defendant and as the defendant had a right to retain them till the time for which they were hired was expired, and as they were at the time the mischief was done in the use and under the directions of the defendant, I think that the driver was for this purpose in the employ, and, in law, the servant of the defendant, and that the defendant was in law answerable for the driver's negligence in the execution of the defendant's orders in such employ, in whatever situation the driver might also stand with respect to Bryant, with regard to Bryant's responsibility for him, at the election of the plaintiff.

A person may stand in the relation of servant to two different persons as his masters in two different respects with regard to the same thing, and this even though the service done, or to be done, be special and limited to a single act, as appears in 2 ROLLE'S ABRIDGMENT, 556, pl. 14, though that, indeed, was a

case in which the party employing the officer, who was considered as his servant, would not be responsible for the conduct of the officer as his servant, but that would be so on account of the duties and obligations upon the officer, and upon grounds not applicable to the question of the defendant's responsibility in the present case. There it is said:

"If a serjeant of London, or bailiff in a county, take a man upon a capias in process at my suit, and J. S. rescue him out of his possession, I may have a general writ of trespass against him, because the serjeant is as well my servant to this purpose as the servant of the king [that is, as it is expressed in HOBART, 180; minister as well to the person suing out the process as to the court], and, therefore, the taking out of the possession of the serjeant, who is my servant, is a taking out of my possession": Trinity 15 Jac. [1617], *Wheatley* v. *Stone*, adjudged in a writ of error at Serjeant's Inn.

So in the present case, I think the horses were to be considered in law as in the possession of the defendant and the driver as the defendant's servant for the purpose for which he was sent to the defendant, and I think that a taking of the horses or driver away from the defendant's service during the time for which he had hired them would have been a taking them away from him for which he might have maintained an action of trespass as for a taking them out of his possession and service, and, consequently, that he was answerable for the driver's negligence in driving him, the defendant, while under his, the defendant's orders. It is to be considered, I think, as the defendant's driving of the carriage and horses by his servant. That the responsibility is not confined to the immediate master of the person who committed the injury and that the action may be brought against the person from whom the authority flows to do the act in the negligent execution of which the injury has arisen, is established by *Bush* v. *Steinman* (1), where, the owner of a house having contracted with a surveyor to repair the house for a stipulated sum, and the surveyor having contracted with a carpenter to do it, who employed a bricklayer, who contracted for a quantity of lime with a lime burner, the owner of the house was held responsible for the damage occasioned by the lime burner's servants improperly laying that lime in the high road. The principles on which that case was decided apply, I think, directly to the present case and show the responsibility of the present defendant, and, indeed, HEATH, J., puts the very case that where a person hires a coach upon a job and a job coachman is sent with it, the person who hires the coach is liable for any mischief done by the coachman while in his employ, though (as the judge is there made to say), he is not his servant. But under the circumstances of the present case the defendant was, I think, liable for the negligence of the driver as his servant, driving the defendant pursuant to his orders (the driver being, in law, his servant, in my opinion, for that purpose according to the declaration), and, consequently, that the nonsuit ought to be set aside and a new trial granted.

BAYLEY, J.—The question in this case is whether the owner of the carriage is answerable for the negligence of the driver. This is not the case of a driver where, according to established usage, carriage and horses and driver belong, not to the person driven, but to another master who may be easily discovered, as in the case of a hackney-coach, nor is it the case of a driver, where, according to established usage, neither horses or driver belong to or are commonly in the service of the person driven, but belong to another master who is either known, or may easily be discovered, as in the case of post-horses, but it is the case of a person who hires a pair of horses for the day to draw his own carriage, and leaves it to the owner of the horses to send such person to drive them as such owner may think fit. There is nothing from usage or otherwise to imply that the horses are not the defendant's and the driver his regular servant; nothing to designate it to make it easy to discover to whom the horses and driver belong.

The general rule in the case of master and servant, as laid down in *Boson* v.

Sandford (13), is that the man who employs another is answerable for him. Had the defendant hired the driver, can there be a doubt but that he would have been the defendant's servant? If he leaves it to the owner of the horses to hire him, is he not, in substance, hired by the defendant? If I hire horses of A. and hire B. to drive, B. is undoubtedly, for the time, my servant. Is the driver less my servant for the time because I hire him and the horses under one bargain and allow the owner of the horses to select him? He is employed for me; that cannot be disputed. He drives where I direct, and so long as I require nothing contrary to my contract with the owner of the horses, he must obey my reasonable commands. He must go where I order; must stop where I require; must go the pace I specify. Though the owner of the horses is to a certain extent his master, I am, to a certain extent, his master also. Though the former is his master in general, he has, for a time, let him out to me, and a master is liable for the acts of one who is in his service or employ though the master who is to be charged is not his immediate employer, but employs him through the medium of another. If I hire the driver, I am answerable for him; if I employ J. S. to hire him, am I not still answerable? I exercise my own judgment in the one case, I leave it to J. S. to exercise a judgment for me in the other, but still it is for me that the judgment is exercised. The service is performed for me. It is my work the driver does.

In *Bush* v. *Steinman* (1), the man who did the wrong was not selected by the defendant and was not immediately employed by him; he was only employed through the medium of one who contracted to do the work for the defendant, but he was doing the defendant's work. He was (through the medium of the contractor, indeed, but still he was) working for the defendant, and on that account the defendant was held liable.

> "If a deputy has power to make servants, the principal will be chargeable for their misfeasance because the act of the servant is the act of the deputy, and the act of the deputy is the act of the principal:"

per HOLT, C.J., in *Lane* v. *Cotton* (14) (1 Ld. Raym. at p. 656). The owner of a ship is answerable for the misfeasance of mariners, though he leaves it to the master to select the crew. The owners of a coach will be liable, though they leave it to J. S. to select the driver and horses, or though they employ as driver the man who owns the horses. In many instances one proprietor horses a coach for one stage, another for a second, and so on, and in some instances the man who finds the horses finds the coachman also. Shall this take away the liability of all the proprietors? Shall it be said, if the coach does an injury upon a given stage, that the proprietor who finds the horses and driver for that stage shall alone be answerable? The horses and driver are found by the one to do the work of all, they are employed upon the work and for the benefit of all, and, therefore, all are responsible. Nor does it appear to me to make any distinction whether the driver and horses are hired for a single day only, or for a longer period. Had they been hired by the year, can there be a doubt but that the hirer would have been answerable? What if they had been hired for a month or for a week? Would the difference of period for which they were hired make a difference in the responsibility? Can any legal principle be adduced to make the period the criterion of being answerable or not? The driver is equally employed on account of the hirer, to do the work of the hirer, to obey the lawful commands of the hirer, and to be the temporary servant of the hirer, whether he is engaged for the day, the week, the month, or the year, and the hirer bears the appearance for the time of standing in the relation of master to the driver. These are circumstances which in my judgment make the hirer responsible.

Upon these grounds, therefore, that the driver in this case was in the temporary employ and service of the defendant and that this is not a case in which, according to the known and established course of proceeding, it is notorious that the person

driven does not stand in relation of master to the driver, and it is matter of easy discovery who does stand in that relation, as in the cases of hackney-coaches and post-horses, and that there was nothing in this case to rebut the prima facie presumption that the horses were the defendant's and the driver his servant, I am of opinion that this defendant was liable to the action, and that the nonsuit was wrong.

ABBOTT, C.J. This is an action upon the case brought to recover damages for an injury done to a horse of the plaintiff by the negligent driving of a carriage against it in one of the streets of London. At the trial before me the plaintiff was nonsuited. A rule was obtained for setting aside the nonsuit, and the case was argued first in this court, and afterwards before us and the judges of the other courts at Serjeant's Inn, but a difference of opinion has existed both in this court and among the other judges.

I take the question to be whether either of the counts in the declaration was sustained by the evidence given at the trial. The evidence given was that the defendant, a gentleman usually residing in the country, being in town for a few days with his own carriage, sent in the usual way to a stable-keeper for a pair of horses for a day. The stable-keeper, accordingly, sent a pair of horses and a man to drive them, being the horses and driver mentioned in the declaration. The defendant did not select the driver, nor had any previous knowledge of him. The stable-keeper sent such person as he chose for this purpose. I thought at the trial that the driver could not be considered as the servant of the defendant, so as to sustain either of the first two counts, and also that the horses were not under the care, government, and direction of the defendant, nor driven, governed, and directed by him so as to sustain the last count. And, with all due respect for such of my learned brothers, both in and out of this court, who think otherwise, I must say that I still entertain the same opinion.

I will first advert to the authorities quoted on the one side and the other. The decisions cited for the plaintiff were the judgment of the Court of Common Pleas in *Bush* v. *Steinman* (1), as furnishing a principle, the observation of HEATH, J., referring to a supposed case like the present and assuming that the owner of the carriage would be answerable: *Hall* v. *Pickard* (12); and *Croft* v. *Alison* (15). On the part of the defendant were cited *Chilcot* v. *Bromley* (10); *Dean* v. *Branthwaite* (5); *Sammell* v. *Wright* (4); and *Houghton's Case* (16), before LORD ELLENBOROUGH. Reference was also made to POTHIER'S TREATISE ON OBLIGATIONS, part 1, No. 121.

Bush v. *Steinman* (1) was an action against the owner of a house, under repair and not inhabited, for causing a quantity of lime to be placed on the high road whereby the plaintiff's chaise was overturned and damaged. The defendant, who had never occupied the house, had contracted with a surveyor to repair it for a fixed sum. The surveyor contracted with a carpenter to do the whole, the carpenter employed a bricklayer, the bricklayer contracted with a lime-burner for a quantity of lime, and the servant of the latter laid the lime in the road. At the trial before EYRE, C.J., the plaintiff was nonsuited, but his Lordship afterwards changed his opinion, and concurred with the other judges of the court in granting a new trial, though he confessed he found a difficulty in stating with accuracy the grounds on which the action could be supported. He appears, however, to have been influenced chiefly by *Stone* v. *Cartwright* (6), and *Littledale* v. *Earl of Lonsdale* (8). These were actions for injury done to a dwelling-house by the improvident working of a colliery under it. In the first case the owner of the colliery was an infant; the action was brought against an agent and manager, appointed by the Court of Chancery, who hired and dismissed the workmen at his pleasure, but took no personal concern, was not present, and had given no particular directions for working the mine in the manner that occasioned the mischief. The defendant in that case was held not to be answerable, and LORD KENYON said (6 Term Rep. at p. 412):

"I have ever understood that the action must either be brought against the hand committing the injury, or against the owner for whom the act was done."

The second case was an action against such owner, and was held maintainable. These cases establish the principle, that the owner of a mine is answerable to the person whose property may be injured by the improvident manner of working it. If to these we add *Bush* v. *Steinman* (1), the principle will be carried no further. It will only be applied to the owner of a house, and render him answerable for an improvident act taking place in the repair of it.

Hall v. *Pickard* (12) was a question as to the proper form of action, whether trespass or case. It was an action for injury to a horse belonging to the plaintiff, but let by him for a term to a gentleman whose carriage it was drawing, and by whose servant it was driven. It was held that case and not trespass was the proper form of action, for the plaintiff had neither the legal nor actual possession of the horse, so as to maintain trespass. *Croft* v. *Alison* (15) was an action for damage to a carriage. The plaintiff, a stable-keeper, had hired the carriage of a coachmaker for a day, had furnished horses, appointed a coachman, and then let it out to a third person for the day. Under these circumstances it was held that the plaintiff was the proprietor of the carriage pro tempore.

On the other hand, *Dean* v. *Branthwaite* (5) was decided upon the principle that the owner of horses let to draw the defendant's carriage to Epsom races, under the conduct of postillions appointed by the plaintiff, had not thereby put the horses into the possession of the defendant, so as to preclude himself from maintaining an action of trespass against the defendant for an injury done by him to one of them. *Sammell* v. *Wright* (4) was an action brought against a stable-keeper who had let four horses in the usual way to draw a lady's carriage to Windsor, and the defendant was held liable to the action. *Houghton's Case* (16) was that of horses hired by Sir Henry Houghton to draw his carriage, travelling post, and he was held not to be answerable. It is true, that all the three were decisions at nisi prius, but they were the decisions of a very great judge, and were not afterwards brought before the court. *Chilcot* v. *Bromley* (10) was a suit for a legacy under a will, whereby a legacy was given to each of the testator's servants. The testator hired a carriage and horses for a year of a jobmaster who also supplied a coachman and paid him 9s. a week. The testator paid him 12s. a week for board wages, and he received a livery with the other men servants. The question was whether this coachman was a servant of the testator within the meaning of the will. The Master of the Rolls held that he was not, and appears to have founded his judgment principally on the ground that there was no contract between the testator and the coachman, the contract being with the jobmaster, who might change the coachman, if he should think fit, without a breach of his contract if he substituted another of whom the testator could not have reason to complain.

Upon this review of the decisions, they appear to me to predominate in favour of the defendant. *Stone* v. *Cartwright* (6), *Littledale* v. *Earl of Lonsdale* (8), and *Bush* v. *Steinman* (1), do not, in my opinion, afford a rule by which the present case ought to be governed. Whatever is done for the working of my mine or the repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control and management of all that belongs to my land or my house, and it is my fault if I do not so exercise my authority as to prevent injury to another. But does it follow from this that I have the care, government, or direction of horses hired by me of another person, who sends a servant of his own choice to conduct and manage them, because I have hired the horses to draw my carriage? The opinion given by HEATH, J., on this subject, in *Bush* v. *Steinman* (1), was extra-judicial. It has the weight properly belonging to the opinion of a very learned judge, but it could not be revised and has not the authority of a judgment. *Dean* v. *Branthwaite* (5) and

Sammell v. *Wright* (4), and *Houghton's Case* (16), were decisions at nisi prius, but they were the decisions of a very learned judge. They were capable of revision; they were not afterwards questioned; and the last of the three bears directly upon the question in the present case.

Having made these remarks upon the former cases, I will now proceed to make some observations upon the case as it might stand independent of prior decisions. I admit the principle that a man is answerable for the conduct of his servants in matters done by them in the exercise of the authority that he has given to them, and also (which is the same thing in other words) that whatever is done by his authority is to be considered as done by him. I am sensible of the difficulty of drawing any precise or definite line as to the time or distance. But I must own that I cannot perceive any substantial difference between hiring a pair of horses to draw my carriage about London for a day and hiring them to draw it for a stage on the road I am travelling, the driver being in both cases furnished by the owner of the horses in the usual way, nor can I feel any substantial difference between hiring the horses to draw my own carriage on these occasions and hiring a carriage with them of their owner. If the hirer be answerable in the present case, I would ask on what principle can it be said that he shall not be answerable if he hires for an hour or for a mile? He has the use and benefit pro tempore, not less in the one case than in the other. If the hirer is to be answerable when he hires the horses only, why should he not be answerable if he hires the carriage with them? He has the equal use and benefit of the horses in both cases, and has not the conduct or management of them more in the one case than in the other. If the temporary use and benefit of the horses will make the hirer answerable and there be no reasonable distinction between hiring them with or without a carriage, must not the person who hires a hackney-coach to take him for a mile, or other greater or less distance, or for an hour, or longer time, be answerable for the conduct of the coachman? Must not the person who hires a wherry on the Thames be answerable for the conduct of the waterman?

I believe the common sense of all men would be shocked if anyone should affirm the hirer to be answerable in either of these cases. Will it be said that the hirer is not answerable in either of these cases because the coachman and the wherryman are ready to attend to the call of any person who will employ them? I answer: So, also, is the stable-keeper. If it be said that they are obliged to obey the call of any person when they are on the stand, or at the stairs, I would ask: Will there be any difference if they are spoken to beforehand, and desired to attend at a particular hour, which is not an unusual occurrence where persons have an engagement to go out at an early hour in the morning? If the personal presence of the hirer will render him responsible, why should he not be equally so if he is absent and has hired the horses or carriage for his family or servants? Does his presence give him any means of superintending or controlling the driver? Can any legal obligation depend upon such minute distinctions? If the case of a wherry on the Thames does not furnish an analogy to this subject, let me put the case of a ship hired and chartered for a voyage on the ocean to carry such goods as the charterer may think fit to load, and such only. Many accidents have occurred from the negligent management of such vessels, and many actions have been brought against their owners, but I am not aware that any has ever been brought against the charterer though he is to some purposes the dominus pro tempore and the voyage is made not less under his employment and for his benefit whether he be on board or not than the journey is made under the employment and for the benefit of the hirer of the horses.

Why, then, has the charterer of the ship, or the hirer of the wherry, or the hackney-coach, never been thought answerable? I answer: Because the ship-master, the wherryman, and the hackney-coachman have never been deemed the servants of the hirer although the hirer does contract with the wherryman and the coachman and is bound to pay them, and the pay is not for the use of the

A boat, or horses, or carriage only, but also for the personal service of the man. In the case now before the court the hirer makes no contract with the coachman. He does not select him; he has no privity with him; he usually gives him a gratuity, but he is not by law obliged to give him anything; from thence I conclude that the coachman is not the servant of the hirer. If the coachman is not the servant of the hirer on such an occasion, but is chosen and entrusted by the owner of the B horses to conduct and manage them, I think it cannot be said that the hirer has in law, what he certainly has not in fact, the conduct and management of the horses. If the coachman is in such a case the servant of the hirer, the hirer may at any moment require him to quit the charge of the horses and deliver them over to another, and he must be obeyed, but I think it cannot be said that the coachman may not lawfully refuse and ought not in most cases to do so. It does C not seem to be doubted that the injured party may sue the owner of the horses. Is there, then, any rule of law, or any principle of convenience, requiring that he should have his choice of suing either the stable-keeper or the hirer at his election. Generally speaking, the one is as well able to pay damages as the other, and may be as easily found out and known, and more easily if the carriage and horses are hired together. Should the hirer be held responsible in the first instance D he must certainly have his remedy over against the letter, so that the letter will in the end be answerable, and there will be a circuity of action which is inconvenient and to be avoided if possible.

I have acknowledged the difficulty of drawing a line with reference to time or distance, and I think we must look to other circumstances in order to ascertain E the obligation of the hirer. Length of time may in itself be a circumstance deserving of attention because it may be evidence of the subsequent approbation and continuance, if not of the original choice, of the coachman. The payment of board wages and the furnishing a livery may also be circumstances worthy of attention, because they also may in some cases be considered as evidence of a choice and a contract. I do not pronounce upon any case of this kind. I speak F only of the present case, and of the evidence given at the trial, and, not being able to find any reason satisfactory to my own mind by which the defendant in this cause can be made answerable in the present action, I think myself bound to say that, in my opinion, the rule for setting aside the nonsuit ought to be discharged.

Rule discharged.

DOCKER *v.* SOMES AND ANOTHER

[LORD CHANCELLOR'S COURT (Lord Brougham, L.C.), April 17, 19, 22, 1834]

[Reported 2 My. & K. 655; 3 L.J.Ch. 200; 39 E.R. 1095]

Trustee—Profit from trust—Duty to account to cestui que trust—Responsibility for loss—Conversion of material into article of greatly increased value.

Whenever a trustee, or one standing in the relation of a trustee, deals with the trust estate for his own advantage the rule is that he shall account to the cestui que trust for all the gain which he has made. If he lays out trust money in a commercial venture he must account for the profits which he receives. If, on the other hand, the venture results in a loss, that loss must fall on him. An exception to the rule that there must be a full accounting is where material is bought with another person's money and is converted into an article of greatly increased value by the highly skilled labour of the person buying the material.

Trustee—Constructive trustee—Use of money of another person without consent—Purchase of land or investment in venture.

Where one who is not expressly a trustee uses the money of another person the law raises a trust by implication, clothing him, though a stranger, with a fiduciary character for the purpose of making him accountable. If, therefore, a person buys land with another person's money or invests money in some venture without the consent of its owner he is held to be a trustee for the benefit of the owner.

Notes. Considered: *Vyse* v. *Foster* (1874), L.R. 7 H.L. 318. Referred to: *Wedderburn* v. *Wedderburn* (1838), 4 My. & Cr. 41; *Macdonald* v. *Richardson*, *Richardson* v. *Marten* (1858), 1 Giff. 81.

As to constructive and resulting trusts and a trustee's liability to account for profits, see 38 HALSBURY'S LAWS (3rd Edn.) 855 et seq., 1049, 1050. For cases see 43 DIGEST 631 et seq., 704 et seq., 861–863.

Cases referred to:

(1) *Brown* v. *De Tastet* (1819), Jac. 284; 37 E.R. 858; 43 Digest 774, *2141*.

(2) *Robinson* v. *Pett* (1734), 3 P. Wms. 249; 2 Eq. Cas. Abr. 454; 24 E.R. 1049; sub nom. *Robinson* v. *Lorkin*, 2 Barn. K.B. 435, L.C.; 43 Digest 775, *2151*.

(3) *Sheriff* v. *Axe* (1827), 4 Russ. 33; 38 E.R. 717; 24 Digest (Repl.) 651, *6430*.

(4) *Hovey* v. *Blakeman* (1799), 4 Ves. 596; 31 E.R. 306; 24 Digest (Repl.) 726, *7122*.

(5) *Newton* v. *Bennet* (1784), 1 Bro. C.C. 359; 28 E.R. 1177, L.C.; 24 Digest (Repl.) 746, *7321*.

(6) *A.-G.* v. *Solly* (1829), 2 Sim. 518; 57 E.R. 882; 8 Digest (Repl.) 501, *2214*.

(7) *Raphael* v. *Boehm* (1708), unreported; (1805), 11 Ves. 92; 32 E.R. 1023, L.C.; (1807), 13 Ves. 407; 33 E.R. 347, L.C.; 13 Ves. 590; 33 E.R. 415, L.C.; 24 Digest (Repl.) 749, *7366*.

(8) *Tebbs* v. *Carpenter* (1816), 1 Madd. 290; 56 E.R. 107; 24 Digest (Repl.) 747, *7338*.

(9) *Walker* v. *Woodward* (1826), 1 Russ. 107; 38 E.R. 42; 24 Digest (Repl.) 746, *7326*.

(10) *Heathcote* v. *Hulme* (1819), 1 Jac. & W. 122; 37 E.R. 322; 24 Digest (Repl.) 615, *6119*.

(11) *Treves* v. *Townshend* (1783), 1 Bro. C.C. 384; 1 Cox, Eq. Cas. 50; 28 E.R. 1191; 4 Digest (Repl.) 244, *2203*.

(12) *Rocke* v. *Hart* (1805), 11 Ves. 58; 32 E.R. 1009; 24 Digest (Repl.) 747, *7336*.

(13) *Piety* v. *Stace* (1799), 4 Ves. 620; 31 E.R. 319; 24 Digest (Repl.) 746, *7324*

(14) *Pocock* v. *Reddington* (1801), 5 Ves. 794; 31 E.R. 862; 43 Digest 949, *3885*.
(15) *Palmer* v. *Mitchell* (1809), 2 My. & K. 674, n.; 39 E.R. 1101; 24 Digest (Repl.) 738, *7251*.

Also referred to in argument:

Sutton v. *Sharp* (1826), 1 Russ. 146; 38 E.R. 57; 44 Digest 594, *4187*.
Hockley v. *Bantock* (1826), 1 Russ. 141; 38 E.R. 55; 43 Digest 950, *3893*.
Freeman v. *Fairlie* (1812), 3 Mer. 29; 36 E.R. 12, L.C.; 43 Digest 846, *2921*.
Burden v. *Burden* (1804 and 1814), cited in 1 Jac. & W. at p. 134.

Appeal from a decision of SHADWELL, V.-C., in an action for an account.

The testator, Samuel Somes, bequeathed his property consisting, among other things, of a ship and of shares in other ships, to his sons, Samuel F. Somes and Joseph Somes, whom he appointed his executors, upon trust, subject to certain legacies and annuities, for the benefit of his six children in manner therein mentioned. His will contained a proviso that, if they should think it advantageous for his estate, his trustees might carry on his shipping business for any period not exceeding six years from his decease, and might employ in it such capital as was then employed therein or such greater capital taken from the rest of his property as they should think fit, and that the profits of the business so carried on should be added to the rest of his property, be considered as part thereof, and distributed accordingly. The testator died in November, 1816. The trustees paid some of the legacies, but instead of winding-up and closing the testator's concerns, they continued to carry on his shipping business during the six years, considering that such a course would be more beneficial to the estate. Some of the shipping property, however, they from time to time disposed of. The concern eventually proved to be a losing one, and, in consequence of the general depreciation of shipping property, the testator's estate was worth less at the expiration of the six years than at the time of his decease.

After the six years had expired a bill was filed by one of the testator's daughters, against the executors and trustees, for an account and payment of her distributive share. The defendants, by their answer, admitted that within a year after the testator's death they began to carry on the business of ship chandlers and sail-makers in partnership together, and they further admitted that in February, 1820, they received the sum of £2,775 on account of the testator's share in a ship, which sum, they stated, was again shortly afterwards employed for the benefit of the testator's estate. They further admitted that in the course of winding-up and settling the concerns of the testator's estate they had received divers sums of money for which they had charged themselves with interest at the rate of 5 per cent. from the time of receiving the same, and that such sums were paid in by them at their banker's to the credit of their general account without distinguishing the same from the moneys employed in their own business, conceiving that, as the testator's estate was benefited by receiving a higher rate of interest than could have been obtained on government or real securities, and as they were then making arrangements for putting an end to the shipping business and finally settling all the concerns of the testator's estate, such a temporary disposition of his assets was for the benefit of the persons interested therein, and, therefore, not objectionable or improper. By the decree made by the vice-chancellor at the hearing of the cause it was (among other things) declared that the sums on which the defendants had charged themselves with interest at the rate of 5 per cent. per annum were to be considered as employed in their trades, and the Master was directed to inquire what proportion of the profits received by the defendants from such trades was properly attributable to the moneys so to be considered as employed in their trades. The defendants appealed.

Sir Charles Pepys and *Bleuman* for the defendants.—The ground on which the vice-chancellor proceeded was, that certain balances, admitted to form part of the

testator's estate, had been mixed by the defendants with their own moneys and paid in to one general account at their bankers, and that, as their occasions required, the defendants drew upon that account as well to answer their current expenditure in their ship chandlery, and sail-making concerns as in carrying on the shipping business which under the will they were authorised to continue. His Honour considered that the defendants, in adopting this course, were using the assets of the testator for the purposes of their own trade, and that, although they had charged themselves by their answer with interest at 5 per cent. on the amount of the sums so employed (a larger interest than could have been obtained from any other investment), they were bound to account for all the profits derived in their trade from the use of those sums. The effect of this declaration is to make the cestuis que trust of the testator's estate substantially partners in the private trade of the defendants as ship chandlers and sail-makers, at least to the extent of entitling them to share the profits derived from such part of the capital employed in it as had once belonged to the testator's assets. Such a declaration, besides being in the highest decree inconvenient, is totally unwarranted by precedent.

Boteler and *Bigg* for the plaintiff.—Except *Brown* v. *De Tastet* (1), which is strictly in point, it may be difficult to find a precedent which applies directly to the present case, but the doctrine laid down in a variety of cases, and still more the principles upon which the court has uniformly acted in dealing with trustees who have been guilty of a breach of trust, are strongly in favour of the vice-chancellor's decree. It is settled that a trustee shall not be allowed to charge or receive remuneration for the time or trouble he may have expended in the execution of his trust: *Robinson* v. *Pett* (2), *Sheriff* v. *Axe* (3), *Hovey* v. *Blakeman* (4), and it is equally clear, that, whatever profit has been made by the application of a trust fund, must be added to and form part of the principal of that fund, the rule being that a person shall not be permitted, either directly or indirectly, to derive a benefit to himself from his character of trustee. If, therefore, a speculation in which a trustee has, without authority, embarked funds belonging to the trust, proves unfortunate, the loss is entirely his own; if it proves successful, the gain is that of the cestui que trust.

Cur. adv. vult.

April 22, 1834. **LORD BROUGHAM, L.C.**—The importance of the question raised upon this appeal, independently of its novelty, would be fully sufficient to make me feel some anxiety in deciding it, and this anxiety is not lessened by the consideration that the question is now for the first time to receive a judicial determination. There is clearly no decided case upon the point; none which even touches it more nearly than by recognising general principles. Certainly there is no decision allowing an account of actual profits. Indeed, it may rather be said that the cases, by uniformly giving interest at different rates, and sometimes with rests where the trust funds have been employed in the trustee's trade, would seem to acknowledge the principle that no account of actual profits shall be given in such instances.

Thus, in *Newton* v. *Bennet* (5), where an executor had used the produce of the testator's estate in his trade, interest was allowed, and so in *A.-G.* v. *Solly* (6), and other cases. But the strongest instance is *Raphael* v. *Boehm* (7), before Lord Loughborough, L.C., in 1798, a case which, upon that point, is nowhere reported, but which is particularly mentioned in *Tebbs* v. *Carpenter* (8) (1 Madd. at p. 300) by the vice-chancellor, who had taken time to examine the Registrar's book. It came also before Lord Erskine, L.C., and Lord Eldon, L.C., in subsequent stages of the cause. In that case a gross breach of trust had been committed, for the large sum of £30,000 was expressly directed to be laid out for accumulation, and, the executor having thought proper to employ it in his own trade, the court ordered him to be charged with interest at 5 per cent. from the time of the testator's death, with half-yearly rests and interest for the intermediate times. All the

judges who have mentioned this decree have considered it as severe, and certainly it proceeded from a strong feeling in the court that a breach of trust had been committed so aggravated as to call for the most severe visitation. It is hence not unnaturally argued that the utmost power of the court had been exerted upon this occasion, and an opinion forces itself almost unavoidably upon us that the court must have felt its authority limited to the allowing of interest. If, in every case of such misconduct, the appropriation of the trust funds has been only visited by charging interest, the inference seems reasonable enough that this was the extent to which the court felt itself at liberty to go in any instance of the like malversation. In the absence of any precedent of a decree for an account of actual profits whatever may have been the culpability of the trustee in exposing the trust funds to hazard in quest of his own gain, there seems good ground for holding that, as far as the authority of judicial determination goes, the weight lies on one side, and that the rule is to give interest and nothing else in cases of this kind. Let us, however, refer for a moment to the undoubted principles that regulate the dealings of the court with breaches of trust, and see to what these plainly lead us.

Whenever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behoof, the rule is that he shall account to the cestui que trust for all the gain which he has made. Thus, if trust money is laid out in buying and selling land and a profit made by the transaction, that shall go, not to the trustee who has so applied the money, but to the cestui que trust whose money has been applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself, yet for every farthing of profit he may make he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure or from the concern. In all these cases, it is easy to tell what the gains are; the fund is kept distinct from the trustee's other moneys, and whatever he gets, he must account for and pay over. It is so much fruit, so much increase on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor. So it is also where one not expressly a trustee has bought or trafficked with another's money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable. If a person has purchased land in his own name with my money, there is a resulting trust for me; if he has invested my money in any other speculation without my consent, he is held a trustee for my benefit; and so an attorney, guardian, or other person standing in a like situation to another gains, not for himself, but for the client, or infant, or other party whose confidence has been abused.

Such being the undeniable principle of equity, such the rule by which breach of trust is discouraged and punished—discouraged by intercepting its gains, and thus frustrating the intentions that caused it; punished by charging all losses on the wrongdoer, while no profit can ever accrue to him—can the court consistently draw the line as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent—those instances where the trustee is most likely to misappropriate, namely, those in which he uses the trust funds in his own traffic? At first sight this seems grossly absurd, and some reflection is required to understand how the court could ever, even in appearance, countenance such an anomaly. The reason which has induced judges to be satisfied with allowing interest only, I take to have been that they could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock, and the process became still more difficult

where a great proportion of the gains proceeded from skill or labour employed upon the capital. In cases of separate appropriation there was no such difficulty, as where land or stock had been bought and then sold again at a profit, and here, accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust money in that trade along with his own there was so much difficulty in severing the profits which might be supposed to come from the money misapplied from those which came from the rest of the capital embarked that it was deemed more convenient to take another course, and, instead of endeavouring to ascertain what profit had been really made, to fix upon certain rates of interest as the supposed measure or representative of the profits and assign that to the trust estate.

This principle is undoubtedly attended with one advantage. It avoids the necessity of an investigation of more or less nicety in each individual case, and it thus attains one of the important benefits resulting from all general rules. But mark what sacrifices of justice and of expediency are made for this convenience. All trust estates receive the same compensation whatever risks they may have run during the period of their misappropriation; all profit equally whatever may be the real gain derived by the trustee from his breach of duty; nor can any amount of profit made be reached by the court, or even the most moderate rate of mercantile profit, that is the legal rate of interest, be exceeded whatever the actual gains may have been, unless by the very clumsy and arbitrary method of allowing rests, in other words, compound interest, and this without the least regard to the profits actually realised, for in the most remarkable case in which this method has been resorted to, *Raphael* v. *Boehm* (7) (which, indeed, is always cited to be doubted, if not disapproved), the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it.

The principal objection which I have to the rule is founded upon its tendency to cripple the just power of this court in by far the most wholesome, and, indeed, necessary exercise of its functions, and the encouragement thus held out to fraud and breach of trust. What avails it towards preventing such malversations that the contrivers of sordid injustice feel the power of the court only where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores? It is in vain they are told of the court's arm being long enough to reach them and strong enough to hold them if they know that a certain delicacy of touch is required, without which the hand might as well be paralysed or shrunk up. The distinction, I will not say sanctioned, but pointed at by the negative authority of the cases proclaims to executors and trustees that they have only to invest the trust money in the speculations, and expose it to the hazards, of their own commerce, and be charged 5 per cent. on it, and then they may pocket 15 or 20 per cent. by a successful adventure. Surely the supposed difficulty of ascertaining the real gain made by the misapplication is as nothing compared with the mischiefs likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction.

Even if cases were more likely to occur than I can think they are of inextricable difficulties in pursuing such inquiries, I should still deem this the lesser evil by far, and be prepared to embrace it. Counsel for the defendants put a case of a very plausible aspect with the view of deterring the court from taking the course which all principle points out. He feigned the instance of an apothecary buying drugs with £100 of trust money and earning £1,000 a year by selling them to his patients, and so he might have taken the case of trust money laid out in purchasing a piece of steel or skein of silk and these being worked up into goods of the finest fabric, Birmingham trinkets or Brussels lace, where the work exceeds by 10,000 times the material in value. But such instances, in truth, prove nothing, for they are cases not of profits upon stock, but of skilful labour very highly

paid, and no reasonable person would ever dream of charging a trustee whose skill thus bestowed had so enormously augmented the value of the capital as if he had only obtained from it a profit, although the refinements of the civil law would certainly bear us out even in charging all gains accruing upon those goods as in the nature of accretions belonging to the true owners of the chattels.

I have looked to the authorities with the view of seeing, generally, whether or not they afforded any direct precedent either way in this question, and, as far as decision goes, they certainly do not. But there are strong indications to be traced in the books of judges inclining towards the point which I would fain hope we may now be said to have reached. *Walker* v. *Woodward* (9) was referred to at the Bar as a case in which, an executor having made profit by farming with his testator's stock, an account of the profits was waived and 5 per cent. with rests charged. But there the testator's own concern was continued with his farm stock by the executor. A like remark arises upon *Heathcote* v. *Hulme* (10), although as far as dicta go, SIR THOMAS PLUMER there certainly held a cestui que trust generally entitled to elect to take the profits made or a rate of interest on the principal.

There are other cases deserving of attention as indicating the inclination of the court on this subject. *Treves* v. *Townshend* (11) was the case of an assignee of a bankrupt who had kept near £2,000 for sixteen years without ever proposing to make a dividend. It was on this circumstance mainly that the lords commissioners charged him with 5 per cent. and ordered him to pay the costs, but it further appeared that he had employed the money in his trade as a Blackwell Hall factor though he said he had an equal sum at his banker's ready to answer any demands —demands which, he was pretty well assured, would, through his own laches in discharging his duty of assignee, never be made. On a re-hearing before LORD THURLOW, his Lordship said his only doubt was as to the rate of interest, but he held it established that the money had been used in the assignee's trade, and he said: "If 5 per cent. is made in that trade, I cannot give four." An inquiry was, therefore, offered to the defendant as to the usual rate of a Blackwell Hall factor's profit, and, this offer being refused, the decree of the lords commissioners was affirmed. If this case shows, on the one hand, the impression to have been that the court would not go to the real amount of profits made, but would only inquire as to these for the purpose of ascertaining whether more than the usual rate of 4 per cent. shall be allowed, limiting itself to the legal interest of 5 per cent., if so much has been made, it as clearly proves, on the other hand, that there was no disposition to shrink from an inquiry, now represented as impossible, into the rate of profits and the proportion of them attributable to the trust fund. If, however, it were to be inferred from this case that trust moneys used in the trustee's trade cannot be charged with more than 4 per cent. unless more be made of them, the doctrine would be dangerous indeed. LORD LOUGHBOROUGH seems to have taken a far sounder view of the principles on which the court deals with breach of trust when he charged 5 per cent. simply on account of the unjustifiable use of the money and without any regard to the gains made by the malversation. When LORD THURLOW stated that 4 per cent. was the rate usually allowed, and that it was never to be exceeded but in a special case, he laid down the admitted rule, but a special case was here abundantly made when it was shown that the assignee had allowed sixteen years to elapse without offering to make a dividend, and had during that period trafficked with the fund. I have further to remark on this case, that the refusal of an inquiry by the defendant who had appealed may seem to indicate an apprehension of more than 5 per cent. being charged, when the actual profits should be ascertained. It is possible, indeed, that he may have declined the inquiry for fear of being fixed with the additional costs. SIR WILLIAM GRANT, however, in *Rocke* v. *Hart* (12), referring to *Treves* v. *Townshend* (11), plainly considers that his refusal was for fear of more than 5 per cent. being found to be the profits of the business, and charged accordingly.

Piety v. *Stace* (13), before LORD ALVANLEY, was the case of an executor not laying out the testator's money as he was directed, but employing it partly in his trade in stock transactions and partly in loans to his son. He was charged with 5 per cent. The doctrines of the court are strongly and clearly laid down by LORD ALVANLEY (4 Ves. at pp. 622, 623). They are so well understood, said his Lordship, that it is waste of time to repeat them. An executor, acting otherwise than the testator desires with the property, cannot possibly be a gainer by it. Any gain

> "must be for the benefit of his cestui que trust; and if there is any loss upon the capital, as if the stocks rise ever so much, he must replace it. Every farthing more than the dividends that lay in his hands is just so much gain to himself; for every shilling he got by any of these transactions he shall pay interest at 5 per cent. for every minute it lay in his hands."

Accordingly, the defendant was charged with the same interest on all he lent his son. Here, then, he was made to account not only for the actual profits made by the stock transactions, but for 5 per cent. on those profits. The principle stated, indeed, is as large as possible, for it comprehends all profits received by a trustee who deals with the trust fund for his own advantage, but LORD ALVANLEY plainly had his mind directed to the kind of dealing in question, viz., in the stocks.

In *Pocock* v. *Reddington* (14), the same very able and accurate judge proceeds upon the like views. After observing that a trustee has no right to deal with the trust fund so as to hazard it, on the chance of being able to replace it if lost, which, as his Honour with marked but not excessive severity says, is an argument used by others in a very different case and has cost them their lives, he says:

> "therefore the executor must answer for that which he may reasonably be supposed to have made; and if he made more, he must also answer for that too."

The defendant was ordered to be charged with the sum for which he had sold the stock, and with 5 per cent. upon it. Lastly, I would refer to *Palmer* v. *Mitchell* (15), with a note of which I have been furnished, and which, as it was decided by SIR WILLIAM GRANT, deserves great attention as a precedent.*

It was right that I should advert to these authorities, but at the same time I am ready to admit that my opinion in the present case is founded much more upon principle than upon decision. In affirming the decree of his Honour, I am sure that I overrule nothing ever actually decided and that I only extend an undeniable principle of the court to a case where its application appears to be peculiarly called for by the most pressing considerations both of consistency in principle and expediency in practice. That the parties whose funds have been misapplied should, in every case, have their option of receiving either the actual profits made, or interest at 4 or 5 per cent. according to circumstances, appears a rule exposed to no serious objection, and although the court, moved by special circumstances, may allow rests with compound interest, yet this seems, generally speaking, much less advisable than an account of actual profits. Should in any case a serious difficulty arise in tracing and apportioning the profits, this may be a reason for preferring a fixed rate of interest in that case. Nor can any argument be raised upon the inconvenience of going into the special circumstances in each instance, for, even according to the course pursued in the cases I have referred to, this kind of inquiry is indispensable. The authority of LORD THURLOW (who leant

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* *Palmer* v. *Mitchell* was a suit, heard in the Rolls Court on Dec. 8, 1809, for an account of the estates of the testator William Innes, deceased. The bill charged, that the defendant, George Hanbury Mitchell, one of the executors, continued to carry on the business in which the testator had been engaged and that he had retained large balances of the testator in his hands which he had invested in that trade, or in other mercantile concerns or speculations. An account was decreed to be taken of what balances were from time to time in the hands of the executors or either of them; and it was declared that they ought to be charged with the profits and advantages made by them of the personal estate of the testator while the same or any part thereof was employed by them in any trade or business since the testator's decease.

less hardly against trustees than any other judge) has laid it down that more than 4 per cent. is never to be charged without special circumstances proved, so that, at all events, some inquiry is rendered necessary, and it may be safely stated that the last person who can be heard to argue from the difficulty of tracing or apportioning the profits of the misapplied fund is the man whose breach of trust has caused the misapplication and created the difficulty. When did a court of justice, whether administered according to the rules of equity or of law, ever listen to a wrongdoer's argument to stay the arm of justice, grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather let me ask, when did any wrongdoer ever yet possess the hardihood to plead, in aid of his escape from justice, the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying: "You had better not make the attempt, for you will find I have made the search very troublesome?" The answer is: "The court will try." The judgment must be affirmed, but, as this is a case of the first impression, without costs.

Appeal dismissed.

STEPHENSON *v.* HART AND ANOTHER

[COURT OF COMMON PLEAS (Park, Burrough and Gaselee, JJ.), February 11, 1828]
[Reported 4 Bing. 476; 1 Moo. & P. 357; 6 L.J.O.S.C.P. 97; 130 E.R. 851]

Carriage of Goods—Misdelivery—Liability of carrier for conversion—Non-delivery—Consignee not at address given for delivery—Termination of contract of carriage—Obligation of carrier to take care of goods—Fraud—Consignment of goods obtained by fraud on consignor—Delivery to fraudulent person—Property of goods remaining in consignor.

A common carrier is bound to deliver the goods carried to the right consignee. If he fails to do so he is liable to the consignor of the goods in an action for conversion.

If the carrier finds that the consignee is not at the address which the consignor has given for delivery, the contract of carriage is at an end, but, if the goods remain in the hands of the carrier as the goods of the consignor, a new, implied contract arises between the carrier and the consignor under which the carrier is bound to take care of the goods for the use of the consignor. In such circumstances and where the agreement under which the consignor consigned the goods had been obtained by fraud the property in the goods would never pass out of the consignor.

Notes. Considered. *Crouch* v. *Great Northern Rail. Co.* (1856), 11 Exch. 742; *McKean* v. *McIvor* (1870), L.R. 6 Exch. 36; *Heugh* v. *London and North Western Rail. Co.* (1870), L.R. 5 Exch. 51.

As to obligation of carrier regarding delivery, see 4 HALSBURY'S LAWS (3rd Edn.) 147–150; and for cases see 8 DIGEST (Repl.) 32 et seq.

Cases referred to:

(1) *Ross* v. *Johnson* (1772), 5 Burr. 2825; 98 E.R. 483; 3 Digest (Repl.) 114, *352*.
(2) *Youl* v. *Harbottle* (1791), Peake, 68, N.P.; 8 Digest (Repl.) 35, *203*.
(3) *Devereux* v. *Barclay* (1819), 2 B. & Ald. 702; 106 E.R. 521; 3 Digest (Repl.) 83, *187*.
(4) *R.* v. *Aickles* (1784), 1 Leach, 294; 2 East, P.C. 675, C.C.R.; 15 Digest (Repl.) 1042, *10,244*.
(5) *R.* v. *Campbell* (1827), 1 Mood. C.C. 179, C.C.R.; 15 Digest (Repl.) 1039, *10,208*.

(6) *Duff* v. *Budd* (1822), 3 Brod. & Bing. 177; 6 Moore, C.P. 469; 129 E.R. 1250; 8 Digest (Repl.) 45, *268*.

(7) *Dawes* v. *Peck* (1799), 8 Term Rep. 330; 3 Esp. 12; 101 E.R. 1417; 8 Digest (Repl.) 167, *1078*.

Also referred to in argument:

Noble v. *Adams* (1816), 7 Taunt. 59; 2 Marsh. 366; 129 E.R. 24; 39 Digest (Repl.) 759, *2368*.

R. v. *Jackson* (1813), 3 Camp. 370; 15 Digest (Repl.) 1181, *11,946*.

Earl of Bristol v. *Wilsmore* (1823), 1 B. & C. 514; 2 Dow. & Ry. K.B. 755; 1 Dow. & Ry. M.C. 407; 1 L.J.O.S.K.B. 178; 107 E.R. 190; 35 Digest (Repl.) 38, *306*.

Perkins v. *Smith* (1752), 1 Wils. 328; Say. 40; 95 E.R. 644; 1 Digest (Repl.) 786, *3145*.

Stephens v. *Elwall* (1815), 4 M. & S. 259; 105 E.R. 830; 46 Digest (Repl.) 459, *94*.

Rule Nisi obtained by the defendants for a new trial of an action brought by the plaintiff against the defendants, common carriers, for the conversion of goods which they had misdelivered.

On Sept. 27, 1826, a person calling himself J. West applied to the plaintiff, a comb manufacturer at Birmingham, for a parcel of combs, and, after taking a certain quantity with him, ordered £30 worth to be forwarded as early as possible addressed to J. West, 27, Great Winchester Street, London. In payment he gave the plaintiff a bill of exchange which had two months to run, purporting to be drawn at Edinburgh for £50 by Guerin, upon Le Cointe & Co., merchants, Devonshire Square, London, and accepted by them, payable at Smith, Payne, and Smith, bankers, London. The plaintiff agreed to discount the bill, and on Sept. 30 he packed up the combs and the change supposed to be due to West (£6 10s.), in a box, addressed it as directed by West, and booked it for London at the office in Birmingham of the defendants, who were carriers.

The box arrived the next day. The defendants, upon offering to deliver it at No. 27, Great Winchester Street, found, not only that no such person as West was known there, but that the house had not been tenanted for a twelvemonth. About a week or ten days afterwards, the defendants received a letter from St. Alban's, signed J. West, informing them that a box for him had been addressed by mistake to Great Winchester Street and requesting them to forward it to the Pea Hen, a public house at St. Alban's. The defendants forwarded the box accordingly, and a person calling himself West, who had been staying for two or three days at the Pea Hen and had told the mistress of the house that he could not pay her bill till a box arrived in which he expected money, said on its arrival: "That is the box I expected," opened it, took out money, and paid his bill. He shortly afterwards disappeared.

The bill of exchange given by West to the plaintiff having been presented for payment when it became due, it was found that there was no such firm as Le Cointe & Co. in Devonshire Square, and that no such persons had ever kept cash with Smith, Payne, and Smith. Application for the box on behalf of the plaintiff was then made at the defendants' office in London. They first asserted that the box had been returned to Birmingham, but afterwards produced the letter signed by West and said that on receiving it they had delivered the box at St. Alban's.

The plaintiff brought an action framed in (inter alia) trover claiming from the defendants damages for the conversion of the goods. At the trial at the Warwickshire Summer Assizes in 1827, LORD TENTERDEN, C.J., who in the course of the trial had observed that it was for the jury to say from the whole transaction whether it was not a mere act of swindling, in summing-up the case to the jury said that the question for them to consider was whether the defendants had delivered

A the box according to the due course of their business and duty as carriers. The jury found a verdict for the plaintiff, assessing the damages at £37 17s. 6d.

Subsequently, *Serjeant Adams* for the defendants, moved for a new trial on the ground that the jury ought to have been directed to consider whether or not the box had been delivered to the person to whom it was consigned, and that the count in trover could not be supported inasmuch as upon the delivery to the B carriers the property in the box ceased to be in him, the plaintiff, and was vested in the consignee. A rule nisi was granted.

Feb. 11, 1828. *Serjeant Bosanquet* for the plaintiff, showed cause against the rule.

Serjeant Wilde and *Serjeant Adams* for the defendants, supported the rule.

C **PARK, J.**—I incline to think that the special counts in this declaration are not borne out by the evidence in the cause, but I consider the action to be maintainable upon the count in trover. From the cases which have been cited it is clear that trover lies against a carrier for misfeasance in delivering a parcel to a wrong person. In *Ross* v. *Johnson* (1) a distinction was taken between misfeasance and D nonfeasance, and it was held that trover would not lie where a carrier had lost goods by a robbery or theft, LORD MANSFIELD and ASTON, J., considering that a case of mere omission. But in *Youl* v. *Harbottle* (2) LORD KENYON, referring to *Ross* v. *Johnson* (1), said, that where the carrier was actor, and delivered the goods to a wrong person, he was liable in trover. ABBOTT, C.J., in *Devereux* v. *Barclay* (3) took the same distinction between omission and commission, and held the E defendant liable for having done an act which he ought not. BAYLEY, J., referred to *Youl* v. *Harbottle* (2).

The question, therefore, on the present occasion is whether the defendant has been guilty of a wrongful delivery for which trover lies. The plaintiff had sold goods to a felon who tendered a fictitious bill in payment. Upon such a transaction the question is not what the seller means to do, but what are the intentions of F the customer. Did he mean to buy in the present case? Never. He went with an intention to commit a felony. *R.* v. *Aickles* (4) turned on that distinction. But the point was under the consideration of all the judges this term [*R.* v. *Campbell* (5)] in the case of James Campbell who went to the shop of one Berens and proposed to buy fancy articles. Berens agreed to sell, and was to deliver them at Lad Lane to Campbell the same evening. When he came to Lad Lane, G Campbell said he expected a friend with money who had not arrived, and, opening a twopenny post letter which he pretended to have just received, added: "My friend will give me £200 at Tom's Coffee House. Leave the box, and meet me at Tom's in an hour." As soon as Berens was out of sight, Campbell went off with the box, and was heard of no more till his apprehension some days afterwards. The learned Common Serjeant left it to the jury to say, not what was the intention of H Berens, but whether Campbell intended to buy the goods or to steal them. The jury having found him guilty of felony, the point was reserved for the judges, who held that the property in the goods never passed out of Berens.

It is clear that in the present case the person calling himself West never meant to pay for the goods, and the question of fraud was sufficiently left to the jury by the Chief Justice's saying in the course of the trial that the whole appeared I to be a swindling transaction. Then, on summing-up, he left it to the jury to say whether the defendants had delivered the box according to the course of their business and duty. It is manifest that they had not. The property in the box was never out of the plaintiff, and it is plain that the defendants thought so, for upon their failing to find any person in Great Winchester Street to whom it belonged, and upon inquiry being made what they had done with it, they affirmed that they had sent it back, and, when the falsehood of this was discovered, asserted that they had, at all events, delivered it to the right person. A felon could not be the right

person. But were carriers, of their own authority, without consulting the consignor, to send to an inn at St. Alban's a box addressed to Great Winchester Street, London? If they had made inquiry at Birmingham, whence the box arrived, there could have been no difficulty in discovering who was the consignor. But without inquiry, and notwithstanding the warning that was given by the circumstance that West had never been heard of at the place to which the box was addressed, they forward it to an unknown person at an inn, upon the faith of a letter of which they did not know the writer.

I cannot distinguish this case from *Duff* v. *Budd* (6). There the plaintiffs, having received an order from a stranger to furnish goods for J. Parker, of High Street, Oxford, and finding upon inquiry that Mr. Parker of the High Street was a tradesman of respectability, forwarded the goods by a carrier, having directed them to J. Parker, High Street, Oxford. On the arrival of the parcel at Oxford, the carrier's porter there, who knew W. Parker of the High Street (and was accustomed to deliver parcels at the houses of the consignees), told him of the arrival of the parcel, no other Parker residing in that street. W. Parker said he expected no parcel. A person to whom the porter had before delivered parcels under the name of Parker called at the defendant's office shortly afterwards, and he, saying the parcel was his, was allowed to take it on paying the carriage, there being many persons of that name in Oxford. The plaintiffs, having thus lost their goods, desired the defendant by letter to apprehend the person who had taken them if he again presented himself, and afterwards said that they had done with the defendant if the man who had the parcel were produced. A notice was suspended in a conspicuous part of the defendant's office, limiting his responsibility to £5, except where articles were entered according to their value, and the parcel in question had not been so entered, though worth £89. The plaintiffs having sued the carrier, and the judge having directed the jury that the carrier's negligence had been such as to render it unnecessary to consider the question as to the notice touching the limited responsibility and a verdict having been found for the plaintiffs, the court refused to grant a new trial, which was moved for on the ground that the question touching the notice ought to have been considered, that the judge ought to have pointed the attention of the jury to the plaintiffs' letter, telling the carrier to apprehend the cheat, and the subsequent conversations thereon, and to have directed the jury that the property of the goods had passed out of the plaintiffs.

That was a much harder case against the carrier than the present because the person who came to the office had often been there before, but it was never doubted that the property in the parcel remained in the consignor, and I rely particularly on the language of RICHARDSON J., who says (3 Brod. & Bing. at p. 184):

> "There was clearly a property in the plaintiffs entitling them to sue, as they had been imposed upon by a gross fraud."

The argument which has been raised for the defendants by the assertion that the box was delivered to the right person is answered by saying that a felon cannot be the right person. As to the defendants' liability to an action at the suit of West until it was ascertained that the bill he had given would not be honoured, such an action might have been well defended by showing that the box was tendered at Great Winchester Street and that no such person was known there. I am, therefore, clearly of opinion that the rule which has been obtained on the part of the defendants must be discharged.

BURROUGH, J.—I am of opinion that the verdict is right, that there is no ground for a new trial, and that the action is maintainable on the second count of this declaration. At the outset no doubt the contract was between the carrier and the consignee, but when it was discovered that no such person as the consignee was to be found in Great Winchester Street that contract was at an end, and, the goods remaining in the hands of the carriers as the goods of the consignor, a new

implied contract arose between the carrier and the consignor to take care of the goods for the use of the consignor. It is clear that the property in them never passed out of the plaintiff, the consignor. The whole transaction was a gross fraud—the goods procured by a bill with a false drawer and false acceptor, and no such person as the consignee ever heard of at the place to which he had addressed the goods. That circumstance ought to have awakened the suspicions of the defendants, and they were guilty of gross negligence in parting with them without further inquiry. In the result, they have the goods of the plaintiff in their possession, and they are liable to him if they deliver them wrongfully.

GASELEE, J.—I am of opinion that the defendants conducted themselves with gross negligence. When they found that the consignee was not to be heard of in Great Winchester Street, it was their duty to have made inquiry whether the statement in the letter from St. Alban's was true, and, if they had investigated the conduct of West, the fraud would have been discovered, but I doubt whether the action can be maintained upon a declaration framed like the present. On the second count it appears as if a contract had been made between the consignor and the carrier. From *Dawes* v. *Peck* (7) it is clear that where goods are despatched by a carrier the contract for payment of the carriage is between him and the consignee, even though the goods should have been booked by the consignor and though the property in these goods turned out afterwards to be in the consignor, yet that did not appear at the time of the contract. Can the action be maintained in trover? There can be no doubt that this was a swindling transaction, and I incline to think that the question of fraud was sufficiently left to the jury by what fell from the learned Chief Justice in the course of the trial. But taking that to be so, my doubt is whether, the goods having been delivered to the person, who, up to the time the bill drawn by Le Cointe became payable, was the person apparently entitled to them, the defendants are liable in trover for such delivery, as having been guilty of a wrongful conversion of the goods. For delivery to a wrong person, a carrier is no doubt responsible in trover, but from all that appears in this case, it may be collected that the person who received the box at St. Alban's was the person calling himself West, and the person to whom it was intended the box should be delivered. However, LORD TENTERDEN having left it properly to the jury to say whether the box was delivered in the due course of the defendants' business, a new trial could not be granted except upon payment of costs. The plaintiff, too, would amend, and probably recover upon the second trial, so that justice appears upon the whole to have been done, and, my two learned brothers entertaining a different opinion on the subject of the declaration, the rule must be discharged.

Rule discharged.

DOE d. GARNONS *v.* KNIGHT

[Court of King's Bench (Abbott, C.J., Bayley, Holroyd and Littledale, JJ.), June 1, 1826]

[Reported 5 B. & C. 671; 8 Dow. & Ry. K.B. 348; 4 L.J.O.S.K.B. 161; 108 E.R. 250]

Deed—Operation—Time for coming into operation—Retention of deed by person executing it—Deed remaining under his control—Need for delivery to grantee or third person for his use.

When a deed has been duly signed and sealed and formally delivered with apt words of delivery, and there is nothing to show that the person who executed it did not intend it to operate immediately, it will operate as a deed although it is not parted with, but is retained by the person who executed it and remains under his control. Delivery to the person who is to take under the deed, or to any person for his use, is not essential to the validity and effectiveness of the deed.

Deed—Operation—Time of coming into operation—Delivery of deed to third person for use and on behalf of grantee—Grantor parting with control over deed—Need for delivery to or acceptance by grantee.

Where a grantor who has duly executed a deed in favour of a grantee delivers the deed to a third person for the use and on behalf of the grantee, so that he parts with all control over the deed, the deed becomes effectual without any concurrence by the grantee from the moment of that delivery, and its operation will not be postponed until it is delivered to and accepted by the grantee.

Notes. Applied: *Hall* v. *Palmer* (1844), 3 Hare, 532. Considered: *Xenos* v. *Wickham* (1867), L.R. 2 H.L. 296. Referred to: *Grugeon* v. *Gerrard* (1840), 4 Y. & C. Ex. 119; *Roberts* v. *Williams* (1841), 11 L.J.Ch. 65; *Fletcher* v. *Fletcher* (1844), 4 Hare, 67; *Doe d. Richards* v. *Lewis* (1852), 11 C.B. 1035; *Jeffries* v. *Alexander* (1860), 8 H.L. Cas. 594; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25; *Macedo* v. *Stroud*, [1922] 2 A.C. 330.

As to the execution and delivery of deeds, see 11 Halsbury's Laws (3rd Edn.) 343 et seq.; and for cases see 17 Digest (Repl.) 212 et seq.

Cases referred to:

(1) *Barlow* v. *Heneage* (1702), Prec. Ch. 210; 2 Eq. Cas. Abr. 283, Pl. 2; 24 E.R. 103; 17 Digest (Repl.) 225, *259*.

(2) *Clavering* v. *Clavering* (1704), 2 Vern. 473; Prec. Ch. 235; 1 Eq. Cas. Abr. 24, pl. 6; 23 E.R. 904; affirmed (1705), 7 Bro. Parl. Cas. 410, H.L.; 17 Digest (Repl.) 225, *260*.

(3) *Lady Hudson's Case* (1704), cited 2 Vern. 476; 2 Eq. Cas. Abr. 52, pl. 5; 23 E.R. 905; 17 Digest (Repl.) 251, *546*.

(4) *Naldred* v. *Gilham* (1719), 1 P. Wms. 577; 2 Eq. Cas. Abr. 52; 24 E.R. 525, L.C.; 40 Digest (Repl.) 590, *937*.

(5) *Boughton* v. *Boughton* (1739), 1 Atk. 625; 9 Mod. Rep. 212; 26 E.R. 393, L.C.; 40 Digest (Repl.) 589, *929*.

(6) *Doe d. Roberts* v. *Roberts* (1819), 2 B. & Ald. 367; 106 E.R. 401; 17 Digest (Repl.) 318, *1248*.

(7) *Stirling* v. *Vaughan* (1809), 11 East, 619; 2 Camp. 225; 103 E.R. 1145; 29 Digest (Repl.) 138, *797*.

(8) *Taw* v. *Bury* (1558), 2 Dyer, 167a; Ben. & D. 75; 73 E.R. 366; 17 Digest (Repl.) 218, *171*.

(9) *Alford* v. *Lee* (1587), Cro. Eliz. 54; 2 Leon. 110; 78 E.R. 315; 17 Digest (Repl.) 218, *172*.

(10) *Butler and Baker's Case* (1591), 3 Co. Rep. 25a; 1 And. 348; 3 Leon. 271; Moore, K.B. 254; Poph. 87; 76 E.R. 684; 17 Digest (Repl.) 218, *173*.

(11) *Wankford* v. *Wankford* (1699), 1 Salk. 299; Holt, K.B. 311; 11 Mod. Rep. 38; 91 E.R. 265; 17 Digest (Repl.) 244, *465.*

Also referred to in argument:

Thoroughgood's Case (1612), 9 Co. Rep. 136b; 77 E.R. 925; 17 Digest (Repl.) 217, *155.*

Estwick v. *Cailland* (1793), 5 Term Rep. 420; 101 E.R. 236; 25 Digest (Repl.) 226, *428.*

Grendit v. *Baker* (1602), Yelv. 7; 80 E.R. 6.

Chamberlain v. *Stanton* (1588), Cro. Eliz. 122; 78 E.R. 379; 17 Digest (Repl.) 216, *146.*

Shelton's Case (1582), Cro. Eliz. 7; 78 E.R. 274; 17 Digest (Repl.) 217, *162.*

Parker v. *Tenant* (1590), 2 Dyer, 192b; Ben. & D. 92; 73 E.R. 424; sub nom. Anon., Jenk. 221; 17 Digest (Repl.) 218, *177.*

Scar v. *Ashwell* (1739), 3 Swan. 411, n.; 36 E.R. 928, L.C.; 25 Digest (Repl.) 270, *787.*

Worrall v. *Jacob* (1817), 3 Mer. 256; 36 E.R. 98; 17 Digest (Repl.) 249, *527.*

Cotton v. *King* (1726), 2 P. Wms. 358; 2 Eq. Cas. Abr. 53, pl. 10; 24 E.R. 764, L.C.; 40 Digest (Repl.) 576, *809.*

Murray v. *Earl of Stair* (1823), 2 B. & C. 82; 3 Dow. & Ry. K.B. 278; 107 E.R. 313; 17 Digest (Repl.) 222, *229.*

Johnson v. *Baker* (1821), 4 B. & Ald. 440; 106 E.R. 998; 17 Digest (Repl.) 223, *235.*

Wilson v. *Balfour* (1811), 2 Camp. 579, N.P.; 5 Digest (Repl.) 948, *7730.*

Hassells v. *Simpson* (1784), 1 Doug. K.B. 89, n.; 99 E.R. 60; 4 Digest (Repl.) 56, *478.*

Cadogan v. *Kennett* (1776), 2 Cowp. 432; 98 E.R. 1171; 25 Digest (Repl.) 191, *140.*

Rule Nisi obtained by the defendant for the new trial of an action of ejectment brought to recover possession of certain messuages and lands in Flintshire.

The plaintiff Garnons claimed the property as mortgagee under a deed purporting to be executed by one Wynne, deceased. Wynne was an attorney residing at Mold, Flintshire, and had acted in that character for Garnons who resided at a distance of about three miles from Mold. Wynne's sister and a niece lived in a house adjoining his own at Mold. On April 12, 1820, Wynne called at his sister's house, his niece then being the only person at home, and asked her to witness a parchment. He produced the parchment, placed it on the table, signed his name, and then said: "I deliver this as my act and deed," putting his finger at the same time on the seal. The niece signed her name, and he took the document away with him. The deed remained on the table until he took it away. He did not mention to his niece the contents of the deed, or the name of Mr. Garnons. The niece had no authority from Mr. Garnons to receive anything for him. It was proved by Miss Elizabeth Wynne, the sister of Wynne, that in April, 1820, but (whether before or after the execution of the deed did not distinctly appear) he brought her a brown paper parcel, and said: "Here, Bess, keep this: it belongs to Mr. Garnons." Nothing further passed at this time, but a few days later he came again, and asked for the parcel which she gave him. He returned it to her on April 14, 15, or 16, saying: "Here, put this by." When she received it the second time, it was less in bulk than before.

Wynne died in August, 1820. After his funeral, his sister delivered the parcel to one Barker in the same state in which she had received it from her brother. Barker, who was an intimate friend of Wynne, stated that in July, 1814, the latter sent for him and told him that he had received upwards of £26,000 upon Mr. Garnons' account, and, after taking credit for sums he had paid and placed out for Mr. Garnons, he was still indebted to him in more than £13,000. He then asked the witness if he, as his (Wynne's) friend, would see Mr. Garnons to explain the circumstances. The witness consented, and Wynne then made a statement of his

property by which it appeared that after payment of his debts, including the £13,000 he would have a surplus for himself and family of £8,000 at the least. He desired the witness to tell Garnons that, although he could not pay him at that time, he would take care to make him perfectly secure for all the moneys due from him. Upon this being communicated to Garnons he desired Barker to assure Wynne that he would not then distress him or expose his circumstances, but he expected that he would provide him securities for the money he, Wynne, owed him. This was communicated to Wynne who expressed great gratitude to Garnons, and said that he would take care to make him perfectly secure. After the funeral of Wynne his will was produced and with it was a paper in his own handwriting which contained a statement of his property and a list of various debts secured by mortgage or bond. Among others, under the title "mortgage," there was stated to be a debt to Mr. Garnons of £10,000. Miss Wynne soon after delivered to the witness, Barker, a brown paper parcel sealed, but not directed. Upon this being opened, there was enclosed in it another white paper parcel directed in Wynne's handwriting to "Richard Garnons, Esq." Within it was a mortgage deed (the same that was witnessed by Wynn's niece, as before stated) from Wynne to Garnons for £10,000. There was also within the white parcel, a paper folded in the form of a letter directed in the handwriting of Wynne to Garnons. That contained a statement of the account between Wynne and Garnons, and £10,000, part of the balance due from Wynne to Garnons, was stated to be secured upon Wynne's property. The mortgage deed found in the parcel was then delivered to Garnons. It was a mortgage of all Wynne's real estates.

At the trial it was contended on the part of the defendant that nothing passed by the deed inasmuch as there had been no sufficient delivery of it to the mortgagee or to any person on his behalf, to make it valid, and, secondly, because it was fraudulent and void against the creditors of the grantor. GARROW, J., overruled the objections, and the defendant then proved that Mr. Wynne, in May, 1820, delivered to him a bond and mortgage of his real estates to secure money due from Wynne to him, and that by his will he devised all his estates to the defendant, Knight, in trust to sell and pay his debts. The learned judge told the jury that the first question for their consideration was whether the mortgage to the plaintiff was duly executed by Wynne, and that, if they thought it was originally well executed, the question for their consideration would be whether the delivery to Miss Elizabeth Wynne was a good delivery. He told them he was of opinion that if, after it was formally executed, Mr. Wynne had delivered it to a friend of Mr. Garnons or to his banker for his use, such delivery would have been sufficient to vest in Mr. Garnons the interest intended to be conveyed to him under it, and the question for them to decide was whether the delivery to Miss Wynne was, under all the circumstances of the case, a departing with the possession of the deed, and of the power and control over it for the benefit of Mr. Garnons, the deed to be delivered to him either in Wynne's lifetime or after his death, or whether it was delivered to Miss Wynne merely for safe custody as the depository and subject to Wynne's future control and disposition. If they were of opinion that it was delivered merely for the latter purpose, they should find for the defendant, otherwise for the plaintiff. The jury returned a verdict for the plaintiff.

Subsequently a rule nisi for a new trial was obtained by the defendant upon two grounds: (i) that there had not been a sufficient delivery of the deed; (ii) that it was fraudulent as against creditors or purchasers within the Fraudulent Conveyances Acts, 1571 and 1584 [both repealed by the Law of Property Act, 1925]. Upon the first point it was contended that delivery was necessary to the execution of a deed; that there could be no good delivery unless made to the party intended to be benefited by it, or to some person acting on his behalf, or to a stranger expressly for his use. Reliance was placed on SHEPPARD'S TOUCHSTONE, 57, where it was laid down that

"a deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him, or it may be delivered to any stranger for and on the behalf, and to the use of him to whom it is made, without authority. But if it be delivered to a stranger without any such declaration, intention, or intimation, unless it be in a case where it is delivered as an escrow, it seems this is not a sufficient delivery."

It was contended that in the present case there was no delivery to the mortgagee or any person on his behalf on April 12, and that the subsequent delivery to Miss Wynne was not sufficient because it did not put the deed out of the control of Mr. Wynne and there was no evidence to warrant the finding of the jury that Mr. Wynne had parted with the control.

Taunton and *G. R. Cross* for the plaintiff, showed cause against the rule.
Campbell and *Oldrall Russell* for the defendant, supported the rule.

Cur. adv. vult.

June 1, 1826. **BAYLEY, J.,** delivered the following judgment of the court.—There were two points in this case—one whether there was an effectual delivery of a mortgage deed under which the plaintiff claimed so as to make the mortgage operate; the other whether such mortgage was or was not void against creditors or a subsequent mortgagee.

HIS LORDSHIP stated the facts, and continued: GARROW, J., who tried the cause, left two questions to the jury—one whether the mortgage was duly executed, and the other whether the delivery to the sister was a good delivery, and he explained to them that, if the delivery was a departing with the possession and of the power and control over the deed for the benefit of Mr. Garnons in order that it might be delivered to him either in Wynne's lifetime or after his death, the delivery would be good, but, if it was delivered to the sister for safe custody only for Wynne, to be subject to his future control and disposition, it was not a good delivery, and they ought to find for the defendant. The jury found for the plaintiff. Their opinion, therefore, was, that Wynne parted with the possession and all power and control over the deed and that his sister held it for Mr. Garnons, free from Wynne's control and disposition.

It was urged upon the argument that there was no evidence to warrant this finding, and that the conclusion which the jury drew had no premises upon which it can be supported. Is this objection, however, valid? Why did Mr. Wynne part with the possession to his sister except to put it out of his own control? Why did he say when he delivered the first parcel: "It belongs to Mr. Garnons" if he did not mean her to understand that it was to be held for Mr. Garnons' use? And though the sister did return it to her brother when he asked for it, would she not have been justified had she refused? Might she not have said: "You told me it belonged to Mr. Garnons, and I will part with it to no one but with his concurrence." The finding, therefore, of the jury, if this be a material point, appears to me well warranted by the evidence. Then there will be two questions upon the first point—(i) whether, when a deed is duly signed and sealed and formally delivered with apt words of delivery, but is retained by the party executing it, that retention will obstruct the operation of the deed; (ii) whether, if delivery from such party be essential, a delivery to a third person will be sufficient if such delivery puts the instrument out of the power and control of the party who executed it, and though such third person does not pass the deed to the person who is to be benefited by it until after the death of the party by whom it was executed.

Upon the first question, whether a deed will operate as a deed though it is never parted with by the person who executed it, there are many authorities to show that it will. In *Barlow* v. *Heneage* (1) George Heneage executed a deed purporting to convey an estate to trustees that they might receive the profits, and put them out for the benefit of his two daughters and gave bond to the same trustees conditioned to pay to them £1,000 at a certain day in trust for his daughters, but he kept both

deed and bond in his own power and received the profits of the estate until he died. He noticed the bond by his will and gave legacies to his daughters in full satisfaction of it, but the daughters elected to have the benefit of the deed and bond and filed a bill in equity accordingly. It was urged that, the deed and bond being voluntary and always kept by the father in his own hands, were to be taken as a cautionary provision only. LORD KEEPER WRIGHT said that these were the father's deeds and he could not derogate from them, and, the parties having agreed to set the maintenance of the daughters against the profits received by the father from the estate, he decreed upon the bond only, but that decree was that interest should be paid upon the bond from the time when the condition made the money payable.

In *Clavering* v. *Clavering* (2), Sir James Clavering settled an estate upon one son in 1684 and in 1690 he made a settlement of the same estate upon another son. He never delivered out or published the settlement of 1684, but had it in his own power, and it was found after his death among his waste papers: see 2 Vern. at pp. 474, 475. A bill was filed under the settlement of 1690 for relief against the settlement of 1684, but LORD KEEPER WRIGHT held that the relief could not be granted, and observed that, though the settlement of 1684 was always in the custody or power of Sir James, that did not give him a power to resume the estate, and he dismissed the bill. In *Lady Hudson's Case* (3), cited by LORD KEEPER WRIGHT, a father, being displeased with his son, executed a deed giving his wife £100 per annum in augmentation of her jointure. He kept the settlement in his own power, and, on being reconciled to his son, cancelled it. The wife found the deed after his death and on a trial at law the deed, being proved to have been executed, was adjudged good, though cancelled, and, the son having filed a bill in equity to be relieved against the deed, LORD SOMERS dismissed the bill.

In *Naldred* v. *Gilham* (4), Mrs. Naldred in 1707 executed a deed by which she covenanted to stand seised to the use of herself, remainder to a child of three years old, a nephew, in fee. She kept this deed in her possession, and afterwards burnt it and made a new settlement. A copy of the deed having been surreptitiously obtained before the deed was burnt, a bill was filed to establish the copy and to have the second settlement delivered up, and SIR JOSEPH JEKYL determined, with great clearness, for the plaintiff, and granted a perpetual injunction against the defendant, who claimed under the second settlement. It is true that LORD PARKER, L.C., reversed this decree but it was not on the ground that the deed was not well executed, or that it was not binding because Mrs. Naldred had kept it in her possession, but because it was plain that she intended to keep the estate in her own power; that she designed that there should have been a power of revocation in the settlement; that she thought that while she had the deed in her custody she had also the estate at her command; that, in fact, she had been imposed upon by the deed's being made an absolute conveyance, which was unreasonable, when it ought to have had a power of revocation; and because the plaintiff, if he had any title, had a title at law, and had, therefore, no business in a court of equity. LORD PARKER's decision, therefore, is consistent with the position that a deed, in general, may be valid, though it remains under the control of the party who executes it, not at variance with it, and so it is clearly considered in *Boughton* v. *Boughton* (5).

In that case, a voluntary deed had been made, without power of revocation, and the maker kept it by him. LORD HARDWICKE considered it as valid, and acted upon it, and he distinguished it from *Naldred* v. *Gilham* (4), which, he said, was not applicable to every case, but depended upon particular circumstances. He described LORD MACCLESFIELD as having stated as the ground of his decree that he would not establish a copy surreptitiously obtained, but would leave the party to his remedy at law, and that the keeping the deed (of which there were two parts) implied an intention of revoking (or rather of reserving a power to revoke).

Upon these authorities it seems to me that where an instrument is formally sealed and delivered and there is nothing to qualify the delivery but the keeping

the deed in the hands of the executing party and nothing to show he did not intend it to operate immediately, it is a valid and effectual deed, and delivery to the party who is to take by it, or to any person for his use, is not essential. I do not rely on *Doe d. Roberts* v. *Roberts* (6), because there the brother who executed the deed, though he retained the title deeds, parted with the deed which he executed.

If this point were doubtful, can there be any question but that delivery to a third person for the use of the party in whose favour a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit: per LORD ELLENBOROUGH in *Stirling* v. *Vaughan* (7), 11 East, at p. 623, and there is the strongest ground here for presuming Mr. Garnons' assent because of his declaration that he relied and expected Mr. Wynne would provide him security for his money and Wynne had given an answer importing that he would. SHEPPARD, who is particularly strict in requiring that the deed should pass from the possession of the grantor (more strict than the cases I have stated imply to be necessary) lays it down that delivery to the grantee will be sufficient, or delivery to any one he has authorised to receive it, or delivery to a stranger for his use and on his behalf: SHEPPARD'S TOUCHSTONE, p. 57. ROLLE'S ABRIDGMENT (K.) 24, pl. 7, *Taw* v. *Bury* (8), and *Alford* v. *Lee* (9), and *Butler and Baker's Case* (10) (3 Co. Rep. at p. 26 b), are clear authorities that, on a delivery to a stranger for the use and on behalf of the grantee, the deed will operate instanter, and its operation will not be postponed till it is delivered over to or accepted by the grantee.

The passage in ROLLE'S ABRIDGMENT is this:

> "If a man make an obligation to I., and deliver it to B., if I. get the obligation, he shall have action upon it, for it shall be intended that B. took the deed for him as his servant."

The point is put arguendo by Serjeant Paston who adds: "for a servant may do what is for his master's advantage, what is to his disadvantage not." In *Taw* v. *Bury* (8) an executor sued upon a bond. The defendant pleaded that he caused the bond to be written and sealed, and delivered it to Calmady to deliver to the testator as defendant's deed; that Calmady offered to deliver it to the testator as defendant's deed, and the testator refused to accept it as such; wherefore Calmady left it with testator as a schedule, and not as defendant's deed, and so non est factum. On demurrer on this and another ground, SIR HENRY BROWN and DYER, JJ., held, that, first by the delivery of the deed to Calmady without speaking of it as the defendant's deed, the deed was good, and was in law the deed of defendant before any delivery over to the testator and the testator's refusal could not undo it as defendant's deed from the beginning, and they gave judgment for the plaintiff, very much against the opinion of SIR ANTHONY BROWN, C.J., but others of the King's Bench, says DYER, agreed to that judgment. It was afterwards reversed, however, for a discontinuance in the pleadings. SIR ANTHONY BROWN'S doubt might possibly be grounded on this, that the delivery to Calmady was conditional on the testator accepting the deed; if so, it would not invalidate the position which alone is material here, that an unconditional delivery to a stranger for the benefit of the grantee will enure immediately to the benefit of the grantee and will make the deed a perfect deed without any concurrence by the grantee.

This is further proved by *Alford* v. *Lee* (9). That was debt upon an arbitration bond. The award directed that before the feast of Saint Peter both parties should release to each other all actions. The defendant executed a release on the eve of the feast, and delivered it to Prim to the use of the plaintiff, but the plaintiff did not know of it until after the feast. Then he disagreed to it, and whether this was a performance of the condition was the question. It was urged that it was not, for the release took no effect till agreement of the releasee. It was

answered that it was immediately a release, and the defendant could not plead non est factum or countermand it, and the plaintiff might agree to it when he pleased. It was adjudged to be a good performance of the condition, no place being appointed for delivering it, and the defendant might not be able to find the plaintiff, and they relied on *Taw* v. *Bury* (8). This, therefore, was a confirmation, at a distance of twenty-eight years, of *Taw* v. *Bury* (8), and at a still later period (1591) it was again confirmed in *Butler and Baker's Case* (10). Sir Edward Coke there explains this point very satisfactorily (3 Co. Rep. at p. 26 b):

> "If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently. But if C. offer it to B., there B. may refuse it in pais, and thereby the obligation will lose its force; (but, perhaps, in such case, A. in an action brought on this obligation cannot plead non est factum, because it was once his deed) and therewith agrees *Taw's* case (8). The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal in pais, and by that the property and interest will be divested, and such disagreement need not be in a court of record. Note, reader, by this resolution you will not be led into error by certain opinions delivered by the way and without premeditation, in 7 Edw. 4, 7 a b, and 19 b . . . and other books obiter."

Gould, J., cites this doctrine in *Wankford* v. *Wankford* (11) (1 Salk. at p. 301). Upon these authorities we are of opinion that the delivery of this deed by Wynne, and putting it into the possession of his sister, made it a good and valid deed at least from the time it was put into the sister's possession.

The remaining question is whether this deed is void as against creditors under the Fraudulent Conveyances Act, 1571, or as against defendant as a purchaser under the Fraudulent Conveyances Act, 1584. As to creditors, there was no proof of outstanding debts at the time of the trial nor any proof of there being any creditor except the defendant, and he may be considered in the double character of creditor and purchaser. The facts in evidence as to him are merely that in May or June, 1820, Mr. Wynne delivered to his son a bond and mortgage for the defendant and title deeds, and the mortgage and title deeds related to the same premises as Mr. Garnons' mortgage. What was the nature of the defendant's debt did not appear, or what was the consideration for the bond and mortgage. Whether any money was advanced when such bond and mortgage was given, or whether it was for a pre-existing debt, whether it was obtained by pressure from the defendant, or given voluntarily and of his own motion by Mr. Wynne, and whether the defendant knew of it or not, are points upon which there was no proof, and under these circumstances we cannot say that the defendant made out a case to entitle him to treat Mr. Garnons' deed as void under either of the statutes of Elizabeth. Should he be able hereafter to show that his mortgage is entitled to a preference, the present verdict will be no bar to his claim. For these reasons we are of opinion that the rule for a new trial must be discharged.

Rule discharged.

BRETT *v.* BEALES AND OTHERS

[Court of King's Bench (Lord Tenterden, C.J.), December 16, 17, 1829]

[Reported Mood. & M. 416]

Evidence—Statute—Private Act—Section stating Act "to be a public Act"—Admissibility of evidence of Act against strangers as a public Act.

An Act of Parliament, private in its nature, is not made admissible in evidence against strangers by a clause declaring "that it shall be deemed and taken to be a public Act, and shall be judicially taken notice of without being specially pleaded."

A canal Act is not rendered a public Act by containing provisions empowering the canal company to regulate and take tonnage rates and tolls from persons using the canal.

Notes. Considered: *Beaumont* v. *Mountain* (1834), 10 Bing. 404; *Woodward* v. *Cotton* (1834), 1 Cr. M. & R. 44. Referred to: *Beaufort* v. *Smith* (1849), 4 Exch. 450; *York and North Midland Rail. Co.* v. *R.* (1853), 22 L.J.Q.B. 225.

As to admissibility of Acts of Parliament, see 15 Halsbury's Laws (3rd Edn.) 366 et seq.; and for cases see 22 Digest (Repl.) 343 et seq.

Action of assumpsit for tolls.

The plaintiff was the lessee of tolls under the corporation of Cambridge and brought this action to recover the amount of the tolls claimed to be due from the defendants.

For the plaintiffs it was proposed to read from a copy printed by the King's printer, an Act of 52 Geo. 3, c. 141, entitled "An Act for making and maintaining a navigable canal with aqueducts feeders and reservoirs, from the Stort Navigation at or near Bishop's Stortford in the county of Hertford, to join the river Cam near Clay-hithe Sluice in the county of Cambridge, with a navigable branch or cut from the said canal at Sawston to Whaddon in the county of Cambridge."

By s. 122 the Canal Co. were empowered

"to ask demand take and recover . . . for the tonnage of all goods wares and merchandise . . . carried or conveyed upon the said canal and cut, a rate or sum not exceeding three pence per ton per mile . . ."

By s. 166 it was enacted,

"This Act should be deemed and taken to be a public Act, and shall be judicially taken notice of as such by all judges justices and others, without being specially pleaded."

Sir James Scarlett, for the defendants, objected to the receipt of this evidence on the ground that s. 166 was a clause introduced in a large class of these Acts, and it was, therefore, important to come to a correct decision in this case. He considered that the only operation of that clause was to prevent the necessity, in any legal proceedings in which the Act came in question, of setting it out in the same manner as a private deed on the record; it went no further but was merely to facilitate those proceedings, and did not alter the character of the Act as public or private, which depended merely on its object and provisions. The nature of this Act was a mere private arrangement, never even acted on, between the projectors of the canal and the proprietors of the contemplated line, the corporation of Cambridge among others. These private Acts had always been treated as mere contracts between individuals, and their recitals were of no more value than the recitals of any private deed. They in no way bound the inhabitants of the town or strangers; the most that they amounted to was a bargain between the adventurers and corporation.

Taunton for the plaintiff.—The legislature call it a public Act by s. 166: and if a public Act at all, it is so to all intents and purposes and among others for the

mode of proof. Besides this, the Act is, in itself, of a public nature. Any Act which affects all the King's subjects is so; and this Act, by s. 122, gives to the Canal Co. the high prerogative of taxing all the King's subjects. Such an Act as this has never been treated as a mere private contract, although those words may have been applied to some local Acts. Being then a public Act, both in its nature and by the express declaration of Parliament, I use it, not merely for its recitals in the preamble of the section, but as a legislative recognition of the existence of those tolls, for the diminution of which a remedy is provided.

LORD TENTERDEN, C.J., having consulted his brethren, gave judgment as follows.—The point is quite new and of great importance, as it will apply to so large a class of statutes. Two grounds have been laid for the admission of this evidence—(i) that s. 166 renders it admissible as a public Act; (ii) that independently of that clause it is so from its nature. The answer given to the first was that the clause only applied to the forms of pleading and did not vary the general nature and operation of the Act. I was inclined to that opinion at the time and my learned brothers agree with me in that impression. We also think that the second ground fails. It is said that the Act gives a power of levying a toll on all the King's subjects and, therefore, the Act is public. The power given is not so extensive; it is only to levy toll on such as shall think fit to use the navigation. The ground, therefore, on which it is said the Act is public, and the evidence admissible, fails; and I cannot receive it.

Evidence accordingly rejected.

GABAY AND ANOTHER *v.* LLOYD

[Court of King's Bench (Abbott, C.J., Bayley, Holroyd and Littledale, JJ.). Hilary Term, 1825]

[Reported 3 B. & C. 793; 5 Dow. & Ry. K.B. 641; 3 L.J.O.S.K.B. 116; 107 E.R. 927]

Insurance—Marine insurance—Usage—Need for universal adoption—Knowledge of parties.

Custom—Usage—Need for universal adoption—Knowledge of parties.

The plaintiffs effected a policy of marine insurance on horses warranted free from mortality and jettison. On the voyage due to the rolling of the ship in a storm the horses broke down the partitions which separated them and kicked each other to death. A special verdict found that a usage respecting such policies prevailed among underwriters subscribing policies at Lloyd's Coffee House in London and merchants effecting policies there, and that this policy was effected there, but it was not found that the plaintiffs had any knowledge of the usage or intended to contract with reference to it.

Held: (i) this was a loss by a peril of the sea and the plaintiffs were entitled to recover; (ii) there being no evidence to show that the usage was universally adopted or that the plaintiffs had any knowledge of it, the usage could neither control the policy nor bind the plaintiffs.

Notes. Considered: *Bayliffe* v. *Butterworth* (1847), 1 Exch. 425; *Sweeting* v. *Pearce* (1859), 7 C.B.N.S. 449. Distinguished: *Taylor* v. *Dunbar* (1869), L.R. 4 C.P. 206. Referred to: *Bartlett* v. *Pentland* (1830), 10 B. & C. 760; *Robertson* v. *Jackson* (1845), 2 C.B. 412; *Maxwell* v. *Deare* (1854), 23 L.T.O.S. 1; *Sweeting* v. *Pearce* (1861), 9 C.B.N.S. 534.

As to persons bound by usage, see 11 Halsbury's Laws (3rd Edn.) 196 et seq., and for cases see 17 Digest (Repl.) 27 et seq. As to necessity for usage to be general and notorious in order to be binding in insurance policies; and as to

perils insured against, inherent vice or nature of cargo, in marine insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 19, 88, respectively; and for cases see 29 DIGEST (Repl.) 92, 231, respectively.

Case referred to:

(1) *Lawrence* v. *Aberdein* (1821), 5 B. & Ald. 107; 106 E.R. 1133; 29 Digest (Repl.) 231, *1726*.

Also referred to in argument:

Pelly v. *Royal Exchange Assurance Co.* (1757), 1 Burr. 341; 97 E.R. 343; 29 Digest (Repl.) 91, *373*.

Noble v. *Kennoway* (1780), 2 Doug. K.B. 510; 99 E.R. 326; 29 Digest (Repl.) 49, *46*.

Ougier v. *Jennings* (1800), 1 Camp. 505, n., N.P.; 29 Digest (Repl.) 92, *380*.

Vallance v. *Dewar* (1808), 1 Camp. 503, N.P.; 29 Digest (Repl.) 196, *1364*.

Palmer v. *Blackburn* (1822), 1 Bing. 61; 7 Moore, C.P. 339; 1 L.J.O.S.C.P. 1; 130 E.R. 25; 29 Digest (Repl.) 277, *2076*.

Action of assumpsit on a policy of insurance on goods, as per annexed statement, valued at £2,800, on the ship *Aimwell*, at and from Liverpool to Jamaica; with a memorandum, that horses were warranted free of jettison and mortality.

The declaration stated that the defendant, as underwriter, subscribed the policy for £200; that three horses, parcel of the goods valued in the statement, had been shipped at Liverpool on board the *Aimwell*; that the plaintiffs had an interest under the policy, and that the horses were lost by the perils of the sea. The defendant pleaded the general issue.

At the trial before ABBOTT, C.J., at Guildhall, the jury found a special verdict, stating the following facts: The order for effecting the insurance; that the three horses were parcel of the goods valued in the statement; the payment of the premium; the subscription of the defendant; the shipment of the horses; the interest of the plaintiffs in the goods including the three horses; the sailing of the vessel; and that the vessel having the three horses on board, together with the other goods, the horses, which were between decks, being at that time in good safety, and properly secured in stalls, with slings and halters, and having sufficient partitions between them, and also a person to attend to take charge of them; and the vessel being in every respect seaworthy, sailed from the port of Liverpool on her voyage; and that during the night a gale arose with excessive squalls. The three horses, by the rolling of the vessel, broke their slings, and by kicking, broke down the partition between them; were unable to stand, on account of the great rolling of the vessel; and that by their kicking they bruised and hurt each other so much that their necks were broken and they died; and that the death of the horses was not occasioned by the neglect or default of the plaintiffs or their servants, but was due to the circumstances above set forth.

The special verdict then stated that the vessel afterwards arrived at Jamaica with the residue of the goods, and that the defendant had notice of the loss, and was called upon to pay his proportion of the loss, but refused so to do; and that, according to the usage and custom among insurers or underwriters who were in the habit of subscribing policies of marine insurance at Lloyd's Coffee House in London, and merchants and others effecting such policies of insurance there, there were two classes of policies for insuring livestock on board ships on voyages from the United Kingdom to Jamaica and elsewhere; the first containing an exception from the perils insured against, or a warranty of freedom from mortality; the second not containing any such exception or warranty and which usually contained words expressly including the risk of mortality; that the premium for the first class was much lower than that for the second class. And that, in policies of the first class, the assured have not claimed from the underwriters, and the underwriters have not paid the assured, or been considered liable to pay a loss by the mortality of cattle where the vessel, carrying such cattle arrived safely; but it had always been

usual on policies of the second class, to claim and pay a loss by mortality of cattle, in all cases where such loss had occurred, although the vessel arrived safely; and that on policies of either class if the vessel had been lost on voyage and the animals drowned, the underwriters had been in the habit of paying the assured. The special verdict further stated that the policy of insurance now sued on was effected at Lloyd's Coffee House, and was then and there signed and subscribed by the defendant, who was an insurer and underwriter there.

Two questions arose: (i) whether by the words of this policy the underwriter was liable for the loss accruing from the death of the animals; and (ii) whether the usage found by the special verdict did or did not show, that it was the intention of the parties to the contract, that the underwriter should be exempted.

Parke for the plaintiffs.
Campbell for the defendant.

ABBOTT, C.J.—The usage found in this case is not sufficient to take it out of the general rule laid down in *Lawrence* v. *Aberdein* (1). The special verdict is a finding rather of that which might have been evidence of the usage, there is nothing to show that the plaintiffs had any knowledge of it, or intended to contract with reference to it. This case, therefore, appears to me not distinguishable from *Lawrence* v. *Aberdein* (1). Judgment must be for the plaintiffs.

BAYLEY, J.—The precise meaning of the word mortality as used in the policy of insurance, it might have been difficult to define, but upon general principles I am satisfied that the construction put upon it in *Lawrence* v. *Aberdein* (1) is the just and sound construction, and, therefore, the present case must be governed by that decision. If there had been evidence to show that the usage relied on by the defendant was universally adopted throughout the city of London by all parties effecting insurances there and the plaintiffs were acquainted with it, then the usage here might have been receivable to explain the policy and the whole case might have assumed a different complexion. But there is no such evidence, for the usage found extends no further than Lloyd's Coffee House and certain private individuals accustomed to effect policies there and it is not even found that the plaintiffs knew of that usage or were in the habit of effecting policies at that place. Such a usage can neither control the policy nor bind the party insured by it; this is consequently no answer to the action.

HOLROYD, J.—I am entirely of the same opinion.

LITTLEDALE, J.—The usage found by the verdict to prevail at Lloyd's cannot possibly affect any other persons than those who frequent that place and are familiar with that usage. The plaintiffs are not shown to be persons answering that description, therefore the usage cannot bind them. With respect to the word mortality, I must say I have some doubt whether I should have concurred in the decision of *Lawrence* v. *Aberdein* (1) on that point, but assuming that case to be law, I think the present case cannot be distinguished from it.

Judgment for plaintiffs.

SNOWDON *v.* DALES

[Vice-Chancellor's Court (Shadwell, V.-C.), April 17, 1834]

[Reported 6 Sim. 524; 3 L.J.Ch. 188; 58 E.R. 690]

Bankruptcy—Property available for distribution—Life interest subject to discretionary trusts—Directions as to part unapplied—Whole paid to bankrupt until bankruptcy.

A. assigned £800 to trustees in trust during the life of B., or such part thereof as they should think proper, or at such times and in such portions as they should judge expedient, to pay the interest to him, or, if they should think fit, to lay it out in procuring for him diet and other necessaries, but so that he should not have any right to the interest other than the trustees, in their uncontrolled discretion, should think proper and so as no creditor of his should have any claim thereon, nor should the same be subject to his debts. It was declared that after his death the £800 and all savings and accumulations of interest, if any, should be held in trust for his children, and, if he should have no child, then in trust for C. B. became bankrupt. The trustees had paid him the interest down to his bankruptcy.

Held: B.'s life interest passed to his assignees.

Notes. Description of bankrupt's property divisible among creditors is dealt with by the Bankruptcy Act, 1914, s. 38 (2 Halsbury's Statutes (2nd Edn.) 373).

Distinguished: *Twopenny* v. *Peyton* (1840), 10 Sim. 487.

As to property available for distribution on bankruptcy where provision in settlement for maintenance, see 2 Halsbury's Laws (3rd Edn.) 415; and for cases see 5 Digest (Repl.) 703.

Case referred to in argument:

Piercy v. *Roberts* (1832), 1 My. & K. 4; 39 E.R. 582; 5 Digest (Repl.) 703, *6142*.

Demurrer by the defendants to a bill filed by the plaintiffs, the assignees of the bankrupt, against the defendants, the bankrupt and his infant children and the settlement trustees and beneficiaries, interested under the discretionary trusts, praying for a declaration that the plaintiffs were entitled to the bankrupt's life interest in £800 for the benefit of his creditors and that the trustees be decreed to pay the plaintiffs interest accrued due since the bankruptcy and during the bankrupt's life.

By a deed poll of Dec. 7, 1821, after reciting two indentures by which J. Crosby assigned two mortgage sums of £1,000 each, to trustees upon such trusts as he should appoint, it was witnessed, and Crosby did thereby appoint that the trustees should stand possessed of those sums, in trust for himself for life, and, after his decease, in trust to pay thereout £500 and £700 to his wife's daughters, Susannah Hepworth and Anne Thompson, respectively; and, as to the remaining £300, in trust, during the life of John Doughty Hepworth, his wife's son, or during such part thereof as the trustees should think proper, and at their will and pleasure but not otherwise, or at such other time or times, and in such sum or sums, portion and portions as they should judge proper and expedient, to allow and pay the interest of the £800 into the proper hands of J. Doughty Hepworth, or otherwise if they should think fit, in procuring for him diet, lodging, wearing apparel and other necessaries; but so that he should not have any right, title, claim or demand in or to such interest, other than the trustees should, in their or his absolute and uncontrolled power, discretion and inclination, think proper or expedient, and so as no creditor of his should or might have any lien or claim thereon in any case, or the same be, in any way, subject or liable to his debts, disposition or engagements; and, in case he should marry and leave a widow him surviving, then, after his decease, to pay the interest to his widow during her life, for her

separate use, in such manner as the trustees should judge proper: and Crosby thereby declared and appointed that a proportionate part of the interest should be paid up to the day of the decease of J. D. Hepworth and his widow; and that, from and after the decease of him or his widow, the £800 and all savings or accumulations of interest, if any, should be in trust for his children in equal shares, with benefit of survivorship on any of them dying under twenty-one; but, if he should have no child who should attain twenty-one, then one moiety of the £800 and all savings and accumulations of interest, if any, should be upon such trusts as Anne Thompson should appoint, and, in default of appointment, in trust for her absolutely; and that the other moiety should be in trust for Susannah Hepworth absolutely: and the trustees were empowered to apply the interest and capital of the shares of J. D. Hepworth's children, for their maintenance and advancement respectively.

Crosby died in October, 1822. In April, 1832, J. D. Hepworth became bankrupt. The trustees had paid or applied the interest of the £800 to him or to his use, down to the time of his bankruptcy.

The defendants put in a general demurrer.

O. Anderdon for the defendants, supported the demurrer.

Bethell for the plaintiffs, supported the bill.

SHADWELL, V.-C.—It is plain that the grantor did intend to exclude the assignees; and that object might have been effected if there had been a clear gift over. But the question is whether there is anything in the deed that amounts to a direction that the trustees shall withhold the payment of the interest and accumulate it, during the lifetime of J. D. Hepworth, if they shall think fit. Although the words: "savings and accumulations," as they first occur, might bear that construction; yet, taking the whole of the instrument together, I think that the better construction is that those words do not enable the trustees to withhold and accumulate any portion of the interest during the life of J. D. Hepworth. I declare that the plaintiffs are entitled to the bankrupt's life interest in the £800.

Judgment for plaintiffs.

OWEN *v.* THOMAS

[Rolls Court (Sir John Leach, M.R.), June 6, 1834]

[Reported 3 My. & K. 353; 3 L.J.Ch. 205; 40 E.R. 134]

Sale of Land—Description of property sold—Reference to deeds in possession of named person.

An agreement in writing for the sale of a house did not by description ascertain the particular house, but it referred to the deeds as being in the possession of a person named in the agreement.

Held: the agreement was sufficiently certain as it could be ascertained by an inquiry before the master that the deeds in possession of the person named referred to the house in question.

Notes. That part of s. 4 of the Statute of Frauds (1677) which relates to contracts for the sale of land was repealed by the Law of Property Act, 1925, Sched. 7, and substantially re-enacted by s. 40 (1) of that Act (20 Halsbury's Statutes (2nd Edn.) 500).

Applied: *McMurray* v. *Spicer* (1868), L.R. 5 Eq. 527. Considered: *Smith* v. *Webster* (1876), 3 Ch.D. 49. Applied: *Naylor* v. *Goodall* (1877), 47 L.J. Ch. 53. Considered: *Shardlow* v. *Cotterill* (1881), 44 L.T. 549. Referred to: *Carpenter* v. *Churchill* (1854), 2 W.R. 364; *Sheers* v. *Thimbleby* (1897), 76 L.T. 709.

As to admission of extrinsic evidence to explain meaning of document, see 11 Halsbury's Laws (3rd Edn.) 405 et seq.; and for cases see 17 Digest (Repl.) 294 et seq. As to sale of land and description of property sold, see 34 Halsbury's Laws (3rd Edn.) 250; and for cases see 40 Digest (Repl.) 34.

Cases referred to in argument:

Boys v. *Ayerst* (1822), 6 Madd. 316; 56 E.R. 1112; 40 Digest (Repl.) 12, *20*.

Palmer v. *Scott* (1830), 1 Russ. & M. 391; Taml. 488; 8 L.J.O.S.Ch. 127; 39 E.R. 151; 44 Digest (Repl.) 22, *121*.

Fowle v. *Freeman* (1804), 9 Ves. 351; 32 E.R. 638; 40 Digest (Repl.) 36, *191*.

Whaley v. *Bagnel* (1765), 1 Bro. Parl. Cas. 345; 1 E.R. 611, H.L.; 40 Digest (Repl.) 44, *260*.

Cooke v. *Tombs* (1794), 2 Anst. 420; 145 E.R. 922; 40 Digest (Repl.) 38, *208*.

Coles v. *Trecothick* (1804), 9 Ves. 234; 1 Smith, K.B. 233; 32 E.R. 592; 12 Digest (Repl.) 178, *1181*.

Bill for specific performance of an agreement to sell a house filed by the plaintiff, purchaser, against the defendant, vendor.

The defendant, who was possessed of a leasehold house at Newport, in Monmouthshire, entered into a parol agreement for the sale of the house to the plaintiff for £1,050. As soon as the agreement was concluded, the plaintiff, by the direction of the defendant, wrote and sent by post to Mr. Church, the defendant's solicitor, the following letter, to which the defendant, having previously read it over, affixed his signature:

"To Samuel Church, Feb. 7, 1828.—Dear Sir, I have this day sold the house, etc., in Newport to Mr. John Owen for £1,050, and I am to receive the next half year's rent; the money to be paid as soon as the deeds can be had from Mr. Deere; and you will be pleased to lose no time in getting them from him. I am, etc., Rowland Thomas."

By s. 4 of the Statute of Frauds, 1677:

"No action shall be brought . . . upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or

note thereof, shall be in writing and signed by the party to be charged therewith . . ."

Bickersteth and *Lynch* for the plaintiff.
Pemberton and *Richards* for the defendant.

SIR JOHN LEACH, M.R.—This letter from the defendant to his solicitor was written to apprise him of the agreement into which he had entered with the plaintiff, in order that the solicitor might take the necessary measures to carry it into execution and is a sufficient memorandum or note of the agreement in writing within s. 4 of the Statute of Frauds (1677). It is true that the agreement must be certain in its terms; but id certum est quod certum reddi potest. It appears, upon the face of the agreement, that the house referred to is the house of which the deeds were in the possession of Mr. Deere, and the house might easily be ascertained before the master. The defendant, however, having declined the inquiry, in effect admits that any uncertainty as to the subject of the agreement would be thereby removed; and the plaintiff is, therefore, entitled to the decree of specific performance.

Judgment for plaintiff.

DOE d. MANN *v.* WALTERS

[Court of King's Bench (Bayley, Littledale and Parke, JJ.), Hilary Term, 1830]

[Reported 10 B. & C. 626; 5 Man. and Ry. K.B. 357; 8 L.J.O.S.K.B. 297; 109 E.R. 583]

Landlord and Tenant—Notice to quit—Notice by agent of landlord—Authority to give notice—Ratification of notice given without authority.

An agent who has authority to collect the rents of a landlord and manages the landlord's affairs during his absence abroad, does not, in the absence of any evidence in that behalf, have authority to give a notice to quit. Where an agent has given a notice to quit without authority ratification of his authority must, in order to validate the notice, be given before the moment at which the notice becomes operative.

Notes. Applied: *Doe d. Lyster* v. *Goldwin* (1841), 2 Q.B. 143; *Doe d. Pulker* v. *Walker* (1845), 14 L.J.Q.B. 181. Explained: *Ancona* v. *Marks* (1862), 7 H. & N. 686. Referred to: *Doe d. Richmond Corpn.* v. *Morphett* (1845), 14 L.J.Q.B. 345; *Re Bebington's Tenancy, Bebington* v. *Wildman*, [1921] 1 Ch. 559.

As to a notice to quit being given without the landlord's authority see 23 Halsbury's Laws (3rd Edn.) 524; and for cases see 1 Digest (Repl.) 379, 380. As to the time when ratification of an agent's authority must be given, see 1 Halsbury's Laws (3rd Edn.) 177; and for cases see 1 Digest (Repl.) 460 et seq.

Cases referred to:

(1) *Doe d. Marsack* v. *Read* (1810), 12 East, 57; 104 E.R. 23; 31 Digest (Repl.) 501, *6262*.

(2) *Right d. Fisher, Nash and Hyrons* v. *Cuthell* (1804), 5 East, 491; 2 Smith, K.B. 33; 102 E.R. 1158; 1 Digest (Repl.) 379, *457*.

(3) *Goodtitle d. King* v. *Woodward* (1820), 3 B. & Ald. 689; 106 E.R. 813; 1 Digest (Repl.) 379, *458*.

Also referred to in argument:

Roe d. Dean and Chapter of Rochester v. *Pierce* (1809); 2 Camp. 96; 1 Digest (Repl.) 380, *467*.

Rule Nisi obtained by the defendant to enter a nonsuit in an action of ejectment.

At the trial before Burrough, J., in 1829, the only question was as to the validity of a notice to quit. It appeared that the defendant was a yearly tenant of certain glebe land to the lessor of the plaintiff, who had left England five years before the

commencement of the action, and had since resided in Italy. The notice to quit purported to be signed by one Grylls as the agent of the lessor of the plaintiff, and was delivered to the defendant's wife on June 22, 1827, and required the defendant to quit on Dec. 25 then next following, or at the expiration of the current year of his tenancy. The declaration was entitled of Hilary Term, 1829, and the day of demise was Jan. 1 in that year.

Grylls was called as a witness. He stated that he was a banker as well as an attorney, and managed Mr. Mann's affairs in his absence; that he had not let the land to the defendant, but had received rent from him; that Mr. Mann, when in England, kept the glebe land in his own hands.

It was objected by the counsel for the defendant that the notice was insufficient, because it did not appear that Grylls had any authority from Mr. Mann to give it. The judge thought that as Grylls managed Mr. Mann's affairs and received his rents, he had an implied authority to give the notice to quit, and directed the jury to find a verdict for the lessor of the plaintiff; but reserved liberty to the defendant to move to enter a nonsuit, if the court should be of opinion that he had no such authority. A rule nisi was obtained for entering a nonsuit, on the ground that a mere receiver of rent had not, as such, authority to determine the estate of a tenant from year to year by giving a notice to quit; and *Doe d. Marsack* v. *Read* (1), *Right d. Fisher, Nash and Hyrons* v. *Cuthell* (2) and *Goodtitle d. King* v. *Woodward* (3) were cited, the authority of the last-mentioned case being called in question.

Coleridge for the lessor of the plaintiff, showed cause against the rule.

Follett, for the defendant, supported the rule.

BAYLEY, J.—I think that it was a question for the jury upon the evidence whether Grylls had authority from the lessor of the plaintiff to give the notice to quit, and that the rule, therefore, ought to be made absolute for a new trial, but not for a nonsuit. There was evidence that Grylls, who was a banker as well as an attorney, was the manager of the affairs of the lessor of the plaintiff, and it would be a question for the jury whether he had authority to do the act in question.

The jury, from the fact of Grylls having managed the affairs of the lessor of the plaintiff, and received the rent for him, may or may not infer that the lessor of the plaintiff intended to authorise him to give notice to quit. The fact of such authority having been given is one peculiarly within the knowledge of the lessor of the plaintiff, and he cannot complain that he is hardly dealt with, if the jury will not, from the facts proved, draw the inference that Grylls had authority. If any express authority was given, Grylls might have proved it, but he only proved that he managed the affairs of the lessor of the plaintiff, and received rent from the defendant. There was no evidence of any express authority to give the notice, but then there was some, though slight evidence, of an implied authority.

As to the subsequent recognition, *Goodtitle d. King* v. *Woodward* (3) is not in point. There the recognition was certainly before the ejectment was brought, and probably before the day of the demise in the declaration; in the present case, there was no recognition of the authority of the agent before the day of the demise laid in the declaration.

LITTLEDALE, J.—I also think that this rule should be made absolute for a new trial. If I had been upon the jury and this evidence had been given, I should have thought that Grylls had no authority to give the notice. Mr. Mann, when he left this country, may have made Grylls manager of his affairs and receiver of his rents without intending to authorise him to determine tenancies. Suppose Mann had lent money upon mortgage, would it follow that, as manager of his affairs, Grylls would have had authority to determine the loan? Clearly not. Nor does it follow from his being manager of Mann's affairs that he had authority to determine the estate of the tenants. As to the notice to quit, I am of opinion that, if Grylls had no authority to give such notice at the time when it was given, or at least when the

half-year mentioned in it began to run, no subsequent recognition of his authority would make it valid. I think that the ratification of the act on the day after the notice was given, or after the half-year began to run, would not be sufficient; because, in that case, the tenant would not have six months' notice, the notice being valid only from the time when it becomes the notice of the landlord.

PARKE, J.—The notice to quit contains an implied assertion that Grylls was the agent of Mann for the purpose of giving that notice, and it is argued that the fact of the defendant having received the notice and kept it without making any objection, was evidence, as against him, to go to the jury that Grylls had authority to give it. It was not shown that the defendant had read the paper and assented to it; for it was delivered to the defendant's wife, and there was no evidence to shew that he had ever read it, unless that is to be presumed from the fact of his having kept it. But even if such a presumption be made, still it would be very slight evidence that Grylls was the agent of the lessor of the plaintiff; for whether he had authority or not, was a fact not within the knowledge of the tenant.

There is no distinct proof that Grylls had any express authority to manage the affairs of the lessor of the plaintiff. The evidence is that he did manage his affairs, and that he received the rent of the premises in question. But a mere receiver of rents, as such, has no authority to determine a tenancy. I think very little reliance, therefore, can be placed on the form of the notice to quit, or on the fact that Grylls received the rent.

The next ground on which it is said that Grylls was authorised to give the notice is, that the lessor of the plaintiff, by bringing the ejectment, has recognised the authority of Grylls, and, therefore, according to *Goodtitle d. King* v. *Woodward* (3) has rendered the notice to quit valid from the time when it was given. I cannot say that I am satisfied with the reasons given for the decision in that case. But assuming that a subsequent recognition of the authority of an agent can in any case be sufficient, it ought, at all events, in this case, to have been before the day of the demise laid in the declaration, for the plaintiff must show a right to the possession on that day. The bringing of an ejectment, therefore, is not, in this case, a sufficient recognition of the authority of the agent.

In *Right d. Fisher, Nash and Hyrons* v. *Cuthell* (2) it was held by LORD ELLENBOROUGH, C.J., and LAWRENCE, J., that the ratification by a joint tenant of a notice to quit given by his companion would not make it good, on the ground that the notice must be such a one on which the tenant can rely and act with certainty at the moment of receiving it. If Grylls had no authority to give the notice at the time when it began to operate as a notice, it seems to me that it was insufficient, and that the lessor of the plaintiff would not be entitled to recover. But inasmuch as there was some evidence, though very slight, from which the jury might infer that Grylls had a previous authority, I think that the rule should be made absolute, not for a nonsuit but for a new trial.

Rule absolute for new trial.

COCKS AND OTHERS *v.* MASTERMAN AND OTHERS

[Court of King's Bench (Lord Tenterden, C.J., Bayley and Littledale, JJ.), Trinity Term, 1829]

[Reported 9 B. & C. 902; Dan. & Ll. 329; 4 Man. & Ry. K.B. 676; 8 L.J.O.S.K.B. 77; 109 E.R. 335]

Bill of Exchange—Forgery—Forgery of acceptance—Money paid on due date—Notice of mistake given following day—Recovery of money paid.

The holder of a bill of exchange is entitled to know on the day when it becomes due whether it is an honoured or a dishonoured bill. Where, therefore, bankers paid on behalf of customers a bill the acceptance of which by the customers, unknown to the bankers, had been forged, and the bankers did not give notice to the payees of the forgery until the day following the payment when the forgery was brought to their notice,

Held: the bankers could not recover from the payees the money which they had paid to them.

Notes. Considered: *Robarts* v. *Tucker* (1851), 20 L.J.Q.B. 270. Explained: *Durrant* v. *Ecclesiastical Comrs.* (1880), 6 Q.B.D. 234; *Leeds and County Bank* v. *Walker* (1883), 11 Q.B.D. 84. Considered: *Deutsche Bank* v. *Beriro* (1895), 11 T.L.R. 591. Applied: *London and River Plate Bank, Ltd.* v. *Bank of Liverpool*, [1895–9] All E.R. Rep. 1005. Distinguished: *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A.C. 49. Applied: *Morison* v. *London County and Westminster Bank, Ltd.*, [1914–15] All E.R. Rep. 853. Distinguished: *Goldman* v. *Cox* (1924), 40 T.L.R. 744. Referred to: *Mather* v. *Maidstone* (1856), 18 C.B. 273; *Aiken* v. *Short* (1856), 1 H. & N. 210; *R. E. Jones* v. *Waring and Gillow*, [1926] All E.R. Rep. 36.

As to the time at which notice of dishonour of a bill of exchange must be given, see 3 Halsbury's Laws (3rd Edn.) 209 et seq.; and for cases see 6 Digest (Repl.) 244 et seq. As to payment on forged endorsement, see 2 Halsbury's Laws (3rd Edn.) 208; and for cases see 3 Digest (Repl.) 258 et seq., 6 Digest (Repl.) 97 et seq.

Case referred to:

(1) *Wilkinson* v. *Johnson* (1824), ante p. 321; 3 B. & C. 428; 5 Dow. & Ry. K.B. 403; 3 L.J.O.S.K.B. 58; 107 E.R. 792; 6 Digest (Repl.) 337, *2443*.

Also referred to in argument:

Price v. *Neal* (1762), 3 Burr. 1354; 1 Wm. Bl. 390; 97 E.R. 871; 6 Digest (Repl.) 336, *2437*.

Smith v. *Mercer* (1815), 6 Taunt. 76; 1 Marsh. 453; 128 E.R. 961; 3 Digest (Repl.) 258, *727*.

Jones v. *Ryde* (1814), 5 Taunt. 488; 1 Marsh, 157; 128 E.R. 779; 3 Digest (Repl.) 259, *733*.

Bruce v. *Bruce* (1814), 5 Taunt. 495; 1 Marsh. 165; 128 E.R. 782; 6 Digest (Repl.) 99, *775*.

Action of assumpsit to recover a sum of money paid under a mistake of fact. The defendant pleaded non assumpsit.

At the trial before Lord Tenterden, C.J., in 1827, it appeared that the plaintiffs carried on business as bankers at Charing Cross, in the city of Westminster, and the defendants carried on business as bankers in Nicholas Lane, in the city of London. Before, on and after May 24, 1827, certain persons carrying on trade and business under the firm and style of Sewell and Cross kept an account and cash with the plaintiffs as their bankers, and certain other persons carrying on trade and business under the firm and style of Sanderson & Co., kept an account and cash with the defendants, as their bankers. Before May 24, a bill of exchange, drawn by one T. Dutton, upon Sewell and Cross, bearing date Mar. 21, 1827, for £198 19s., payable two months after date to the order of T. Dutton, and endorsed by T. Dutton,

and also by C. Heginbotham and one J. Harris, and purporting to be accepted by Sewell and Cross, payable at the plaintiffs', was paid to the defendants by Sanderson & Co. to their credit with the defendants; and on May 24, the defendants presented the bill to the plaintiffs, and required them to pay it according to the said acceptance. The plaintiffs, believing the acceptance to be that of Sewell and Cross, paid to the defendants the sum of £198 19s. as the amount of the bill of exchange so purporting to be accepted as aforesaid. On May 25 (being the day next following that on which such payment was made) the plaintiffs discovered that the acceptance on the bill was not the acceptance of Sewell and Cross, but that it was forged by T. Dutton, the drawer of such bill. On May 25, about one o'clock, the plaintiffs gave notice to the defendants and to J. Harris, the endorser, and to Sanderson & Co., that the acceptance was forged; and that payment had been made by them under a mistake, and in ignorance of the acceptance being so forged, and they requested the defendants to repay them the said sum of £198 19s. On the same day one Thomas Gates, as attorney for the Bankers' Society for Protection against Forgers, and of which society the plaintiffs and defendants were members, sent the following letter to C. Heginbotham, the other endorser, and also a similar one to J. Harris:

> "Sir, a bill of exchange, bearing your endorsement for £198 19s., drawn by Thomas Dutton, and purporting to be accepted by Sewell and Cross, and endorsed by you to J. Harris, due yesterday, has been refused payment, and now lies with me, the acceptance being forged; and if the same is not taken up by ten o'clock tomorrow, legal proceedings will be taken against all parties."

The sum of £198 19s. was entered by the plaintiffs in the day-book, to the debit of Sewell and Cross, but was not carried into the ledger or further charged to their account. Sanderson & Co. did not draw out of the hands of the defendants any sum of money upon the credit of or in respect of the said bill, and the balance of moneys belonging to Sanderson & Co., in the hands of the defendants as their bankers, both before, at and after the days before mentioned, greatly exceeded the said sum of £198 19s.

The above stated facts were stated as a Special Case for the opinion of the court.

R. V. Richards for the plaintiff.
Pollock for the defendant.

Cur. adv. vult.

BAYLEY, J., delivered the following judgment of the court.—This was an action brought by Cocks & Co. bankers in London, to recover a sum of money paid by them to the defendants on the ground that they, having paid money in mistake and ignorance of the facts, were entitled to recover it back. The bill was presented on May 24, the day on which it became due. The plaintiffs paid it, not knowing that it was not the genuine acceptance of Sewell and Cross. On the following day it was discovered that the acceptance was a forgery, and the plaintiffs on that day gave notice to the defendants.

It was insisted that the plaintiffs were not entitled to recover because they, being bankers, ought, before they paid the bill, to have satisfied themselves that the acceptance was genuine. On the other hand, it was said that the plaintiffs, having given notice of the forgery to the defendants on the day next after the bill had been paid, were entitled to recover back the money, on the ground that they had paid the money under a mistaken supposition that the acceptance was the genuine acceptance of Sewell and Cross. *Wilkinson* v. *Johnson* (1) was relied on. That case differs from the present in one material point, viz., that the notice of the forgery was given on the very day when payment was made, so as to enable the defendant to send notice of the dishonour to the prior parties on that day. In this case we give no opinion upon the point whether the plaintiffs would have been

entitled to recover if notice of the forgery had been given to the defendants on the very day on which the bill was paid, so as to enable the defendants on that day to have sent notice to other parties on the bill. But we are all of opinion that the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honoured or dishonoured bill, and that, if he receive the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. The holder, indeed, is not bound by law (if the bill be dishonoured by the acceptor) to take any steps against the other parties to the bill until the day after it is dishonoured. But he is entitled so to do, if he thinks fit, and the parties who pay the bill ought not by their negligence to deprive the holder of any right or privilege. If we were to hold that the plaintiffs were entitled to recover, it would be in effect saying that the plaintiffs might deprive the holder of a bill of his right to take steps against the parties to the bill on the day when it becomes due.

Judgment for defendants.

SIORDET AND ANOTHER *v.* HALL AND OTHERS

[COURT OF COMMON PLEAS (Best, C.J., Burrough and Gaselee, JJ.), May 5, 1828]

[Reported 4 Bing. 607; 1 Moo. & P. 561; 6 L.J.O.S.C.P. 137; 130 E.R. 902]

Negligence—Defence—Act of God—Lack of care by defendant.

Proof of lack of care by a defendant in an action for negligence disentitles him from maintaining the defence of Act of God.

Notes. The Carriage of Goods by Sea Act, 1924, gives force of law to certain rules relating to bills of lading which establish the responsibilities and immunities attaching to carriers under bills of lading. See in particular Article 4 of the Schedule to the Act (23 HALSBURY'S STATUTES (2nd Edn.) 889 et seq.)

Considered: *Fenton* v. *Thorley*, [1903] A.C. 443. Referred to: *The Norway* (1864), Brown & Lush. 377.

As to the defence of inevitable accident or Act of God, see 28 HALSBURY'S LAWS (3rd Edn.) 80; and for cases see 36 DIGEST (Repl.) 161 et seq.

Case referred to:

(1) *Forward* v. *Pittard* (1785), 1 Term Rep. 27; 99 E.R. 953; 8 Digest (Repl.) 18, *99*.

Also referred to in argument:

Smith v. *Shepherd* (1796), Abbott's Merchant Shipping, 14th Edn., 578, n.; 36 Digest (Repl.) 161, *855*.

Rule Nisi obtained by the defendants for a new trial in an action of assumpsit, brought against the defendants, owners of the *Superb* steam vessel trading from London to Antwerp, for damage done to a quantity of indigo shipped by the plaintiffs on board that vessel, to be carried to Antwerp.

The declaration stated that, on Feb. 9, 1827, the plaintiffs caused to be shipped on board the *Superb*, certain indigo, then in good order and well conditioned, to be safely carried and taken care of by the defendants, as owners, from the river Thames to Antwerp, and there to be delivered in the like good order (the act of God and the dangers of the seas, etc., excepted), and that, in consideration thereof, and of certain freight to the defendants in that behalf, they undertook to take care of, and safely carry and deliver the indigo at Antwerp, and assigned for breach, that, through the negligence of the defendants, the indigo became spoilt and wholly lost to the plaintiffs.

At the trial before BEST, C.J., it appeared that the cargo was shipped on Feb. 10, 1827, and the vessel, a steam vessel, was then tight and staunch. The captain expecting to start the following morning, caused the water to be pumped into the

boiler on the evening of the 10th, as that operation required two hours, and the heating about three more. For this reason, it was his practice, and the practice of steam vessels generally, when they started in the morning, to fill the boiler the preceding evening. The next morning it was ascertained that the pipe which conducts the water into the boiler had cracked, that a considerable quantity of water had escaped by this means into the hold, and that much of the cargo was damaged. The pipe was a sound and good one, and its bursting was occasioned by the action of frost on the external portion of it. The defendants submitted that the mischief was done by act of God which was one of the risks excepted in the bill of lading.

The Chief Justice told the jury that if the water had been unnecessarily placed in the boiler, or considering the season of the year, improperly left there without heat to prevent the action of frost upon the pipe, the mischief was not occasioned by the act of God, but by gross negligence. The jury accordingly found for the plaintiffs. *Serjeant Taddy* obtained a rule nisi for a new trial, on the ground of misdirection by the Chief Justice.

Serjeant Wilde for the defendant, was not called on to show cause against the rule.
Serjeant Taddy for the plaintiffs, supported the rule.

BEST, C.J.—I certainly intimated to the jury a strong opinion that the loss in question was occasioned by negligence, and, when the circumstances are looked at, there can be no doubt of it. Everyone knows that frost will crack iron, and that, if water be contained within it, it is the more liable to do so. The question, then, is whether, by the custom or usage applicable to steam vessels, the master is justified in keeping the boiler full of water in frosty weather, two days before the vessel starts, or whether the owners of goods on board are to suffer merely because it might occasion the master a little extra trouble to let the water out of the boiler on a frosty evening and fill it the next morning. I left it to the jury to exercise their discretion, and, although I expressed a strong opinion, it cannot be a ground for a new trial. If they had found the verdict the other way, I certainly should have been dissatisfied with it.

BURROUGH, J.—The jury were in full possession of the facts, and it appears to me that their verdict is perfectly right. *Forward* v. *Pittard* (1) appears to me to be far stronger than the present case. There, goods were destroyed by fire, without any actual negligence in the defendant, a carrier; and yet he was held liable, he being bound to deliver them at all events, except damaged or destroyed by the act of God, a carrier being in the nature of an insurer.

GASELEE, J., concurred.

Rule discharged.

POWELL AND OTHERS *v.* LLOYD

[Court of Exchequer (Alexander, C.B., Garrow, Hullock and Vaughan, B.B.), May 18, 1827]

[Reported 1 Y. & J. 427]

Injunction—Interlocutory injunction—Continuation—Need for plaintiff to show indefeasible right to remedy sought.

A plaintiff who has been granted an interim injunction in an action for specific performance is not obliged to show an indefeasible right to specific performance in order to have the injunction continued until the hearing. It is sufficient if he shows some colourable right.

Notes. Referred to: *Crosbie* v. *Tooke* (1833), 1 My. & K. 431; *Buckland* v. *Papillon* (1866), 13 L.T. 736.

As to the principles upon which the court will grant an interlocutory injunction, see 21 Halsbury's Laws (3rd Edn.) 364, 365; and for cases see 28 Digest (Repl.) 748 et seq.

Cases referred to in argument:

Weatherall v. *Geering* (1806), 12 Ves. 504; 33 E.R. 191; 5 Digest (Repl.) 1054, *8516.*

Doe d. Lloyd v. *Powell* (1826), 5 B. & C. 308; 8 Dow. & Ry. K.B. 35; 108 E.R. 115; sub nom. *Doe d. Lloyd*, 4 L.J.O.S.K.B. 159; 31 Digest (Repl.) 514, *6377.*

Action for specific performance of an agreement for a lease.

The original bill was filed by the plaintiffs as assignees of Thomas Lloyd a bankrupt. It stated in substance that Ann Lloyd, the mother of the bankrupt, being in November, 1795, in the possession of the messuages, farms, etc., comprised in the agreement set forth, and entitled thereto for a still subsisting term of forty-one years, entered into an agreement with Thomas Lloyd, to demise the same to him, and, in consequence, articles of agreement, bearing date Nov. 20, 1795, made between Ann Lloyd, of the one part, and Thomas Lloyd, of the other part, were prepared and duly executed by the parties. By the said articles she covenanted that she would, when thereunto requested by Thomas Lloyd, demise, lease, set and to farm let unto him the premises in question for the term of forty-one years at a certain rent; with a proviso of re-entry for non-payment of rent, or if Thomas Lloyd, his executors or administrators, should grant, assign over, pass away or depart the premises thereby agreed to be demised, or any part thereof, for all or any part of the term to any person or persons whomsoever, without the consent of Ann Lloyd, her executors or administrators, or such other person or persons, as for the time being should happen to be entitled to the reversion of the premises, thereto first had and obtained in writing.

Thomas Lloyd by virtue of the agreement, entered into the premises, and from thence until his bankruptcy continued partly in the occupation and partly in the receipt of the rents and profits thereof; and from time to time, with the privity of Ann Lloyd, paid the reserved rent to one Roberts, of whom Ann Lloyd held the premises, and who accepted the said rent from Thomas Lloyd as the person then holding the premises, and in the occupation and receipt of the rents and profits thereof. It was then stated that in the bankruptcy of Thomas Lloyd on April 16, 1825, the plaintiffs being appointed as his assignees, then became entitled to the residue of the term and to a lease of the premises, and in consequence entered into and were in the possession and receipt of the rents and profits of the same; and that Ann Lloyd had commenced an action of ejectment for the purpose of recovering possession. The bill prayed a specific performance of the agreement; that Ann Lloyd might be enjoined from proceeding in the action of ejectment, and that, upon the plaintiffs' obtaining the licence of the person under whom she held,

she might be decreed to execute to the plaintiffs a proper lease of the premises for the residue of the term.

An injunction having been obtained for want of an answer, and Ann Lloyd having died, and by will appointed the defendants to the bill of revivor, her executors, who proved the will, and, the suit being revived against them, they put in their answer; in which they stated that the premises in question were demised by one Baldwin to John Lloyd, the husband of Ann Lloyd, by indenture, dated Nov. 25, 1775, for the term of sixty years, at a reserved rent, with a proviso of re-entry, similar to that in the articles of agreement; that the said John Lloyd being in possession of the premises, died intestate in 1787; whereupon Ann Lloyd, his widow, took out administration, and entered into the agreement contained in the bill with Thomas Lloyd, who entered upon the premises, and remained in possession until Jan. 20, 1825, three months before his bankruptcy, when he assigned the premises to the plaintiffs, for the benefit of his creditors; to which assignment Ann Lloyd did not consent, but immediately re-entered upon the premises, and remained in possession until the August following. They admitted the payment of rent by Thomas Lloyd, with the privity of Ann Lloyd, to Roberts, who received it, not on the account of Thomas Lloyd, but as from the representatives of John Lloyd; the commission of bankruptcy, and appointment of the plaintiffs as assignees; but contended that, by the previous assignment, a breach had been committed, which vacated the agreement.

An order was obtained to dissolve the injunction upon the coming in of the answer.

Martin and *Wilbraham*, for the defendants, showed cause on the merits.

Jervis and ***Martin, J.***, for the plaintiffs.

ALEXANDER, C.B.—This is an application to continue to the hearing an injunction already obtained, so as to prevent, until that period arrives, the possession from being changed. I cannot admit the proposition that the plaintiffs, in order to have the injunction continued, must show a right to a specific performance; it is, in my opinion, enough to show some colour of right, and the more so as the court is under the necessity of taking the facts as they are stated by the defendants themselves in their answer and the plaintiffs, on that account, cannot have the same advantage as they might have on the hearing of the case. I admit there is in this case a considerable question whether the plaintiffs, as assignees of a bankrupt, can have a specific performance, but enough appears to show the possibility of such a right, for a licence for that purpose may be obtained from the original lessor.

The rest of the court concurring, the injunction was continued to the hearing.

BURTON *v.* BARCLAY AND ANOTHER

[Court of Common Pleas (Tindal, C.J., Park, Gaselee and Bosanquet, JJ.), June 13, 1831]

[Reported 7 Bing. 745; 5 Moo. & P. 785; 9 L.J.O.S.C.P. 231; 131 E.R. 288]

Landlord and Tenant—Lease—Merger—Demise for twenty-one years—Sub-demise for twenty-one years less twenty-one days—Assignment to lessor by sub-lessor of term of sub-demise—Cessation of lessor's interest on determination of sub-demise—Right of lessor to assign to plaintiff right to sue on covenants in sub-demise.

In 1814, L., being seised in fee, demised premises to B. for twenty-one years from June, 1814. Later in that year B. underlet the premises to M. for the same term less twenty-one days. By deed poll, dated Feb. 12, 1816, endorsed on the counterpart of the lease to M., B. granted to L. the premises for the term in the counterpart mentioned. Subsequently, L. conveyed his interest in the premises to the plaintiff by way of mortgage, and M. assigned his term to the defendants also by way of mortgage. In an action by the plaintiff against the defendants for breaches of covenants in the lease of 1814,

Held: (i) on the true construction of the deed poll of Feb. 12, 1816, the period of twenty-one days reserved by B. to himself remained untouched and still subsisting in him, and, therefore, when the underlease determined L.'s interest under the deed poll ceased, and the deed could not operate as a surrender of B.'s reversion to L., and there was no merger of B.'s term in L.'s fee; (ii) it was not necessary for L. to be the grantee of the whole of B.'s reversion to enable him to sue on the covenants incident to the reversion and to assign to the plaintiff the right to sue on the lease to M.

Notes. As to merger of a lease, see 23 Halsbury's Laws (3rd Edn.) 690, 691; and for cases see 31 Digest (Repl.) 590 et seq.

Cases referred to:

(1) *Hughes* v. *Robotham* (1593), Cro. Eliz. 302; Poph. 30; 78 E.R. 554; 31 Digest (Repl.) 566, *6869.*

(2) *Williams* v. *Bosanquet* (1819), 1 Brod. & Bing. 238; 3 Moore, C.P. 500; 129 E.R. 714; 31 Digest (Repl.) 425, *5785.*

Also referred to in argument:

— v. *Cooper* (1768), 2 Wils. 375; 95 E.R. 870; 31 Digest (Repl.) 233, *3680.*

Parmenter v. *Webber* (1818), 8 Taunt. 593; 2 Moore, C.P. 656; 129 E.R. 515; 30 Digest (Repl.) 508, *1480.*

Preece v. *Corrie* (1828), 5 Bing. 24; 2 Moo. & P. 57; 6 L.J.O.S.C.P. 205; 130 E.R. 968; 30 Digest (Repl.) 509, *1492.*

Earl of Derby v. *Taylor* (1801), 1 East, 502.

Goodtitle d. Dodwell v. *Gibbs* (1826), 5 B. & C. 709; 8 Dow. & Ry. K.B. 502; 4 L.J.O.S.K.B. 284; 108 E.R. 264; 17 Digest (Repl.) 393, *1963.*

Matures v. *Westwood* (1598), Cro. Eliz. 599; Gouldsb. 175; 78 E.R. 842; 30 Digest (Repl.) 515, *1554.*

Bacon v. *Waller* (1616), 3 Bulst. 203; 1 Roll. Rep. 387; 81 E.R. 171; 31 Digest (Repl.) 584, *7042.*

Hodgkins v. *Thornbury* (1675), 1 Freem. K.B. 417; 3 Keb. 557; 2 Lev. 143; Poll. 141; 89 E.R. 310; 31 Digest (Repl.) 276, *4094.*

Rawlyn's Case (1578), 4 Co. Rep. 52a; Jenk. 254; 76 E.R. 1007; 31 Digest (Repl.) 281, *4157.*

Goodtitle d. Edwards v. *Bailey* (1777), 2 Cowp. 597; 98 E.R. 1260; 30 Digest (Repl.) 381, *240.*

Moore v. *Earl of Plymouth* (1819), 3 B. & Ald. 66.

Gully v. *Bishop of Exeter* (1827), 4 Bing. 290; 12 Moore, C.P. 591; 5 L.J.O.S. C.P. 178; 130 E.R. 779; 19 Digest (Repl.) 402, *2054*.

Action for breaches of covenant.

By an indenture dated July 5, 1814, John Langdon, being possessed of a messuage or tenement in fee, demised it to David Bates for a term of twenty-one years. By an indenture dated Nov. 3, 1814, Bates demised the premises to James Meek for twenty-one years wanting twenty-one days, to be computed from June 24, 1814, at a rent of £50 a year payable quarterly. Meek covenanted to pay rent, and to repair, and entered. By deed poll dated Feb. 12, 1816, endorsed on the counterpart of the lease to Meek, Bates granted the premises to Langdon and his executors, etc., to have and hold for all the time in the counterpart of lease mentioned. By an indenture of July 15, 1822, Langdon granted the premises to the plaintiff for one year, and by indenture of July 16, 1822, Langdon granted to the plaintiff all his interest, to have and to hold for all the time or term of years in the counterpart of lease, subject to a proviso for redemption upon payment of £700 with lawful interest, upon July 15 then next ensuing. On Oct. 19, 1816, all the estate and interest of Meek came to and vested in the defendants by assignment thereof. On Sept. 29, 1828, £500 was due for ten years' rent, reserved on the lease from Bates to Meek, and it was alleged that the defendants did not repair the premises after the assignment and during the continuance of the demise.

The defendants pleaded that all Meek's interest did not by assignment legally vest in the defendants; that the rent was paid; and, that the premises were not out of repair. Upon which pleas issue was joined. They also pleaded that at the time of the execution of the deed poll of Feb. 12, 1816, Langdon continued seised in fee of the reversion expectant on the determination of Bates's lease, and that Bates did, by the deed poll referred to, surrender up to Langdon, who accepted the same, the next immediate reversion expectant on the determination of Meek's underlease (to which the covenants in his lease were incident), whereby, as it was alleged upon the pleadings, the said immediate reversion became merged in Langdon's fee. It was alleged in that plea, as a legal inference, that all rights of action upon the covenants in the lease of Nov. 3, 1814, became thereby suspended. To that plea there was a demurrer, and a joinder in such demurrer.

In 1829, the cause went to trial on the ten issues of fact, when a special verdict found, the deeds of July 15 and 16, 1822, under which the plaintiff derived title in the declaration, and which appeared to have been a mortgage in fee by bargain and sale for a year, and release from Langdon to the plaintiff; by the release, Langdon granted to the plaintiff the premises in the occupation of Meek, together with all easements, profits, commodities, emoluments, advantages, and appurtenances whatsoever to the same belonging, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the same, and of every part and parcel thereof, and all the estate, right, title, interest, use, trust, possession, property, claim, and demand at law and in equity of him, Langdon, in the same, to have and to hold to the plaintiff, his heirs and assigns for ever. There was a proviso for re-conveyance to Langdon if he should pay the plaintiff £700, and interest, on July 15, 1823. The assignment of Oct. 19, 1816, from Meek to the defendants was then set out, whereby, after reciting the lease from Bates to himself, he assigned to the defendants all his estate and interest in the premises, subject to the rent and covenants, upon trust that they should permit Meek to occupy and enjoy the premises until demand should be made of payment of the sum of £420 and interest, upon payment of which sum the assignment should be void, and upon further trust, that, if default should be made, the defendants might enter, and sell and dispose of the term, and pay themselves the said sum of £420, and all arrears of interest. The special verdict further found that no demand had ever been made for payment of the sum of £420 and interest; that Meek had continued in possession from the time of executing the assignment; that the defendants had never entered.

nor ever become actually possessed of the premises, or in any manner acted upon the said indenture of Oct. 19, 1816, otherwise than by receiving that indenture—and the indenture of demise to Meek into their possession, and retaining them. Damages were assessed for the plaintiff at £312 10s. and £130.

The special verdict was argued in Michaelmas Term last by *Serjeant Wilde* for the plaintiff, and *Serjeant Taddy* for the defendants.

Cur. adv. vult.

June 13, 1831. **TINDAL, C.J.,** delivered the following judgment of the court. —This is an action of covenant in which the plaintiff declares for breaches of the covenants for payment of rent and keeping the premises in repair contained in an indenture of lease bearing date Nov. 3, 1815, whereby one David Bates demised to one James Meek premises therein described to hold from June 24, 1814, for the term of twenty-one years wanting twenty-one days.

The plaintiff, in his declaration, makes title to himself as assignee of the reversion, first by averring that Bates, on Feb. 12, 1816, by deed poll endorsed on the counterpart of the indenture of demise to Meek assigned to one John Langdon, his executors, etc., all his estate and interest, to hold to Langdon thenceforth for all such time or term therein as in the counterpart of the indenture was mentioned. The declaration then alleges that Langdon, on July 15, 1822, by indenture assigned all his estate, right, title, and interest of and in the demised premises to the plaintiff, to hold for the term of one whole year, and again, by indenture dated July 16, 1822, assigned to the plaintiff all his estate, right, title, etc., to hold to him, his executors, etc., for all such time or term of years as in the counterpart of the indenture of demise to Meek was mentioned, subject to a proviso for making void the same, on payment by Langdon to the plaintiff of £700 and interest. The declaration then alleges in the usual manner that all Meek's estate and interest came to and vested in the defendants by assignment. The pleas from the second to the eighth, both inclusive, state matters in bar, as it is contended, of the plaintiff's right to maintain the action. The ninth plea denies the liability of the defendants by traversing that the estate and interest of Meek in the premises came to them by assignment. The two remaining pleas merely deny the breaches of covenant alleged in the declaration.

The facts stated upon the pleadings in bar of the plaintiff's right of action are in substance that John Langdon, being seised in his demesne as of fee in the premises in question, by indenture of July 5, 1814, demised them for twenty-one years to Bates, who entered and was possessed; that Bates, being so possessed of the premises, by indenture of Nov. 3, 1815, demised them to Meek for the residue of his term therein, excepting the last twenty-one days; that, at the time of the execution of the deed poll of Feb. 12, 1816, Langdon still continued seised in fee of the reversion expectant on the determination of Bates's lease, and that Bates did, by the deed poll referred to, surrender up to Langdon, who accepted the same, the next immediate reversion expectant on the determination of Meek's underlease (to which the covenants in his lease were incident), whereby, as it is alleged upon the pleadings, the immediate reversion became merged in Langdon's fee. In the fourth plea, the deed poll is stated according to its terms and not according to the legal effect which the defendants contend it bears, and it is alleged in that plea, as a legal inference, that all rights of action upon the covenants in the lease of Nov. 3, 1814, became thereby suspended. To this plea there is a demurrer, and a joinder in such demurrer. It is obvious, however, there can be no real or substantial distinction between the question raised on such demurrer and the question upon the special verdict so far as concerns the legal effect and operation of the deed poll of Feb. 12, 1816.

The special verdict further finds and sets out in haec verba the deeds of July 15 and 16, 1822, under which the plaintiff derives title in the declaration, and which appear to have been a mortgage in fee by bargain and sale for a year, and release

from Langdon to the plaintiff, and also a certain assignment of Oct. 19, 1816, from Meek to the defendants, whereby, after reciting the lease from Bates to himself, he assigns to the defendants all his estate and interest in the premises, subject to the rent and covenants, upon trust, that they should permit Meek to occupy and enjoy the premises until demand should be made of payment of the sum of £420 and interest, upon payment of which sum the assignment should be void, and upon further trust that, if default should be made, the defendants might enter and sell and dispose of the term, and pay themselves the said sum of £420 and all arrears of interest. The special verdict further finds that no demand had been ever made for payment of the sum of £420 and interest; that Meek has continued in possession from the time of executing the assignment; and that the defendants have never entered, nor ever became actually possessed of the premises, or in any manner acted upon the said indenture of Oct. 19, 1816, otherwise than by receiving that indenture and the indenture of demise to Meek into their possession, and retaining them ever since.

Upon the whole of this record three objections have been taken by the defendants against the plaintiff's right to maintain this action. First, it is contended that the legal operation of the deed poll of Feb. 12, 1816, was that of surrendering the immediate reversion expectant on the determination of Meek's underlease to Langdon, the next reversioner in fee, and thereby merging the smaller in the larger estate; secondly that, at all events, if Bates's chattel interest was not merged in the inheritance, it could not pass to Burton, the plaintiff, by the deeds of lease and release of July 15 and 16, 1822, such deeds having their proper operation of conveying the fee; and, thirdly, that the defendants are not such assignees of Meek's interest as to become liable to an action upon the covenants in his lease.

The first question is this: What is the legal effect and operation of the deed poll? Looking at the relation of the parties, Bates the lessee, and Langdon the lessor, no doubt can be raised but that it was the object, and the sole object and intention of the grant, to assign to Langdon the improved rent arising from Meek's underlease. The improved rent was incident to the reversion of twenty-one days which Bates had reserved to himself out of his entire term, and if that reversion passed by the grant to Langdon, it would necessarily defeat the very object of the parties by merging it in the fee and thereby depriving the grantee of any action upon the covenants. The parties, therefore, never could have intended to destroy this immediate reversion; and the question is whether the deed poll is so worded as to make it necessary for the court to construe it as a surrender, and thereby defeat the sole intention of the parties. We think this deed did not operate as a surrender of Bates's reversion of twenty-one days to Langdon, the owner of the fee.

The deed poll is endorsed on the counterpart of the underlease. It is in terms a grant of

> "the within written indenture, and the messuage or tenement, with the appurtenances, thereby granted, and all the estate, right, title, interest,"

etc., of Bates, to hold to the said John Langdon, his executors, administrators, or assigns, from thenceforth, "for all such time or term therein as within mentioned," that is, for the residue of the term of twenty-one years minus twenty-one days created by the underlease. There is nothing so necessarily repugnant in the habendum to the premises contained in this grant as to make the habendum void, but, taking the premises to contain the grant of the estate or interest which Bates then had, the habendum restrains the time or term for which such grant was to operate to the continuance of the lease to Meek. The habendum in this case restrains the generality of the premises which is its proper office, according to HOBART'S REPORT, 170, 171. Upon this construction of the deed poll, the intermediate period of twenty-one days reserved by Bates to himself remains untouched, and still subsisting in Bates. The grant of Bates's interest to Langdon is a grant for a limited time only, viz., for a term co-extensive with Meek's underlease. At

the moment of the determination of that underlease, all the interest which Langdon takes under the deed poll ceases and Bates becomes again entitled to enjoy the estate for the twenty-one days, the residue of the term originally granted to him.

If this be the proper construction of the deed poll, it is a necessary consequence that it cannot operate as a surrender of Bates's reversion to Langdon, and, therefore, again, there is no merger of the term of Bates in the fee of Langdon.

> "A surrender is a yielding up of a particular estate for life or for years to him that hath the immediate estate in reversion or remainder, wherein the estate for life or years may drown."

Co. LITT. 337 b. Again, it is laid down in 2 ROLLE'S ABRIDGMENT, p. 497 (L) 30:

> "If a lessee grants part of his estate to his lessor, whereby a reversion continues in himself, this is no surrender; as if a lessee for twenty years grants all his estate to the lessor, except one year, month, or day, at the end of the term, this is not any surrender, because the lessee hath a reversion."

We therefore think, without referring to other authorities, that this intermediate estate in Bates, carved out of the term granted to him by Langdon, notwithstanding the deed poll of 1816, still exists as a barrier between Meek's term and the inheritance.

It is objected, on the part of the defendants that as the rent and covenants in Meek's underlease are incident to Bates's immediate reversion, if such reversion does not pass to Langdon by the deed poll, the right to sue upon the covenants in the underlease can never be shown to vest in the plaintiff. But to this we answer that it is not necessary that Langdon should be the grantee of the whole of Bates's reversion in order to enable him to sue upon those covenants incident to such reversion, but that, if Bates grants such reversion to Langdon for a limited term only, it will enable Langdon so far to sustain the character of reversioner that he might either take a surrender from Meek, the underlessee or may maintain an action on the covenants incident to the reversion. For it is laid down by POPHAM, C.J., and FENNER, J., in *Hughes* v. *Robotham* (1):

> "If lessee for twenty years make a lease for ten years, and then grants over the reversion for ten years only, viz., no longer than the lease for ten years was to continue, and such lessee for ten years had attorned, then the grantee of the reversion should have the rent and services, and the grantor the residue of the twenty years; and that the lessee for ten years might surrender to the grantee of the reversion for ten years, and he would thereby have possession so many years as were to come of his reversion; and if he had a lesser term in the reversion than the lessee himself had in the possession, it should go to the benefit of the first termor for twenty years, who was his grantor; for the term in possession is quite gone and drowned in the reversion, to the benefit of those who have the reversion thereupon, having regard to their estate in the reversion, and not otherwise."

Upon the whole, therefore, it appears to us, that the legal operation of the deed poll is that of a grant or demise by Bates to Langdon of his reversion expectant on Meek's underlease for a term exactly co-extensive with that underlease, and that such grant or demise has the effect, on the one hand, by preserving the intermediate estate for twenty-one days in Bates, of preventing a surrender or merger, and, on the other hand, to give to Langdon, while such grant continues, the right to sue on all the covenants, the same being incident to the immediate reversion.

It has been contended under this head that the right to sue for the rent is suspended. It is obvious however, from what has been already stated that there can be no suspension of Meek's rent if the reversion expectant upon the determination of the underlease subsists in the grantee of Bates, distinct from the ultimate reversion in fee. Suspension, which is a partial extinguishment, takes place only where the rent, or other profit à prendre issuing out of the land, comes

to him who has possession of the same land for a time only. The rent sought to be recovered in this action is that which is reserved under Meek's underlease, and if either Bates or Langdon had purchased the term granted by Meek's underlease, the rent in that case would have been suspended during the continuance of such underlease, for in that case there would have been a union of the rent and of the land itself in the same person. So, if this action had been brought for the rent reserved under Bates's lease, there might have been a question whether his rent was not suspended until the term granted by him to Langdon had ceased, i.e., until the arrival of the last twenty-one days of his original term. But no such question can arise here.

We come, therefore, to the second objection raised by the defendants, viz., the operation of the deeds of lease and release of July 15 and 16, 1822. The second objection is that the chattel interest so granted by Bates to Langdon did not pass from Langdon to the plaintiff by the lease and release of July 15 and 16. The question is, whether this conveyance, which undoubtedly carried the fee from Langdon to the plaintiff and was intended by the parties so to do, can by law have the additional operation of conveying a separate chattel interest in the same premises to the grantee. That the intention of the parties, independent of the deed itself, was to convey to the plaintiff all the interest, of whatever kind which Langdon had in the premises, cannot be doubted. At the time of executing the deed of release, Meek was the tenant in possession. Langdon was possessed of the immediate reversion for the residue of a term of twenty-one years wanting twenty-one days with remainder to Bates of twenty-one days and reversion to Langdon in fee. Thus circumstanced, his object was to give a good and valid security to the plaintiff for the repayment of £700 and interest by a mortgage in fee. But the only mode of making this security available for the next thirteen years was by granting his chattel interest to the mortgagee, for, without it, he would have no remedy for rent or repairs against the occupier of the premises. That the deed of release, by proper words of recital and apt terms of grant, might have conveyed this chattel interest, as well as released the fee, is admitted by the defendants. The only question, therefore, is, whether the words of the release are sufficiently large to carry into effect this, the object and intent of the parties. After granting the messuage, which is described as being in the occupation of Meek, the deed of release contains the terms:

> "the reversion and reversions, yearly and other rents, issues, and profits, and all the estate, right, title, interest, use, trust, possession, property, claim, and demand whatsoever, of, in, and to the premises;"

and under these words we think that the chattel reversion expectant on Meek's term may well pass to the plaintiff and vest in him while the fee passes to him and his heirs.

The general rule is that deeds are to be construed, if possible, so as to effectuate the intent of the parties: see the various instances in SHEPPARD'S TOUCHSTONE, p. 87 et seq., and WILLES'S REPORT, 327, and no authority has been brought before us to show, where a double purpose is intended and the words are large enough, that such double purpose may not be carried into effect. If the chattel interest of which Langdon was possessed passed by grant or assignment to the plaintiff by the deed of release, as we think it did, then no just exception could be taken to the mode in which it is set out in the declaration, for the statement in the declaration of the lease for a year is altogether nugatory and may be rejected as surplusage, and the conveyance of the chattel interest will then stand upon the release alone, operating as a grant of this interest to the releasee.

The only remaining ground of objection made by the defendants is that they are not such assignees of Meek's lease as to make them liable to the covenants therein contained. On this point *Williams* v. *Bosanquet* (2) seems conclusive against the defendants. The indenture of lease granted by Bates to Meek, having

A been received by the defendants in pursuance of the assignment of Oct. 19, 1816, and also the deed of assignment itself and having been retained by them ever since, are equivalent, according to that case, to taking possession. If they have been legally possessed, the trusts of the deed, which are created for their own benefit, cannot affect their legal liability as assignees. We, therefore, think there must be judgment for the plaintiff as well upon the special verdict as upon the demurrer B to the fourth plea.

Judgment for plaintiff.

BLAKEMORE AND ANOTHER *v.* GLAMORGAN CANAL NAVIGATION CO. AND OTHERS

C

[LORD CHANCELLOR'S COURT (Lord Eldon, L.C.), December 17, 23, 24, 29, 1824]

[LORD CHANCELLOR'S COURT (Lord Brougham, L.C.), November 13, 14, 15, 16, 19, December 20, 21, 1832]

[Reported 1 My. & K. 154, 162; 2 L.J.Ch. 95; 39 E.R. 639, 643]

D *Injunction—Interlocutory injunction—Limitation of restraint—Sufficient to stop mischief complained of and stay further injury—Keeping things in statu quo.*

The principle which ought to be the guide of the court in dealing with an application for an interlocutory injunction, and to limit its discretion in granting such injunctions at least where no special circumstances occur, is that only E such a restraint shall be imposed as may suffice to stop the mischief complained of, and, where it is to stay further injury, to keep things as they are for the present—to prohibit, not to abate; to prevent irreparable mischief, not to undo what has been done.

Injunction—Conduct of parties—Ground for grant and refusal.

F Per **LORD ELDON, L.C.:** Many cases have occurred in which injunctions are granted or refused, not on the ground of the right possessed by the parties, but on the ground of their conduct and dealings before they applied to the court for an injunction to preserve and protect that right.

Statute—Construction—Local Act—Contract between persons interested in subject-matter of Act.

G Per **LORD ELDON, L.C.:** I regard local Acts [e.g., an Act for the construction and maintenance of a canal] in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them. Unless that principle is applied in construing statutes of this description they become instruments of greater oppression than anything in the whole system of administration under our constitution. Those who come for such H Acts to Parliament in effect undertake that they will do and forbear all that by their Act they are required to do and forbear as well with reference to the interests of the public as with reference to the interests of individuals.

Note. Distinguished: *Taylor* v. *Davis* (1834), 4 L.J.Ch. 18. Considered: *R.* v. *Edge Lane* (1836), 4 Ad. & El. 723. Applied: *Lee* v. *Milner* (1837), 2 Y. & C. I Ex. 611. Considered: *Lee* v. *Milner* (1837), 2 M. & W. 824. Applied: *Dawson* v. *Paver* (1847), 5 Hare, 415. Followed: *East Lancashire Rail Co.* v. *Hattersley* (1849), 8 Hare, 72. Considered: *Lumley* v. *Wagner* (1852), 1 De G.M. & G. 604; *York and North Midland Rail. Co.* v. *R.* (1853), 1 E. & B. 858. Applied *Bostock* v. *North Staffordshire Rail. Co.* (1856), 3 Sm. & G. 283. Considered: *Ware* v. *Regent's Canal Co.* (1858), 3 De G. & J. 212; *Norton* v. *London and North Western Rail. Co.* (1878), 9 Ch.D. 623; *Devonport Corpn.* v. *Plymouth, Devonport and District Tram Co.* (1884), 52 L.T. 161. Referred to: *Milligan* v. *Mitchell* (1833), 1 My. & K. 446; *Spencer* v. *London and Birmingham Rail. Co.* (1838), 1 Ry. & Can. Cas.

159; *R.* v. *Eastern Counties Rail. Co.* (1839), 10 Ad. & El. 531; *Cohen* v. *Wilkinson* (1849), 12 Beav. 138; *Cardiff Corpn.* v. *Cardiff Waterworks Co.* (1859) 33 L.T.O.S. 104; *Roberts* v. *Roberts* (1862), 3 B. & S. 183; *Baxendale* v. *Great Western Rail. Co.* (1863), 14 C.B.N.S. 1; *Cubitt* v. *Maree* (1873), L.R. 8 C.P. 704; *R.* v. *French* (1878), 3 Q.B.D. 187; *R.* v. *Great Western Rail. Co.* (1893), 9 R. 1.

As to interlocutory injunctions and consideration of the conduct of applicants, see 21 HALSBURY'S LAWS (3rd Edn.) 343, 364-370; as to construction of private or local statutes, see ibid., vol. 36, pp. 418, 419. For cases see 28 DIGEST (Repl.) 748 et seq., 44 DIGEST (Repl.) 335 et seq.

Cases referred to:

(1) *A.-G.* v. *Cleaver* (1811), 18 Ves. 211; 34 E.R. 297, L.C.; 36 Digest (Repl.) 267, *194*.

(2) *A.-G.* v. *Forbes*, cited in Lord Redesdale's [Mitford] Treatise on Pleading (3rd Edn.) 145.

(3) *London Corpn.* v. *Bolt* (1799), 5 Ves. 129; 31 E.R. 507, L.C.; 36 Digest (Repl.) 271, *232*.

(4) *Coulson* v. *White* (1743), 3 Atk. 22; 26 E.R. 816, L.C.; 36 Digest (Repl.) 328, *720*.

(5) *Baines* v. *Baker* (1752), Amb. 158; 27 E.R. 105; sub nom. *Anon.*, 3 Atk. 750, L.C.; 36 Digest (Repl.) 310, *577*.

(6) *A.-G.* v. *Nichol* (1809), 16 Ves. 338; 3 Mer. 687; 33 E.R. 1012, L.C.; 19 Digest (Repl.) 146, *954*.

(7) *East India Co.* v. *Vincent* (1740), 2 Atk. 83; 26 E.R. 451, L.C.; 28 Digest (Repl.) 804, *531*.

(8) *Franklyn* v. *Tuton* (1821), 5 Madd. 469; 56 E.R. 975; 31 Digest (Repl.) 176, *3104*.

(9) *Ryder* v. *Bentham* (1750), 1 Ves. Sen. 543; 27 E.R. 1194, L.C.; 28 Digest (Repl.) 773, *246*.

(10) *Anon.* (1790), 1 Ves. 140.

(11) *Robinson* v. *Lord Byron* (1785), 1 Bro. C.C. 588; 28 E.R. 1315, L.C.; 44 Digest 12, *41*.

(12) *Lane* v. *Newdigate* (1804), 10 Ves. 192; 32 E.R. 818, L.C.; 28 Digest (Repl.) 775, *265*.

Also referred to in argument:

Coats v. *Clarence Rail. Co.* (1830), 1 Russ. & M. 181; 8 L.J.O.S.Ch. 72; 39 E.R. 70, L.C.; 11 Digest (Repl.) 147, *259*.

Weale v. *West Middlesex Waterworks Co.* (1820), 1 Jac. & W. 358; 37 E.R. 412, L.C.; 44 Digest (Repl.) 344, *1796*.

Motion for an injunction to restrain the defendants from diverting water from the plaintiffs' works.

By local Acts of Parliament passed in 1790 and 1796 the defendants, the Glamorganshire Canal Navigation Co., were authorised to make a canal from Merthyr Tydvil to Cardiff. By s. 53 of the Act of 1790 it was enacted that all persons should have free liberty to use, with horses, cattle, and carriages, the private roads and ways belonging to the company, except the towing paths, for conveying goods and other things to or from the canal, and any wharfs, quays, or landing places belonging thereto, without paying for the same, and also to navigate upon the canal with any such ships, boats, or other vessels as the locks thereon would permit, to use the wharfs and quays for loading and unloading any goods and other things, and to use the towing paths for the haling and drawing such boats upon payment of the rates therein granted.

Some years after the passing of these Acts, the plaintiff, Richard Blakemore, became the purchaser of the Melin Griffith and Pentyrch works which were the subject of provisions in s. 6 of the Act of 1790 designed to ensure them an adequate supply of water, and the proprietors of the canal having made some alterations

which the plaintiff conceived would be prejudicial to his works, he, in August, 1824, filed a bill against the canal company. This bill, after setting forth the two Acts of Parliament mentioned, stated that the canal was completed in the year 1801 prior to which time the works of the plaintiff were (with the exception of what was derived from a small rivulet) wholly supplied with water from the river Taff, that the Court of King's Bench had decided that s. 6 of the Act of 1790 was to be considered as being in the nature of a contract between the parties, and that its operation must be taken as applicable to the trade of the canal when once at work, the quantity of water requisite for which was ascertainable by a gauge. It further stated that the defendants had begun to widen and deepen the canal whereby the traffic on the canal would be increased, and a greater quantity of water be required, and that, as such additional supply was to be taken from the river Taff, the supply to the plaintiff's works would be necessarily diminished. The bill, therefore, prayed that the canal company might be restrained from doing any act for the widening, deepening, or enlarging the canal, or any act whereby any larger consumption of the waters of the river Taff might be caused than was contemplated by the act, or whereby the supply of water to the plaintiff's works might be in anywise diminished, and also that the defendants might be restrained from laying out or expending, in such widening or deepening of the said canal, the surplus income arising from the rates thereof.

A few days afterwards the plaintiff filed his supplemental bill against the company, their then clerk, and several shareholders of the company, stating that certain works and operations were then in progress or contemplation under the authority of the company and the other defendants, and, in particular, certain operations for enlarging and deepening the basin of the canal at Cardiff, whereby, as the plaintiff alleged, an additional supply of water would be necessarily required for the use of the canal to the plaintiff's prejudice; and praying that the defendants might be decreed to fill in the basin therein mentioned and to restore it to the same state as it was in prior to the enlargement thereof and that, in the meantime the defendants might be restrained from filling the basin with water and using the same in its enlarged state and form, or permitting the same to be filled and used, or, if filled, from using or permitting the same to be used.

Upon the coming in of the answer, a motion was made before Lord Eldon, L.C., to dissolve an injunction which had been obtained ex parte on the filing of the original bill.

LORD ELDON, in delivering judgment upon that occasion, after stating very fully the material clauses of the Acts of Parliament, and the substance of the pleadings, commented at some length upon the mode in which the defendants had, by their answer, attempted to meet the allegations of the bill with respect to the construction put upon the Acts of Parliament by the Court of King's Bench, and then continued to the following effect: It does not appear to me to be of importance to consider whether these ironworks have, or not, any right to the water founded upon usage prior to the making of this canal, because I follow and adopt the expression of the Lord Chief Justice of the King's Bench, and I am glad to fasten myself in some measure on his great authority and say that, when I look upon these Acts of Parliament, I regard them all in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them. I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such Acts of Parliament have now become extremely numerous, and from their number and operation they so much affect individuals that I apprehend those who come for them to Parliament do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do and that they shall do nothing else—that they shall do and shall forbear

all that they are thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals.

It is upon this ground that applications are frequently made to stay operations where a canal is in the progress of formation. In such a case it may be of very little consequence to A.B. whether the canal is brought to his lands through the lands of C.D., or through those of E.F., nevertheless, if the legislature has said the canal shall be brought to the lands of A.B. from the lands of E.F., and not of C.D., this court would never permit the parties to bring the canal to the lands of A.B. from the lands of C.D. The parties are obliged to submit to the contract which the legislature has made for them. The result is that the contract shall be carried into execution, and the King's subjects are compelled to submit to it upon the notion that it will be for the public good, but they are not compelled to submit to anything except what the legislature has said shall be done. I have, therefore, stated, and I have already more than once acted upon the doctrine, that if a deviation from the line marked out by Parliament were attempted, I would (unless the House of Lords were to correct me) stop the further making of a canal which was in progress, and for the reason that a man may have a great objection to a canal being made in one line, which he would not have to its being made in another and, particularly, he might feel that objection in a case where parties, after obtaining from the legislature leave to do one thing, set about doing another. It may, I admit, be of no greater mischief to A.B. that the canal should come through the lands of C.D. than through those of E.F., but to that my answer is, that you have bargained with the legislature that you shall do the act they have authorised you to do and no other act.

There is another consideration to which, I apprehend, this court would feel very much inclined to attend. Individuals come to the legislature and apply for a canal, or a railway Act, and the legislature says: "You shall have a canal, or railway, to run from such a point to such another point, thereby exposing many persons to infinite inconvenience, and in a great measure destroying the comfort of those who have property upon the line through which the canal, or railway, is to pass." I agree that parties must submit to that if such be the will of the legislature, but, I say, that, if individuals go to Parliament, and Parliament, on being satisfied that the railway or canal can be made at an expense of, say, £100,000, closes with their application and forms them into a company with power to raise money to that amount, that authority is given them by Parliament in the full confidence that the sum which they have asked and obtained power to raise will enable them to execute the work. But, if a case arises in which parties have been enabled by Parliament to engage in an undertaking, on a representation that £100,000 would enable them to complete it, and if they find afterwards that £100,000 is not enough for that purpose, this court would, I think, find it very difficult to allow them to proceed with the work till they had obtained further authority, and till they had satisfied Parliament that, though they had deceived the legislature in the first instance, they were entitled to obtain an extension of their powers. There is an agreement on the part of those who satisfy Parliament that they can and will do such a work for such a sum of money, and on the faith of that understanding they get the authority to begin the work, but, if they deceive Parliament, what right have they to complain if courts of justice will not allow them to go on with the deception?

His Lordship examined the statutes of 1790 and 1796, and continued: Taking the whole of the enactments together, I think the effect of the word "improving" is not to enable the proprietors to widen and deepen the canal, but to enable them to improve the works of the canal (the improving of which works improves the canal), and not to make it a different canal. . . .

If my opinion upon the effect of the Acts of Parliament be right, then, although the owners of these works must take the surplus water subject to the diminution which an increase of the trade upon the present canal shall occasion, let it increase

ever so much or ever so little, I can never agree to the proposition as laid down in some parts of the answer that the proprietors of the navigation are at liberty to improve the canal for the purpose of bringing upon it an increase of trade, and, by such improvements with a view to a contemplated increase of traffic, to affect the surplus water which was, I apprehend, to be preserved for the benefit of the plaintiff's works.

Supposing the court to be right in its opinion that the canal company could not do what they were attempting to do another consideration might then arise, for many cases have occurred in which injunctions are applied for and are granted or refused, not upon the ground of the right possessed by the parties, but upon the ground of their conduct and dealings before they applied to the court for the injunction to preserve and protect that right. Before proceeding to that point, however, I must observe that the answer of the defendants does most distinctly admit that, if there should be an increase of trade, there would then be a decrease of water, but then they add that they do not think that such decrease would be a greater injury to the plaintiff than what would arise from an increase of trade upon the canal in its existing state as now completed. I consider that distinction to be of no importance. If the decrease of water be occasioned by an increase of trade upon the canal as it is now completed, hurtful as that would be to the Melin Griffith and Pentyrch Works, it would not be injurious to them—injurious in the sense which a court of justice puts upon the word, for if, by the necessary operation of the Act of Parliament and of the arrangements which the legislature has made for the benefit of the owners of the canal, on the one hand, and of the owner of these works, on the other, an increase of traffic should be occasioned, each of them must take the effect of those arrangements, but if the same, and only the same, consequences were to be produced by an alteration and improvement in the canal (using that term in the sense in which the answer has used it), still, I say, if the alteration be not sanctioned by Parliament, you are not to bring about the same consequences by means other than those which the Act of Parliament has provided. The result amounts to no more than this, that, if you are doing an act which is to increase the trade and is conformable to the provisions of the Act of Parliament, the consequences, be they what they may, are produced by the Act of Parliament and not by you, but, if I am right in point of law, you would not be at liberty to change the operations, for the purpose of producing the same effect, without the authority of another Act of Parliament.

HIS LORDSHIP concluded by directing that the injunction should be varied, and that the defendants should be restrained from further widening or enlarging the basin and that the parties should proceed to a trial at law upon two issues which as finally settled, were the following:

> "First, whether the widening and deepening of the basin in the pleadings mentioned as the same was widened and deepened before Aug. 28, 1824, did, or will, to the damage and injury of the plaintiff, diminish the surplus water to the Pentyrch and Melin Griffith works, or either of such works, as such supply was provided at the time the canal was completed in 1801? Secondly, whether the further widening or deepening the basin, as the same was intended to be deepened or widened before the injunction in this cause was granted, would, or might, to the damage and injury of the plaintiff, diminish the supply of surplus water to the works or either of them as such supply was provided at the time the canal was completed in 1801?"

The issues came on for trial in February, 1826, before LORD WYNFORD, then Chief Justice of the Court of Common Pleas, when, after a trial which lasted three days, the jury found a verdict for the defendants, on the first issue, and for the plaintiff on the second.

On June 10, 1825, the plaintiff filed his second, and on May 13, 1828, his third, supplemental bill against the canal company and certain proprietors of adjacent

lands for the purpose of restraining the defendants from commencing or continuing other works therein described as being then in contemplation or progress, of which, as the bill alleged, the direct tendency or effect was to widen, deepen, or otherwise enlarge the navigation and to increase the quantity of water required for the consumption of the canal. On June, 25, 1828, LORD LYNDHURST, L.C., directed the trial of certain issues, framed upon the same principle with the issues formerly directed by LORD ELDON, but those issues were never afterwards proceeded with. LORD LYNDHURST, in giving judgment upon that occasion, stated that he concurred with LORD ELDON and LORD WYNFORD in considering the Acts of Parliament in the light of a bargain between the company of proprietors and the plaintiff, and in holding, that after the canal was finally completed, the company were no longer at liberty to alter or enlarge it to the plaintiff's damage. On July 26, 1828, the plaintiff obtained an injunction restraining the defendants from widening or deepening that part of the canal called the Three-mile Pond. Various other proceedings were at different times had in these causes, and, in the year 1827, the plaintiff commenced an action against the canal company for the recovery of damages in respect of the injury sustained by him by reason of their widening and deepening the canal and of their having erected a fire-engine in the declaration mentioned. The action was tried at Hereford, and a verdict was found for the plaintiff on certain of the counts upon which judgment was entered in the Court of Exchequer (3 Y. & J. 60). The judgment afterwards came by writ of error before the Court of Exchequer Chamber, and, ultimately, before the House of Lords, and on both occasions was affirmed (1 Cl. & Fin. 262).

On June 4, 1832, the plaintiffs Richard Blakemore, and his partner Mr. Booker, filed a fourth supplemental bill against the canal company and against Thomas Powell, who was an extensive shipper of coals at Cardiff. This bill set forth all the previous proceedings already stated, and in particular the proceedings upon the trial of the issues and the action, submitting that by the judgment of the House of Lords upon the writ of error it had been finally settled that after the expiration of the year 1798 the company had no right to commence or carry on any new works adversely to the interests of any individual, or to widen, deepen, or enlarge the canal so as to interfere with the water which had been apportioned to the plaintiff's works, and, further, that it was an illegal violation of the plaintiff Blakemore's rights as owner of those works, for the company, or any person by their authority, to draw off or divert from the river Taff any quantity of the water, which otherwise would have flowed to such works. The bill further stated that the defendant Powell had, in the year 1829, with the knowledge and connivance of the company, constructed a certain collateral cut or pond communicating with the Sea Lock Basin, which collateral pond, it was alleged, was merely a contrivance for enabling the canal company to enlarge their canal, and, consequently, to draw a larger quantity of water from the river Taff to the injury of the plaintiffs. The bill, among other things, prayed that the injunction against the company (which had already been granted as to the Sea Lock Basin and the Three-mile Pond) might be extended to the whole canal, and it prayed as against Powell that he might be ordered to fill up the collateral pond and in the meantime be restrained from keeping open the communication between such collateral pond and the Sea Lock Basin.

A motion was now made in the original and supplemental causes that the defendants, the canal company, and their agents, might be restrained from using any fire-engine for the purpose of pumping the water of the Taff into the canal, from drawing off any part of such water which would otherwise flow to the plaintiff's works through the watercourse before mentioned, from permitting water to be supplied to the collateral pond from the Sea Lock Basin and continuing the communication between the collateral pond and the Sea Lock Basin, and from continuing the Sea Lock Basin, the Three-mile Pond, and certain other specified parts of the canal, of any greater depth or width than the same were of at the time when

the canal was completed in 1798. It was also sought that the defendants be restrained from widening, deepening, or otherwise enlarging any part of the canal, and from permitting any alteration to be made therein, or in the locks or works thereof, so as to facilitate the traffic of a greater number of barges or of barges of larger dimensions than could at the time when the canal was completed pass along the same, and that the defendant Powell might be restrained from keeping open or continuing the communication between the collateral pond and the sea lock pond, or basin, and from supplying the same with water from the sea lock pond.

Pepys and *Wakefield* for the motion.

Sir William Horne, *Sir Edward Sugden*, *Swanston* and *Maule* for the canal company.

Jacob for the defendant, Powell.

Dec. 21, 1832. **LORD BROUGHAM, L.C.** This application brings into discussion the proceeding generally by injunction and the jurisdiction of the court in cases of nuisance. Of that jurisdiction, LORD ELDON says in *A.-G.* v. *Cleaver* (1), that it is very confined and rare, and that more is to be found upon it in the practice of the Exchequer than here. LORD REDESDALE, in his TREATISE ON PLEADING (3rd Edn.), p. 145, refers to *A.-G.* v. *Forbes* (2), a case in that court. LORD ELDON observes that the injunction granted by LORD LOUGHBOROUGH, in *London Corpn.* v. *Bolt* (3), was the only one within his experience, and that he knew of no precedents for it but those in ATKYNS and AMBLER. It is certain that LORD HARDWICKE, both in *Coulson* v. *White* (4), and in *Anon.* (5) in ATKYNS, fully recognised the jurisdiction, though in the latter he refused to exercise it on the ground that the nuisance, if any, was a public one, and should have been proceeded against by information at the suit of the Attorney-General.

But, although in these and several later cases the jurisdiction has been acknowledged and sometimes exercised, both where the nuisance was of a public and where it was of a private nature, the injunction has been to restrain; to prohibit, not to abate; to prevent irreparable mischief, not to undo what has been done. The application in *Anon.* (5), which gave rise to LORD HARDWICKE's dicta so much cited upon this subject, was to stay the building of a smallpox hospital. *Coulson* v. *White* (4), where his Lordship states the jurisdiction, perhaps, more broadly than it is laid down in any other authority, refers in terms merely to preventing a nuisance being committed. *London Corpn.* v. *Bolt* (3) was to prohibit the defendant from putting more sugar in warehouses which were overloaded and in a dangerous state, and LORD LOUGHBOROUGH there said, he could not order anything to be done. *A.-G.* v. *Nichol* (6), was an application to stop the raising of a wall higher than it then stood. Notice had been given not to raise, and the wall had, notwithstanding, been raised so high as to be already an obstruction, but no order was made to lower it. In *A.-G.* v. *Cleaver* (1), LORD ELDON gave as one reason why he refused the application that, though it only sought to suspend the exercise of the unwholesome trade moved against, yet a suspension would have the effect of dissolving the concern.

The cases which seem to sanction an order for abating are very few, and in peculiar circumstances. An obstruction to the King's highway, or in a harbour which is quasi highway, has been ordered to be removed as a public nuisance at the suit of the Crown, as in the case mentioned by LORD HARDWICKE (Amb. at pp. 159, 160), to have been decided in LORD KING's time (a case relating to a street near the Exchange), and in the cases of the Bristol and Portsmouth harbours, and others in the Court of Exchequer. *East India Co.* v. *Vincent* (7), where LORD HARDWICKE decreed a wall to be pulled down, did not proceed upon the ground of nuisance, but agreement, and appears to have been, like *Franklyn* v. *Tuton* (8), not a case of injunction, but a decree on a bill for specific performance. On the other hand, in *Ryder* v. *Bentham* (9), LORD HARDWICKE said he never had known an order to pull down made on motion, and but rarely by decree, and LORD

THURLOW, in *Anon.* (10), though pressed with the order made by himself in *Robinson* v. *Lord Byron* (11), and urged to direct that a ditch should be filled up as well as the further digging restrained, would only grant the prohibiting part of the motion, and refused the ordering part. He said (1 Ves. at p. 140):

> "I do not like granting these injunctions on motion. This ditch may be a mile long. Take an order that he shall do nothing more till answer, or further order."

This brings us to *Lane* v. *Newdigate* (12), which may be said to go to the very uttermost verge of all the former cases, and indirectly to order something to be done by restraining the party from continuing to keep certain works out of repair. This case appears to have been ex parte, and not at all argued. LORD ELDON himself suggested the difficulty of making an order that the repairs should be done. SIR SAMUEL ROMILLY said it was no more, in effect, than LORD THURLOW had ordered in *Robinson* v. *Lord Byron* (11), but LORD ELDON appears to have thought otherwise and he refused the order as prayed, directing it, however, in such a manner as to produce the same result by making it "difficult," his Lordship said, "for the defendant to avoid completely repairing the works."

I take leave to agree with LORD LYNDHURST in the opinion that, if the court has this jurisdiction, it would be better to exercise it directly and at once, and I will further take leave to add that the having recourse to a roundabout mode of obtaining the object seems to cast a doubt upon the jurisdiction. But *Robinson* v. *Lord Byron* (11) affords very little countenance to the general proposition, for the injunction issued only a month after the alleged nuisance and that nuisance was of a very varying nature, not the erection of works always producing one effect, but a contrivance by which the defendant sometimes stopped the water and at other times over-flooded and endangered the mill, saying that his "object in doing so was to extort money from the plaintiff." The order of the court, which was made on May 7, was to restrain him from

> "maintaining and using his shuttles, floodgates, erections, and other devices, so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before April 4, 1785."

When we find these two cases so peculiarly circumstanced, and especially that, in the one confessedly coming nearest the point sought to be attained by the present plaintiff, LORD ELDON felt the difficulty so insurmountable that he could not get over it, but went as it were round it, although we have no right to say there is not a precedent for taking a similar course here, yet surely we may pause, and, without denying the jurisdiction, decline to exercise it. In the circumstances of the present case, too, there are additional reasons for coming to the determination to say nothing of the time that has elapsed and the works that have been constructed, and, even if it should be granted that no laches can be imputed to the plaintiff inasmuch as the pendency of the proceedings in other courts prevented him from applying here, still I cannot lay out of view the possible, and not remotely possible, consequences of an order which should compel the defendants either to suspend their navigation altogether or to restore their works, if that were practicable, to the state and condition in which they were many years ago. Such considerations influenced the court in *A.-G.* v. *Cleaver* (1), where they existed in a very inferior degree.

The leading principle then on which I proceed in dealing with this application, the principle which, as I humbly conceive, ought, generally speaking, to be the guide of the court and to limit its discretion in granting injunctions at least where no very special circumstances occur, is that only such a restraint shall be imposed as may suffice to stop the mischief complained of, and, where it is to stay further injury, to keep things as they are for the present.

The only other point to which it is necessary to advert is the construction put upon the two local Acts of Parliament (30 Geo. 3, c. 82 and 36 Geo. 3, c. 69—with

reference to the time allowed for completing the canal—I say the two Acts, for, although the question has principally been raised upon s. 3 of the later Act, yet it seems difficult to construe that without having regard to the earlier Act, and, particularly, s. 1 of it. It is now too late to discuss this, for, whatever might have been the merits of the question had it been entire, judicial decisions have given an interpretation to s. 3 which ought not now to be shaken. Ever since the Court of King's Bench considered the Acts as forming a contract between the company and the neighbouring proprietors it has been judicially held (although it is said that a most able and learned judge expressed a contrary opinion) that the canal should not be altered even within the limits allowed by the earlier Acts. Notwithstanding the great weight of decision in support of this construction, the more I consider the frame of s. 3 and the point of construction generally I am the more impressed with the opinion (which I, therefore, fling out for Mr. Blakemore's best consideration) that he is greatly interested in resting satisfied with the position in which these adjudications have left the question, and, above all, in not further pressing so wild a pretension as that which would stop all improvements of the canal whereby eventually somewhat more water may seem to be used. To a certain length I think him entitled under the shelter of those decisions, but beyond it I am not prepared to aid him, certainly not at this stage of the cause. The injunctions granted in 1824 as to the Sea Lock Basin, and in 1828 as to the Three-mile Pond are confined, the one to widening and deepening, the other to widening, deepening and enlarging the water way. In substance both prohibit the enlargement of the canal. The prohibition now granted will extend to the whole canal with the addition of these words

> "so as directly and by the immediate operation of such enlargement to lessen the supply of water to the Melin Griffith works, or the Pentyrch works, or either of them."

Subject to a like qualification I will also restrain the company from

> "erecting, or permitting to be erected or used, any engine other than is now erected and used by them; from making any new cuts, or deepening any cuts already made, communicating with the river Taff, or using any pipes or other contrivances whatever for drawing water from the said river other than are at present used by them, and from altering the locks, weirs, or other works of the canal."

I add these words to the qualification: "directly and by the immediate operation of such enlargements, erections, cuts, and deepening" in order to prevent the pretence being set up against every improvement of the canal that it increases the traffic, which every improvement may do as by lessening the expenses of the company and enabling them to reduce their dues. Thus, if a new engine or lock upon an improved principle enabled them to accomplish this end, it would not come within the prohibition. It might, by increasing the traffic, indirectly and mediately increase the consumption of water, but this would not be its direct and immediate operation. If such engine or lock occasioned directly and immediately a greater consumption of water, it would come within this order.

It will be perceived that, pursuing the leading principle which I began with stating, adopting the constructions imposed by decisions upon the Acts, and adapting the principle to that construction, or rather acting upon that construction up to the limits of the principle, the whole motion is now disposed of, with the exception of the part relating to Mr. Powell. The application of the general principle on which this judgment is grounded, precludes me from granting the injunction as prayed against him. As against him, therefore, the motion is refused with costs.

Order accordingly.

R. *v.* HUMPHERY

[Court of Exchequer (Graham, Garrow and Hullock, BB.), July 16, 1819, May 6, 1820, July 11, 1821, June 26, 1824, February 1, 4, 1825]

[Reported M'Cle. & Yo. 173; 148 E.R. 371]

Bailee—Lien—General balance due on goods bailed—Wharfinger—Effectiveness of lien against Crown.

By the custom or usage of his trade a wharfinger has a lien for a general balance for wharfage on all goods which come to his wharf.

Where the Crown, by a writ of extent, directed the sheriff to seize the property of a debtor to the Crown to satisfy his debt and a wharfinger claimed to have a lien on the goods for a general balance due to him from the debtor,

Held: the lien was effective against the Crown for the Crown had no direct interest in the goods, but stood only in the place of the debtor and could have nothing more than he had.

Custom—Usage—Trade—Legal effect.

The usage of trade constitutes the recognised law of the land. The law adopts it on the plain principle that when there is a prevalent and universal course and usage of trade all mankind are deemed to contract upon the scale, footing, and foundation of that established course and practice.

Notes. Referred to: *Giles* v. *Grover* (1832), post p. 547; *Searle* v. *Morgan*, [1835–42] All E.R. Rep. 43; *British Empire Shipping Co.* v. *Somes* (1858), 27 L.J.Q.B. 397.

As to a bailee's lien, see 2 Halsbury's Laws (3rd Edn.) 120–122; and for cases see 32 Digest (Repl.) 278–293.

Cases referred to:

(1) *R.* v. *Lee* (1819), 6 Price, 369; 146 E.R. 837; 1 Digest (Repl.) 645, *2205*.

(2) *Drinkwater* v. *Goodwin* (1775), 1 Cowp. 251; 98 E.R. 1070; 1 Digest (Repl.) 640, *2173*.

(3) *Naylor* v. *Mangles* (1794), 1 Esp. 109; N.P.; 32 Digest (Repl.) 280, *274*.

(4) *Spears* v. *Hartly* (1800), 3 Esp. 81, N.P.; 32 Digest (Repl.) 277, *228*.

Also referred to in argument:

R. v. *Cotton* (1751), Park. 112; 2 Ves. Sen. 288; 145 E.R. 729; 16 Digest (Repl.) 253, *176*.

Casberd v. *A.-G.* (1819), 6 Price, 411; Dan. 238; 146 E.R. 850, Ex. Ch.; 35 Digest (Repl.) 523, *2077*.

R. v. *Copland* (1799), cited Hughes' Report of *R.* v. *Bebb*, App. VIII 204; 11 Digest (Repl.) 603, *365*.

Willion v. *Berkley* (1561), 1 Plowd. 225; 75 E.R. 345; 11 Digest (Repl.) 675, *997*.

Mores v. *Conham* (1610), Owen, 123; 74 E.R. 946; 37 Digest (Repl.) 13, *97*.

Ross v. *Bromstead* (1624), Benl. 144; 73 E.R. 999; 29 Digest (Repl.) 25, *282*.

Gilbert v. *Berkeley* (1696), Holt, K.B. 366; Skin. 648; 90 E.R. 1102; 29 Digest (Repl.) 28, *323*.

Stringefellow v. *Brownesoppe* (1549), 1 Dyer, 67 b.

R. v. *Baden* (circa 1694–1699), Show. Parl. Cas. 72.

R. v. *Crump and Hanbury* (1670), cited in Park. at p. 126; 2 Show. at p. 481; 145 E.R. 733; 45 Digest (Repl.) 271, *402*.

Rule Nisi obtained by the Attorney-General to arrest the judgment or set aside the verdict for the defendant and enter a verdict for the Crown in an action in which the defendant claimed certain effects seized under an extent at the immediate suit of the Crown against one Emerson.

By an inquisition, taken on Dec. 9, 1818, under a commission to find debts, Arthur Emerson, a merchant of London, was found to be indebted to the Crown

in £2,760 for lead, paid from time to time by the lessees of certain lead mines, in Yorkshire, and consigned to and sold by him to the king's use. An immediate extent directed to the sheriff of Surrey, attested on Dec. 9, 1818, and returnable Jan. 23, 1819, issued against Emerson, under which all his personal property was seized. The greater part of the effects seized consisted of wares and merchandise at the time of seizure in the custody of the defendant Humphery, who was a wharfinger, on his wharf called Hayes' Wharf, in Tooley Street, Southwark. Emerson had rented a counting-house and warehouse on that wharf for the purposes of his trade, and at, and previous to the issue of the extent, had been indebted to Humphery, on the balance of a general account, for freight on the landing of his (Emerson's) goods and wharfage for landing and shipping his goods, paid by Humphery according to the custom of the trade. On Dec. 19, 1818, a commission of bankrupt issued against Emerson, and the assignees chosen under it came in and claimed the goods seized under the extent. On an issue tried before RICHARDS, C.B., and a special jury, at the sittings after Trinity Term, 1819, a verdict was found for the Crown to the amount of £2,649 14s. 3d.

Humphery refused to deliver up possession of the goods on his premises, and detained them there until June 7, 1819, when they were forcibly taken and removed by a sheriff's officer. In the course of the same month the whole of the property seized was sold by auction, and produced the sum of £1,865. No appearance or claim of property was made by Humphery within the time required by the rule for that purpose, which expired Feb. 3, but after the removal of the goods he applied to the court and obtained a conditional order for leave to enter his claim, on a joint affidavit of himself, his clerk, and attorney, and a suggestion that it had been conceived unnecessary to enter any claim under the circumstances, and the order was made absolute on July 16, 1819. He claimed to have a lien for £1,170 14s. 11d., and pleaded that long before the issuing of the extent on Dec. 9, 1818, he had carried on the trade and business of a wharfinger and still did so, and, theretofore, to wit, on Dec. 8, 1818, divers of the goods and chattels in the inquisition mentioned belonging to Arthur Emerson had been delivered to him as a wharfinger and were in his custody and possession as a wharfinger, before and at the time of the issuing of the extent, and the inquisition taken thereon. Before and on the days mentioned, Arthur Emerson was indebted to him in £1,074 6s. 1d. for freight paid by him and wharfage fees and dues in respect of the said goods and chattels, and divers other goods and chattels of the said Arthur Emerson which had come into his (the claimant's) custody and possession as aforesaid. He still claimed a general lien on the goods and chattels specified, part of the goods, etc., in the inquisition mentioned for the sum of £1,074 6s. 1d., and also for the further sum of £96 8s. 10d. for warehouse room, accrued due in respect of the goods from Dec. 9, 1818, to June 7, 1819, when the same goods and chattels were taken out of his possession.

The Attorney-General (LORD GIFFORD) replied. The replication denied (i) that the goods in question had been delivered to the claimant as a wharfinger; (ii) that Emerson was indebted to the claimant in the sums stated in the plea; and (iii) that the claimant had a general lien on the goods, or any part thereof, and it averred that Emerson, at the times of issuing the extent and taking the inquisition, was possessed of the goods in the manner by the inquisition supposed. The cause was tried at the sittings after Hilary Term, 1820, before RICHARDS, C.B., when a verdict was found for the defendant upon all the issues. In the following term a rule was obtained on behalf of the Attorney-General calling on the defendant to show cause why judgment should not be arrested, or why the verdict should not be set aside and judgment entered up for His Majesty.

Jervis for the defendant, showed cause against the rule.

The Solicitor-General (*Sir Charles Wetherell*) supported the rule.

Cur. adv. vult.

Feb. 1, 1825. **GRAHAM, B.**—It falls to my lot to express the general opinion of the court upon this case. I have taken a great deal of pains to look into cases that have been cited upon both sides, but, inasmuch as the occasion does not seem to call for it and as the court is clear of all kind of doubt on the principal question, I will not enter into any very circumstantial detail with regard to either the cases cited or the topics which have been touched upon in argument.

This case comes before the court upon an extent at the immediate suit of the Crown against a person of the name of Arthur Emerson which was sued out in the year 1818. Upon that extent being sued out, as usual, an order went to the sheriff to inquire what lands and what goods and chattels Emerson had. With respect to land, it is perfectly out of the question, but the inquisition returned contained a very minute specification of the goods and chattels that belonged to Emerson without, however, distinguishing those which mark the peculiar character of the case before us. Some time after the return of the sheriff the defendant, William Humphery, was allowed to come in and make his claim and appearance, and he pleads that which, in point of fact, brings the question entirely before us. He states that before the year 1818 he was a wharfinger, and that he had had dealings with Arthur Emerson, and that Arthur Emerson sent the goods which are particularly mentioned in his plea to his wharf, where they were landed prior to the date of the extent under which the Crown claims. He states what the custom or the usage of trade is with respect to wharfingers, that they have a lien for their general balance on all goods that come to their wharf, and he states that there was due to him in respect of the general balance of account, for wharfage to the amount of £1,074, and for warehouse room £96. Upon his stating his plea, the Attorney-General, as he has a right to do, takes issue upon the different facts that go to constitute the plea, and puts the whole of it in issue. The result of the trial of the issues, before a special jury, was to find, not only all those facts which are averred in the plea, and which, therefore, belong to the case now before us, but also, in particular, the custom and usage of the trade with respect to wharfingers. Warehousemen, I believe, the plea does not particularly mention. From what I shall have to say upon that subject presently it seems to me that that is distinct from the other case. Notwithstanding this finding of the jury, the Attorney-General submitted the motion which is now before us, that the judgment should be arrested or a verdict should be entered for the Crown non obstante the finding of the jury on the usage, which consequently presents to the court the single question whether a wharfinger, though by the usage of the trade he has that lien as against all the world, can act or stand upon it as against the claim of the Crown?

That was the question that was propounded to us. When it was argued by the Attorney-General before RICHARDS, C.B., he admitted almost everything necessary to establish the defendant's case. [HIS LORDSHIP referred to *R.* v. *Lee* (1) which, he said, had established the general lien as against the Crown in the case of a factor, and added that the Attorney-General had argued that a wharfinger had the same lien as a factor as against all the world except the Crown. HIS LORDSHIP continued:] The argument, however ingeniously built, rested upon an extremely slender basis, namely, the distinction between the case of a factor and the case of a wharfinger. The Attorney-General put the distinction upon this, that the factor has not only that sort of special property which is common to both, but he has an absolute control over the property from the circumstance of his having a power of selling it. That distinction appears to me strictly and literally to rest upon an extremely slender basis, and to be a distinction without a difference. Because, what is the interest of a factor? Everybody knows that the factor is merely the agent of the person who employs him. When it is said that he has the control over the property because he has the power of sale, it should be remembered that his power of sale is entirely with a view to his principal's benefit. He is appointed factor for the purpose of converting the goods of the principal into money, and the power of sale which he has is only incidental to his duty of making

the property available to the owner. When reference is made to his having an absolute power, it seems to be forgotten that the factor cannot pledge the principal's property; he not only cannot pledge for his own purposes, but he cannot pledge even for purposes which ultimately might be beneficial to his principal, namely, to raise money in order, in all probability, to give greater effect to the sale. [But see now s. 2 of the Factors Act, 1889 (1 HALSBURY'S STATUTES (2nd Edn.) 29].

Then what is it that the factor has? He has literally no more than this—he has the power of sale and then of paying himself his general balance, that is, he has his lien. The only possible beneficial interest you can assert in him is the lien which the course of trade gives him. The case of the wharfinger is precisely the same. He has the same lien that the factor has—their interests are essentially the same, because the wharfinger has a right to hold the goods as against all the world and to pay himself to the fullest extent, and that is the exact measure of the factor's interest. There really is no sensible difference, and, therefore, if the Attorney-General's argument were the only opposition to the judgment which the court are to pronounce, I, for one, should have no sort of difficulty in saying that the court would not only carry the point decided in *R.* v. *Lee* (1) further, but would satisfy themselves with resting their decision purely upon the same grounds on which that case stands.

There seems to me to be no discernible difference between the two cases up to that stage of the argument. But a change in the constitution of the court made a second argument necessary, and upon that the Solicitor-General, with a great deal of very laudable pains for the information of the court, pushes the argument a great deal further. He opposes the known and established prerogative of the Crown to these which he calls claims newly arising from circumstances and this innovating system of giving validity to these liens. The Solicitor-General takes up that part of his argument as if *Drinkwater* v. *Goodwin* (2) had for the first time established the lien even of a factor. He must allow me to say that he is in error, for so far from that leading to such a conclusion, it stood upon its own particular circumstances. Dowding, a bankrupt, had been a clothier; he had employed a person of the name of Jeffries as his factor. They had gone on for a very considerable time. At length Dowding, the bankrupt, was desirous to raise a sum of money, £3,000, and he applied to Jeffries to join him in the security, and by way of inducement he said: "If you will join me in the security, to guard against any damage that may arise to you, I propose to send to you all the cloths that I shall work up with the money that I shall borrow in order to prevent you sustaining any risk or damage." What is that but an agreement on his part to send his goods to him that he might sell them for the purpose of indemnifying himself? Jeffries agrees to this with some modification by way of greater security. He said: "I will join you in the security for the £3,000, but that money shall be paid into my hands, and you shall draw on me from time to time. I will charge you no interest provided you pay regularly the interest of the obligee in the bond." While this is the case, a bankruptcy issues, but before the bankruptcy, Jeffries had, according to his agreement, sold cloths to the defendant, Goodwin. The bankruptcy intervened before he had actually received the money of Goodwin, and the assignees of the bankrupt had given notice to Goodwin not to pay the money to Jeffries. Goodwin then is indemnified by Jeffries, and the question was between the assignees of the bankrupt and Jeffries. That was the real state of the question, the fact being that at the time of the bankruptcy, and even at the time of the receipt of the money by Jeffries, the obligee had not called for the debt, and since the bankruptcy Jeffries had been called upon, had paid both principal and interest, and had not enough to indemnify himself by any effects in his hands of Dowding, or even by the price of the goods which he had sold.

Then how is that case taken up? Counsel who argued for the plaintiffs never questioned the point of the general lien, but he argues thus: At this time there was no debt at all due to Jeffries for he had not paid upon the bond, and if there

was a debt he had lost his lien. When counsel comes to argue upon the other side he sets out with laying it down that the factor has a general lien upon the goods in his possession for all his general balance as a sort of thing that is perfectly unquestionable. Counsel for the plaintiffs agrees to that, so that at that time it was considered as the clear and settled law upon the subject that the factor had a lien. But under this special agreement the parties understood that the object of sending the cloth to Jeffries was that he should place it to the account of his indemnity, and the court very properly said that the circumstance of his having parted with the possession was nothing, for the possession, and the power which he had of recovering the money by an action, were the same thing in this particular instance, and, as it was clear that, if the moment he sold to Goodwin he had received the money, he could have applied it to his own indemnity, so, having given him credit, the application of the value was equally to be to his indemnity.

Thus it is with respect to the law of the factor's lien, but with respect to the case of the wharfinger's lien, I say (and I am hardly apprehensive that the court can differ with me), that, though it rests upon two nisi prius cases, *Naylor* v. *Mangles* (3) *and Spears* v. *Hartly* (4), the law is equally clear and decided. My position is that the case of a wharfinger stands upon equally clear ground from those nisi prius cases. For what is *Naylor* v. *Mangles* (3) which came before LORD KENYON? Witnesses were called to prove that it was the constant usage and course of trade for wharfingers to have a lien upon goods in their possession for their general balance. LORD KENYON held that, that being the case, he was bound to take it to be the clear and settled law of the land, because the usage of trade constitutes the recognised law of the land, and the law would adopt it on the plain principle that when there is a prevalent and universal course and usage of trade all mankind are deemed to contract upon the scale, footing, and foundation of that established course and practice. Considering what able men were counsel upon that occasion, it is not to be supposed for a moment that, if that decision could have been at all questioned, it would not have been carried further. But all the world acquiesced in it; the parties and their counsel acquiesced in it, and the conduct of the parties is a great matter in these mercantile transactions. They see, and know, and understand the language of the Royal Exchange and the course of commercial dealings, and they would, therefore, if that decision could have been questioned, have carried it further. When the same question came a short time afterwards before LORD ELDON [in *Spears* v. *Hartly* (4)] at nisi prius he says, after referring to the former case (3 Esp. at p. 81):

> "I shall, therefore, hold it as the settled law on the subject that he [the wharfinger] has such a lien."

He carried it much further, in point of fact, in that particular instance than LORD KENYON had, for he held it so binding upon the party that from the circumstance of the wharfinger having got possession of the goods he allowed him to embrace, by force of his lien, a debt of long standing, the remedy for which, by action, was lost by the statute of limitations. After these cases it seems to me to be infinitely too much to be argued in a court of law that this right of wharfingers is not perfectly clear, and generally and universally admitted.

Counsel supporting the rule carried the argument a great deal further than it had been carried before. He argued that, even admitting that these usages, which may be called customs in point of fact, were good against a private individual, they are not good as against the Crown, and he cited a case which, I believe, will be found in the YEAR BOOK 35 Hen. VI, fo. 25, pl. 33. I will give a general outline of it. It was an information by the Crown in the nature of an action of trover, and, what is very remarkable, it was an information for the recovery of jewels which had been actually in the possession of the Crown, that is to say, of the immediate servants of the Crown, and had been stolen from them. An information was brought against a person of the name of Eier, and Eier was allowed to plead

and his plea was undoubtedly a very extraordinary one. The plea was that there was an ancient and laudable custom in the city of London that if any man possessed of any goods of any kind should pledge in the hands of a citizen of London those goods and borrow money for the same (not saying with the knowledge of the real owner, or anything of that sort), by the custom of London, it should be lawful for such citizen of London, having advanced the money, to hold those goods until the sum advanced be paid. The plea goes on to aver, which, by the by, the custom does not seem to require, that the party, Eier, who took those goods in pledge, did not at that time know they were the king's goods, and that they had neither the mark nor the arms of the king upon them. The Attorney-General demurred to this, and it is worthy of remark, and perhaps that is the reason why we no longer hear of this custom, that all the twelve judges were assembled to decide this case and the argument was carried on by men of the greatest ability.

It is an extraordinary circumstance in history that at the time of the weakest reign that ever this country endured, there were existing some of the greatest lawyers it ever produced. This case was argued by a name as celebrated as is recorded in the history of the law. The first person who argues for the custom is SERJEANT CHOKE, who contends, with several other serjeants, that it may be upheld, that you would presume every thing in favour of it, that you would presume even a grant of the Crown or an Act of Parliament in support of it. I could travel through the arguments here, but all that is necessary to be said is this. LITTLETON, our great master, then king's Prime Serjeant, argues, and argues irresistibly, that the custom was radically bad, that it was impossible to uphold a custom of such a nature, that if a thief should come and rob you and carry away your goods to the city of London—that should be tantamount, and more than tantamount to a sale in open market—that it should preclude all inquiry, and should bar even the king himself from recovering. Accordingly, all the judges were unanimously of opinion that this was a custom radically bad.

Counsel supporting the rule in the present case has pressed this argument. He says it is true that the judges did say that the custom was bad, but they also said that, if the custom had been good, it could not have bound the Crown, and, therefore, you are to infer that the Crown is not bound by custom, and, consequently, is not bound by this usage. I am disposed to think that that was an obiter dictum of the court that has no authority, because the decision that the custom was bad totally cut up the defence, and if the court do not tell us what the custom was, we cannot possibly apply it to any future custom or usage that holds in this country. There is no colour for turning this dictum into a general rule against all customs, because we know that the Crown is bound by a vast number of customs in this country. The Crown is bound by the custom of gavelkind, and if the Crown, as we know has been done, buys copyhold property, it must submit to the customs of the copyhold in every respect [gavelkind and copyhold tenure were both abolished by the Law of Property Act, 1925]. The whole of the argument applies to a case of a direct interest in the Crown. In the case he referred to, the Crown was the immediate owner of the goods, but the Crown, in the present instance, has no means of coming at these goods but through Emerson, and Emerson, having placed the goods with his wharfinger, could by no possibility get at them without paying the general balance. The Crown, by virtue of its extent, accedes to the interest of Emerson. The utmost length to which you can carry its right, is to consider that the interest of the debtor had been assigned to it. That is always the assumption that is made in these extents; the debt is considered as quasi assigned.

Is not the necessary consequence of the Crown standing in the place of the debtor, that it can have nothing more than he had. You cannot carry the stream higher than the fountain head—you cannot make a derivative title mount higher than the title from which it is derived—and the Crown can have nothing more assigned to it than what Emerson had the power of assigning. What is that? His

interest in the goods, subject to Humphery's claim. The Crown had the right of taking these goods out of the possession of Humphery upon the terms of paying him his balance. It is the duty of a court of justice to advise the king to do what is just and right, and the Crown Debts Act, 1541, s. 58 (Ruff.) [repealed, Statute Law Revision Act, 1863], directs us to do so, in the case thereby provided for. It would appear to me to be a perfect injustice to decide against this defendant. For what was the situation of Humphery before this extent issued? He had a double security—he had the personal claim against Emerson, and what is infinitely better, a security by pledge, for I cannot distinguish this case from that of a pledge, the law of which is perfectly clear. It is plain he had a double security; the personal security against the bankrupt, and the more substantial security of the actual possession of the goods. Shall it be said then that the Crown, by virtue of any privilege, shall be enabled to take from this man his better security, namely, these goods, and drive him to the doubtful security of a claim against a ruined man? It would be a downright act of injustice, and I hope that I have the concurrence of the rest of the court in saying so.

There remains, therefore, only one word to be said on another part of the case, respecting which, perhaps, there may be some degree of doubt. It appears that there is £1,071 due for wharfage, and £96 for warehouse room. I, for one, am aware of no distinction between the two claims. In my experience I have always considered the case of a wharfinger and of a warehouseman, as standing upon the same grounds.

GARROW, B.—My learned brother having gone very fully into this case and having delivered the judgment of the court, it is not usual, I believe, for the other members of the court to express their opinion upon that on which the opinion of the court is unanimous, but there is a point on which, perhaps, the rest of the court may not entirely agree with him. I think there is a distinction between the cases of the lien of a wharfinger for his wharfage and of a lien for warehouse room.

HULLOCK, B.—I am not prepared to coincide with that part of the judgment which relates to the general lien for warehouse rent, and I, therefore, wish to give no opinion upon that subject. If there is any doubt about it, it had better be re-considered.

Feb. 4, 1825. This day the court observed that the question of a general lien for warehouse room did not arise in the case because the only claim of general lien upon the pleadings was for wharfage, but, it appearing that the £96 8s. 10d. had been tendered to the defendant at the removal of the goods and refused, without payment of his entire demand, the court allowed that claim in the particular instance without giving any opinion on the abstract point, and directed the rule to be discharged generally.

Rule discharged.

DURANT *v.* DURANT

[Court of Arches (Sir John Nicholl), Easter Term, 1825]

[Reported 1 Hag. Ecc. 733; 162 E.R. 734]

Divorce—Condonation—"Forgiveness with implied conditions—No repetition of offence condoned—Treatment of condoning spouse with conjugal kindness—Evidence of condonation—Need to prove knowledge of spouse's offence—No implication of forgiveness from cohabitation without proof of knowledge—Bar to relief—Condonation not held bar against wife as readily as against husband.

Divorce—Adultery—Revival—Revival by cruelty.

Condonation is forgiveness with an implied condition, not only that the particular matrimonial offence shall not be repeated, but also that the condoning party shall be treated with conjugal kindness.

To establish condonation by subsequent cohabitation by one spouse of a matrimonial offence committed by the other spouse there must be proof that the condoning spouse was aware of the offence of the other spouse, for the mere fact of subsequent cohabitation does not imply forgiveness, nor operate as a bar to a suit, unless knowledge of the offence by the other spouse be shown.

In order to be a bar to a suit, it must be clearly and distinctly proved. Knowledge and forgiveness are not to be presumed. Condonation will not be held to be a bar against a wife as readily as against a husband.

Divorce—Separation deed—Bar to suit for judicial separation—Agreement by husband to make allowance to wife if she chose to live separate—Subsequent suit by wife for divorce a mensa et thoro.

By a deed executed by a husband in 1809 he bound himself to allow his wife £500 a year if she should at any time choose to live separate from him and support one of the children of the marriage. In 1817 the trustees of the deed brought an action to enforce payment of the allowance by the husband. In 1820 the wife brought a suit against her husband for a divorce a mensa et thoro.

Held: the bringing of the action on the deed did not constitute a bar to the matrimonial proceedings.

Notes. In reading the judgment in this case it should be borne in mind that s. 42 (3) of the Matrimonial Causes Act, 1965, now provides that adultery which has been condoned shall not be capable of being revived, and that until the Matrimonial Causes Act, 1923, was passed a wife could not obtain a divorce on the ground of her husband's adultery without also proving cruelty or desertion on his part.

Explained: *Palmer* v. *Palmer* (1860), 2 Sw. & Tr. 61. Considered: *Dempster* v. *Dempster* (1861), 2 Sw. & Tr. 438; *Collins* v. *Collins and Eayres* (1884), 9 App. Cas. 205; *Russell* v. *Russell*, [1895–9] All E.R. Rep. 1. Followed: *Beard* v. *Beard*, [1945] 2 All E.R. 306. Referred to: *Bramwell* v. *Bramwell* (1831), 3 Hag. Ecc. 618; *Eldred* v. *Eldred* (1840), 2 Curt. 376; *Snow* v. *Snow* (1842), 2 Notes of Cases Supp. i; *Dysart* v. *Dysart* (1847), 5 Notes of Cases, 194; *Gale* v. *Gale* (1852), 2 Rob. Eccl. 421; *Sopwith* v. *Sopwith* (1860), 2 Sw. & Tr. 160; *R.* v. *Clarence* (1888), 22 Q.B.D. 23; *Bernstein* v. *Bernstein*, [1891–4] All E.R. Rep. 706; *Rogers* v. *Rogers*, [1894] P. 161; *Cramp* v. *Cramp and Freeman*, [1920] All E.R. Rep. 164; *Statham* v. *Statham*, [1929] P. 131; *Tilley* v. *Tilley*, [1948] 2 All E.R. 1113; *Richardson* v. *Richardson*, [1949] 2 All E.R. 330; *Roe* v. *Roe*, [1956] 3 All E.R. 478; *Kemp* v. *Kemp*, [1961] 2 All E.R. 764.

As to a deed of separation as a bar to a suit for judicial separation, condonation,

and revival of a matrimonial offence, see 12 HALSBURY'S LAWS (3rd Edn.) 295, 302–307. For cases see 27 DIGEST (Repl.) 415, 416, 395 et seq.

Cases referred to:

(1) *Soilleux* v. *Soilleux* (1802), 1 Hag. Con. 373; 161 E.R. 586; 27 Digest (Repl.) 568, *5232*.

(2) *Worsley* v. *Worsley* (1730), 2 Lee, 572; 161 E.R. 444; 27 Digest (Repl.) 411, *3394*.

(3) *D'Aguilar* v. *D'Aguilar* (1794), 1 Hag. Ecc. 773; 1 Hag. Con. 134, n.; 162 E.R. 748; 27 Digest (Repl.) 487, *4256*.

(4) *Popkin* v. *Popkin* (1794), 1 Hag. Ecc. 765, n.; 162 E.R. 745; 27 Digest (Repl.) 297, *2423*.

Also referred to in argument:

Elwes v. *Elwes* (1794), 1 Hag. Con. 269; 161 E.R. 549; 27 Digest (Repl.) 315, *2630*.

Beeby v. *Beeby* (1799), 1 Hag. Ecc. 789; 1 Hag. Con. 142, n.; 162 E.R. 755; 27 Digest (Repl.) 399, *3280*.

Suit for divorce a mensa et thoro, brought by the wife against her husband on the ground of his adultery.

The parties were married in February, 1799. The husband, George Durant, was the owner of Tong Castle, Shropshire, and the wife, formerly Mary Ann Eld, a spinster, came of a family who resided in the same neighbourhood. During their cohabitation, the parties lived at Tong Castle, and had fourteen children. The husband was charged with having formed, in 1807, an adulterous connection with Mary Bradbury and with having had three children by her, the first born in July, 1808; the second in March, 1810; and the third in December, 1811. He was alleged to have acknowledged and supported those children. He was also charged with having formed another adulterous connection with Elizabeth Cliffe, by whom he had a child born on June 19, 1809, both these persons being nursery maids in his family. He was further charged with an adulterous connection in 1816 with Mary Dyke, a dairy maid, and an adulterous connection with Jane James, a labourer's wife in 1818. There was a similar charge of intercourse in 1820 with another labourer's wife, of the name of Starkey.

The libel filed by the wife further pleaded that in January, 1808, in consequence of the preceding adultery, she withdrew to the house of her father at Seighford, in Staffordshire, and that on that occasion her husband wrote a letter to her brother confessing his misconduct, expressing contrition, and promising future good conduct. In consequence of the assurances contained in this letter, Mrs. Durant was induced to return, but, in 1810, Durant continuing his adulterous conduct with Bradbury and with Cliffe, she again withdrew to her father's house. Durant went there, and she agreed that, if he would leave Tong, break off his connection, and go to reside in Devonshire, she would again cohabit. They, accordingly, went to reside in Devonshire, and afterwards moved to Bath. Durant then proposed to return to Tong, but Mrs. Durant refused because Bradshaw lived in the neighbourhood. Accordingly, at the end of 1810 they separated, he returning to Tong and Mrs. Durant going to reside in London, accompanied by one of her daughters. During the cohabitations she had become pregnant and, being in want of necessaries in August, 1811, she returned to Tong Castle for the child to be born. From that time till 1817 she continued to live with her husband at Tong, when he quarrelled with her and insisted on her leaving his house, which she was obliged to do and to go to her father's where thereafter she resided.

W. Adams and *Jenner* for the wife.

Lushington and *Dodson* for the husband.

SIR JOHN NICHOLL.—This is a suit for separation by reason of adultery

brought by the wife against her husband, and begun in the consistory court of Lichfield whence it came here on an appeal from a grievance.

His Lordship stated the facts, and continued: The fact of the adulteries charged is fully established. The defence set up is condonation. I proceed, then, to consider the proof of the condonation. Mrs. Durant, in her libel, states that after having returned in consequence of Durant's contrite letter in 1808, yet, upon discovering the renewal of the adultery with Cliffe, she again, in 1810, withdrew to her father's house at Seighford, where she remained a month, but, having had an interview with her husband there, she admits that she agreed to cohabit with him upon condition of his quitting Tong, and going to Devonshire. They went to Devonshire, and she did not return to Tong till 1811. Here then is an admission of condonation after the second adultery with Bradbury and after that with Cliffe. It is not, however, a condonation evincing an unfeeling disregard of her rights and insensibility to the injury. She deeply feels her wrongs; she duly resents them; and she properly takes the most prudent means of reclaiming her husband. Even her return in 1811 was under circumstances which almost amounted to compulsion and necessity. Here also is an admission of subsequent cohabitation, but here is no admission of a knowledge of the fresh adultery with Bradbury.

To establish condonation of that third adultery and thereby to bar her of her remedy, there must be proof that she was aware of her husband's renewed misconduct, for the mere fact of subsequent cohabitation does not imply forgiveness, nor operate as a bar, unless knowledge of the adultery be shown. I know not of any case where condonation has been held to estop a party when it has not been pleaded. It may not be necessary to decide whether, if there was clear indisputable evidence of a condonation, it might, or might not, operate as a bar even against a wife without being pleaded or directly admitted, but all the authorities show that it is not so readily presumed as a bar against the wife as against the husband. All lay down (and the common feelings of mankind confirm them) that it is the very reverse, that the injury is different, that the forgiveness on the part of the wife, especially with a large family, in the hopes of reclaiming her husband, is meritorious, while a similar forgiveness on the part of the husband would be degrading and dishonourable. Without, therefore, advancing, as a clear rule, that condonation to deprive a wife of redress must actually be pleaded, yet I may venture to say that, in order to be a bar, it must be clearly and distinctly proved. Knowledge and forgiveness are not legally to be presumed.

How then stands the proof of this condonation? [His Lordship reviewed the evidence and said that there was not that proof of knowledge by the wife of adultery of her husband after her return to Tong in 1811 as would constitute a bar to the relief sought by the wife].

In the latter end of April, 1817, Mrs. Durant being at Seighford with her father, who was ill, and her sister, Miss Eld, and another lady being at Tong Castle, Durant charged his wife with impropriety of conduct with the tutor of his children. Mrs. Durant on hearing it immediately returned to Tong Castle, accompanied by her two brothers, and Mr. Slaney, a friend of Durant's, being called in, the matter was investigated, and Durant declared himself perfectly satisfied, but the tutor left the family. Notwithstanding this, Durant a few days afterwards ordered his doors to be shut against his wife, stated to Slaney that he had proof of her criminality, and desired her to attend at Slaney's house, not at Tong Castle, to exculpate herself. She indignantly declined, and by Durant's orders his doors continued to be shut against her. He has ever since persisted in the same insinuations, inquiring in his interrogatories whether she has not kept up an intercourse with this tutor and supplied him with money, and even at the hearing he instructed his counsel to persevere in the same species of suggestions. He has, however, never brought forward the charge in any specific and tangible shape, and the court is bound in common justice to consider it as perfectly groundless, and to say in the words of

LORD STOWELL, in *Soilleux* v. *Soilleux* (1), when observing on similar conduct on the part of the husband (1 Hag. Con. at p. 378): A

"This is a continuation of the atrocious conduct which has marked the character of this man throughout."

The terms are not inapplicable on the present occasion.

Upon these events in 1817 the wife did not immediately resort to the present suit. A deed had been executed by Durant in 1809 by which he bound himself to allow his wife £500 a year in case she should at any time choose to live separate and support one of the children. An action was brought in the name of the trustee upon this deed to recover the allowance. In the first instance a verdict was obtained, but upon a writ of error the decision was reversed. [*Titley* v. *Durant*, 7 Price, 577.] Mrs. Durant then resorted to the present suit. The proceeding under that deed was no legal bar to this suit, nor does it appear to bear unfavourably upon the case of the wife. After this charge, after an exclusion from his house and his society, could she wish to return degraded and insulted to her twelve children and her servants? Her object could alone be to procure a subsistence in a state of separation, either under the deed or by the present suit. There was no alternative, and, if that object could at once be obtained under the deed, it was natural and not improper that she should try that method rather than proclaim the misconduct of the father of her children by a detailed disclosure of it in such a proceeding as the present. It is no bar to the suit; it is no acquiescence in her injuries; it was rather meritorious to abstain from the exposure of her husband's domestic profligacy, till driven to it by necessity as her only remaining remedy. B C D E

In the course of the argument the court threw out whether, if the condonation took off the effect of the admitted adultery and the subsequent adultery were not proved, this groundless charge against the wife and the husband shutting his doors against her would not do away the effect of condonation and revive her title to legal relief. It may, perhaps, be unnecessary to decide upon the point, as I am satisfied that adultery subsequent to the established condonation is proved, but it may not be fitting wholly to pass by this point. F

Some propositions seem to be admitted. First, that condonation is accompanied with an implied condition. Secondly, that the condition implied is that the injury shall not be repeated. Thirdly, that a repetition at least of the same injury does away the condonation and revives the former injury. So far the propositions are clear, but must the injury be of the same sort—be proved in the same clear manner —be sufficient per se to found a separation? If nothing but clear proof of actual adultery will do away condonation of adultery, the rule of revival becomes nearly useless, for the revival is unnecessary. The only possible way in which the former adultery could bear would be in, possibly, inducing the court to give some slight additional alimony: but it could not bear even in that way when the suit is brought by the husband, in which case, of course, there would be no question of permanent alimony. It appears, therefore, hardly to be consistent with common sense that clear proof of an actual fact of subsequent adultery should be necessary to remove the bar. Something short would be sufficient, and it seemed almost admitted, though no direct authority was adduced in support of the position, that solicitation of chastity would remove the effect of condonation of adultery. Still, it was maintained that it must be "an injury ejusdem generis." G H I

It is difficult to accede to the good sense even of that principle, or to suppose that the implied condition upon which the forgiveness takes place, could be: "You may treat me with every degree of insult and harshness—nay with actual cruelty, and I bar myself from all remedy for your profligate adultery—only do not again commit adultery or anything tending to adultery." The result of the argument is that this must be supposed to be the condition implied when condonation of adultery takes place. The plainer reason and the good sense of the implied condition is that "you shall not only abstain from adultery, but shall in future treat me—in every respect

treat me (to use the words of the law) 'with conjugal kindness'—on this condition I will overlook the past injuries you have done me."

This principle, however, does not rest wholly on its own apparent good sense, but the court has authority to support it. It has been held that cruelty will revive adultery. *Worsley* v. *Worsley* (2) was read by the court in the course of the argument, and the court has no reason to doubt the correctness of the note. If this cause had turned upon that authority alone, I might have thought it necessary myself to look through the original papers, but, knowing the accuracy of the quarter from which this note came, and still more finding that case fully investigated and the principle recognised by another very high authority in *D'Aguilar* v. *D'Aguilar* (3), I have contented myself with what I have already quoted respecting the decision of *Worsley* v. *Worsley* (2).

I advert to *D'Aguilar* v. *D'Aguilar* (3) also for another purpose, viz., to set right a misconception, which seems to have arisen that it was there laid down by Lord Stowell that the reviving cruelty must be sufficient per se to be the ground of a sentence. If that great judge had solemnly laid down such a proposition I should have much diffidence and hesitation in dissenting. The passage to which I am about to refer stands thus. It is said (1 Hag. Con. at p. 135):

> "Though condonation might be taken away by subsequent facts, they must not be slender facts, but such as would be sufficient to found a sentence. This is the true rule. But I think the facts pleaded are such as might avail substantively, and therefore revive the ancient facts."

This was merely on debating a plea, when dicta may be stated with less precision and are more easily misapprehended, more especially as the point did not require decision, there being actual subsequent cruelty pleaded: but, upon looking at the sentence, I find that that distinguished individual lays down a different doctrine, namely, that less will revive former acts than would found a sentence. He says:

> "A question has been raised in argument, whether acts of adultery revive acts of cruelty? and a case has been cited in which it was decided by Dr. Henchman, who I always understood was one of the most judicious practitioners who ever presided here, that acts of cruelty revived acts of adultery before condoned. The case is *Worsley* v. *Worsley* (2). I have had it looked up. It never proceeded to sentence; but the allegation was admitted after an opposition. It alleges, that the parties were married in 1712; that the husband treated the wife with cruelty; that he committed adultery in 1720; and, in 1728, the parties were living together, for acts of cruelty are then stated. I presume, then, the objection taken was that after 1720 they were living together, and the only ground on which the court could admit the act of adultery was that it was revived by the cruelty. The court, however, overruled the objection. It has then been considered in this court that circumstances may take off the effect of condonation which would not support an original cause. Facts of cruelty revive adultery, though they would not support an original suit for it. The condonation, in this case, is such that it is hardly necessary to resort to the authority of *Worsley* v. *Worsley* (2), but it confirms the doctrine that facts would revive which would not be a sufficient ground for an original proceeding. It is held that words of heat and passion, of incivility, or reproach, are not alone sufficient for an original cause; nor harshness of behaviour: but I cannot but think that their operation would be stronger in condonation. Words, otherwise of heat, receive a different interpretation if upon former occasions they have been accompanied with acts; if it is apparent that the party was in the habit of following up words with blows: and on these grounds I am of opinion much less is sufficient to destroy condonation than to found an original suit."

Under these authorities I am inclined to hold, first, that cruelty will revive adultery, and, secondly, that less is necessary to revive than to found an original sentence.

The same doctrine is thus maintained by the same eminent judge in *Popkin* v. *Popkin* (4) (1 Hag. Ecc. at p. 767, n.):

"The principal objection raised, is, that a condonation appears on the face of the libel. But it is not proved that acts of adultery will not revive cruelty, nor that acts of cruelty will not revive adultery. It may be true that, under a citation for adultery, you might not originally plead facts of cruelty, nor vice versa; but I do not know that it has been held the two are so slightly connected that one will not revive the other. No such case has been cited: nor do I know that such has been the doctrine of this court. I have rather understood otherwise; and *Worsley* v. *Worsley* (2), quoted by DR. SWABEY, is an authority in point. It is not necessary to give a decided opinion here, as the fact of revival is of a mixed nature, partly cruelty and partly evidence of adultery, and would revive either."

To apply the principle to this case. Here is not cruelty which would support a sentence "propter sævitiam," but here is an act which might be pleaded as such in conjunction with other circumstances. If a person who had illtreated his wife, and been guilty of acts of violence and words of menace had finally made a charge of misconduct and criminality which he had not attempted to allege nor to prove, and under that pretence had shut his door against her, it cannot be doubted that such conduct would be admissible matter in a suit for separation by reason of cruelty. By some authorities in the civil law this was held to be a distinct ground of separation, and passages were quoted in the argument to that effect which it is unnecessary again to state. These courts and the law of this country have not gone the length of recognising it as a substantive ground, but it is a fact, among others, "per quod consortium amittitur." Making this charge, and excluding her from his residence without provision, is a species of malicious desertion, but neither is malicious desertion by the law of England a ground of separation [But see now the doctrine of constructive desertion: 12 HALSBURY'S LAWS (3rd Edn.) 246–251].

What however was the situation of this lady at that moment, and what does it now continue? Here is the wife and the mother turned out of doors in the face of her neighbours, her family, and her twelve children, under the heaviest of all imputations—a charge of criminality with her children's tutor. Is there any woman who would not have considered an act of personal violence, inflicted in passion or even deliberately and maliciously, trivial and pardonable in comparison with this accusation? Who would not have considered an act of casual adultery, nay, the deliberate seduction of a nursery-maid, trivial—not really in itself, but as affecting the feelings of a wife—trivial, in comparison with this charge—a charge made, not in the haste and error of the moment, but kept up and persevered in up to the present time? And yet this severest of all injuries is not to wipe away the former condonation, but that condonation is to bar the wife of a remedy on account of all the profligate adulteries previously committed. This is not treatment in conformity with the promises and conditions on which she forgave—promises not left to implication, but expressed in Durant's own letter:

"My dear Sir, I am again obliged to apply to you in my distress: I am the most wretched man alive; my poor dear Marianne has behaved like an angel, but it is impossible she can ever forgive me. On Friday last she heard of the brutal passion which had hurried me on to commit what I shall repent of to my last hour. One of the women confessed to her that I had been criminally connected with her. As I might have expected, she insisted on leaving the house instantly, and the carriage took her on the road to London: but as I could never bear the idea of parting with her, I followed it on horseback, and she most indulgently consented to return. I cannot object to the present determination of being some time at Seighford, as I hope she will there recover the tranquillity I have so miserably destroyed: would she but once consent to return here I would relinquish everything in the world to her guidance, and if I ever prove

ungrateful for her kindness would willingly live on bread and water to give her possession of all my property. Your kindness will, I am assured, send me an answer by my servant, and I hope bring her leave to come to Seighford to fetch her home. I trust nothing will induce you to let her leave Seighford, as I know she would rather suffer any poverty than let her family know where she retired to, and in her present disposition I fear she might make away with herself."

Such are the promises on which she returns. These her husband breaks by repeated subsequent adulteries, and consummates his unworthy treatment by these cruel accusations. If the case turned upon this point, I cannot say how I might feel compelled to decide, but if I were bound to leave the wife without remedy, I should deeply lament the hardship and cruelty of the law which demanded such a decision.

What is the present situation of this lady according to the husband's prayer to be dismissed? His counsel say that her remedy is a suit of restitution. Does, then, the husband pray that he may be compelled to take home and to treat with conjugal kindness the wife whom he has for years been charging as criminal, that he shall take back to the society and to the management of his children the mother whom he has so branded and degraded by his imputations? Is this wife, who has suffered the grossest injuries in point of law from the profligate adulteries of her husband, and the still more distressing insults in point of feeling from his groundless charges, to ask the assistance of the law to compel him to take her home to be held up by him as an object of scorn and aversion to her own children? Is this the "consortium vitæ," which she can alone seek? The court cannot but feel relieved that its duty does not drive it to place her in this miserable and humiliating condition.

On the grounds already stated—that Mrs. Durant's knowledge of her husband's last adultery with Bradbury is not proved, and that the husband's adultery with Dyke is proved, and without deciding on any of these other points, I think I am warranted in pronouncing the wife entitled to the sentence of separation which she prays.

Decree accordingly.

KINGSBURY *v.* COLLINS AND ANOTHER

[Court of Common Pleas (Best, C.J., Park, Burrough and Gaselee, JJ.), May 21, 1827]

[Reported 4 Bing. 202; 12 Moore, C.P. 424; 5 L.J.O.S.C.P. 151; 130 E.R. 746]

Agriculture—Emblements—Termination of tenancy from year to year—Tenant's right to crops harvested within the year.

A tenant of agricultural land under a tenancy from year to year is entitled, after the termination of his tenancy, to a right to the benefit of emblements—growing crops planted within the last year of his tenancy—and he has a right of entry for the purpose of harvesting such crops.

Notes. Section 4 (1) of the Agricultural Holdings Act, 1948 (28 Halsbury's Statutes (2nd Edn.) 31), provides that where the tenancy of an agricultural holding held by a tenant at a rackrent determines by the death or cessar of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements the tenant shall continue to hold and occupy the holding until the occupation is determined by a twelve months' notice to quit expiring at the end of a year of the tenancy in the same manner as if the tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate.

Referred to: *Graves* v. *Weld* (1833), 5 B. & Ad. 105; *Saunders* v. *Pilcher, I.R. Comrs.* v. *Pilcher*, [1949] 2 All E.R. 1097.

As to rights to emblements, see 1 Halsbury's Laws (3rd Edn.) 298, 299; and for cases see 2 Digest (Repl.) 40, 41.

Cases referred to in argument:

Collins v. *Renison* (1754), Say. 138; 96 E.R. 830; 46 Digest (Repl.) 378, *223*.

Gregory v. *Hill* (1799), 8 Term Rep. 299; 101 E.R. 1400; 46 Digest (Repl.) 378, *220*.

A.-G. v. *Buckeridge* (1656), Hard. 75.

Eaton v. *Southby* (1738), Willes, 131; 7 Mod. Rep. 251; 125 E.R. 1094; 31 Digest (Repl.) 42, *2002*.

Tottage v. *Petty* (1736), Lee temp. Hard. 358; 95 E.R. 232; 46 Digest (Repl.) 428.

Searle v. *Darford* (1696), 2 Lut. 1435.

Demurrer in an action of trespass for assault and imprisonment.

The declaration alleged that the defendants seized the plaintiff, pulled, dragged about, kicked, and pushed him out of a close in the county of Somerset, forced him to go before a magistrate, and there imprisoned him for twenty-four hours. The second count was for assaulting, beating, and imprisoning the plaintiff; the third for assaulting and beating him.

The defendants pleaded, first, the general issue; secondly (as to the assault in the first count), that before and at the time when the defendant Collins was lawfully possessed of the close mentioned in the first count, and the defendant Elmes of certain teazles growing in the close; that the plaintiff entered the close and cut the teazles without the leave of defendants; that the defendants requested him to desist and depart, which he refused to do, whereupon the defendants, in defence of their possession of the close and teazles, molliter manus imposuerunt. The third and fourth pleas applied to the same assault, and were in substance the same as the second. The fifth plea justified the same assault on the ground only of Elmes' possession of the teazles, alleging that Elmes requested the plaintiff to depart, and that Collins acted as his servant. There were a number of other pleas relating to assault and imprisonment not relevant to the issue on which the case was reported. None of the pleas, however, justified the imprisonment alleged in the first count.

The plaintiff joined issue on the first plea. As to the second, sixth, and tenth, it was contended that at the time when Collins had no interest except under R. N. Curtis and before Collins had any such interest in the close or Elmes in the teazles, one W. Curtis held the close as tenant from year to year to R. N. Curtis: and W. Curtis being so possessed, before the times Collins had any interest in the close or Elmes in the teazles, it was agreed between W. Curtis and the plaintiff and one J. Derrick, that W. Curtis should plough the land, that plaintiff and Derrick should plant teazles and cleanse and work them, and that when the teazles should be arrived at maturity, W. Curtis should be entitled to one half of them, and the plaintiff and Derrick to the other half: that the plaintiff and Derrick did plant, cleanse, and work accordingly; that the teazles arrived at maturity; that the plaintiff went into the close to gather his and Derrick's share of them, and stayed there until the defendants committed the trespasses aforesaid.

The replication to the other pleas was the same mutatis mutandis; and general demurrer and joinder by the defendants.

Serjeant Taddy for the defendants, supported the demurrer.

Serjeant Bosanquet for the plaintiff.

Cur. adv. vult.

BEST, C.J., delivered the following judgment of the court.—The facts of the case are shortly these. The plaintiff complains of an assault and imprisonment. The defendants, taking no notice of the alleged imprisonment in the first count, answer: We were in possession of a close and some teazles; you came to cut the teazles, and we, therefore, turned you out. The plaintiff replies: You might have been in possession of the close and teazles, but you were only so under R. N. Curtis, to whom W. Curtis was tenant from year to year, and before you had any interest in the premises, he agreed with me and Derrick to cultivate teazles, of which he was to have one half, and I and Derrick the other; we cultivated them

accordingly, and I entered to take what I planted. The court are of opinion, under these circumstances, that it is immaterial in whom the possession of the close was for general purposes. Supposing it to have been in the defendant Collins, if the person from whom he derived title had previously made a demise from year to year, and the party taking under such a demise had planted during his tenancy, the teazles he had planted would have belonged to him as emblements, even though his tenancy should have been determined before they were gathered.

It is laid down by LITTLETON, s. 68, that a lessee at will is entitled to emblements unless he determines his own estate, and though it is otherwise with a tenant for years, who knows the end of his term,* yet LORD COKE says (Co. LITT. 55 b):

> "This is not only proper to a lessee at will, that when the lessor determines his will the lessee shall have the corn sown, etc., but to every particular tenant that hath an estate incertaine, for that is the reason which LITTLETON expresseth in these words, Pur ceo que il nad ascun certaine ou sure estate."

A tenant from year to year does not know in what year his lessor may determine the tenancy by half a year's notice to quit: in that respect at least, he has an uncertain estate: the public interest requires that he who grows a crop shall have a right, where his landlord determines the tenancy, to claim it as emblements; otherwise every tenant from year to year whose holding commences at Michaelmas, and who plants his crop early in the spring may, by a notice to quit given at Lady Day, be deprived of the fruit of his labours whenever the harvest is protracted beyond Michaelmas. Therefore, although the tenancy of W. Curtis might have been determined before the teazles were mature, yet he and the plaintiff had a right to enter for the purpose of gathering the teazles which the plaintiff had planted during the tenancy. It has been objected that it does not appear that William Curtis's interest continued at the time of his entering into the agreement with Derrick and the plaintiff; but it is stated that he made the agreement being so possessed (that is, possessed under the demise from R. N. Curtis), and upon general demurrer, at least, that is a sufficient allegation of his title. Where a tenancy expires, not by efflux of time, but by some act determining the tenancy, it is for the party who asserts the determination of the tenancy to show that such act has taken place. A tenancy from year to year can only end by some act on the part of the lessor or lessee, and in that respect differs from a term for a certain number of years. We are of opinion, therefore, that it sufficiently appears upon these pleadings that at the time of the trespass complained of, the plaintiff had a right to be in the close in question for the purpose of gathering his teazles, and that the replication is a sufficient answer to the pleas.

The second and third set of pleas justify the imprisonment complained of in the plaintiff's second and third count, on the ground that he was trespassing on the defendant's property; but although that might be a justification of a removal, if the plaintiff could not show a right to remain where he was, it has never been held of itself a justification of an imprisonment.

Judgment for plaintiff.

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* "Que conust le fine de son terme. Well said LITTLETON! (which knoweth the end of his terme): that is, where the end of the terme is certain: but Where the lease for yeares depends upon an uncertainty, it is otherwise:" Co. LITT. 56 a.

BLACKETT *v.* ROYAL EXCHANGE ASSURANCE CO.

[Court of Exchequer (Lord Lyndhurst, C.B., Bayley, Garrow and Vaughan, BB.). Hilary Term, 1832]

[Reported 2 Cr. & J. 244; 2 Tyr. 266; 1 L.J.Ex. 101; 149 E.R. 106]

Insurance—Marine insurance—Custom—Usage—Evidence of usage of underwriters as to payment on loss of boats carried on outside of ships.

Evidence of usage of marine underwriters that they would not pay for the loss of boats carried on the outside of a ship is inadmissible where it is not to explain ambiguous words in the insurance policy or to introduce matter upon which the policy is silent, but is at variance with the words of the policy and in plain opposition to the language used.

Document—Construction—Plain and unambiguous language—Admissibility of evidence as to usage.

Evidence of usage may be admitted to explain what is doubtful in a policy of marine insurance, but it is never admissible to contradict what is plain.

Notes. Section 87 (1) of the Marine Insurance Act, 1906 (13 Halsbury's Statutes (2nd Edn.) 56), provides that where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.

Considered: *Hall* v. *Janson* (1855), 4 E. & B. 500; *Miller* v. *Tetherington* (1861), 6 H. & N. 278; *Stewart* v. *Merchants Marine Insurance* (1885), 16 Q.B.D. 619. Referred to: *Steward* v. *Steele* (1842), 5 Scott, N.R. 927; *Humfrey* v. *Dale* (1857), 7 E. & B. 266; *Myers* v. *Sarl* (1860), 3 E. & E. 306; *Miller* v. *Titherington* (1863), 9 L.T. 231; *British and Foreign Marine Insurance* v. *Gaunt*, [1921] All E.R. Rep. 447; *London Export Corpn.* v. *Jubilee Coffee Roasting Co.*, [1958] 2 All E.R. 411.

As to evidence of usage in policies of marine insurance, see 22 Halsbury's Laws (3rd Edn.) 18, 19; and for cases see 29 Digest (Repl.) 47, 48. As to admissibility of evidence of custom to explain what is doubtful, see 11 Halsbury's Laws (3rd Edn.) 193; and for cases see 17 Digest (Repl.) 44. As to the admissibility of evidence on the construction of a document against grantor or covenantor, see 11 Halsbury's Laws (3rd Edn.) 392–394; and for cases see 17 Digest (Repl.) 298 et seq.

Cases referred to:

(1) *Pelly* v. *Royal Exchange Assurance Co.* (1757), 1 Burr. 341; 97 E.R. 343; 29 Digest (Repl.) 91, *373*.

(2) *Earl of Cardigan* v. *Armitage* (1823), 2 B. & C. 197; 3 Dow. & Ry. K.B. 414; 107 E.R. 356; 17 Digest (Repl.) 300, *1074*.

(3) *Bullen* v. *Denning* (1826), 5 B. & C. 842; 8 Dow. & Ry. K.B. 657; 4 L.J.O.S.K.B. 314; 108 E.R. 313; 17 Digest (Repl.) 301, *1075*.

Also referred to in argument:

Parkinson v. *Collier* (1797), 2 Park's Marine Insurance, 8th Edn., 653; 17 Digest (Repl.) 44, *528*.

Le Cheminant v. *Pearson*, *Le Cheminant* v. *Allnutt* (1812), 4 Taunt. 367; 128 E.R. 372; 29 Digest (Repl.) 211, *1518*.

Livie v. *Janson* (1810), 12 East, 648; 104 E.R. 253; 29 Digest (Repl.) 292, 2316.

Gabay v. *Lloyd* (1825), 3 B. & C. 793; 5 Dow. & Ry. K.B. 641; 3 L.J.O.S.K.B. 116; 107 E.R. 927; 29 Digest (Repl.) 92, *385*.

Lawrence v. *Aberdein* (1821), 5 B. & Ald. 107; 106 E.R. 1133; 29 Digest (Repl.) 231, *1726*.

Palmer v. *Blackburn* (1822), 1 Bing. 61; 7 Moore, C.P. 339; 1 L.J.O.S.C.P. 1; 130 E.R. 25; 29 Digest (Repl.) 277, *2076*.

Rule Nisi obtained by the defendants to enter a nonsuit for a new trial in an action of covenant on a policy of insurance at and from London to Calcutta, on the ship *Thames*, her tackle, apparel, ordnance, munition, boat, and other furniture in the usual form which contained the memorandum, "free from average, under £3 per cent., unless general."

At the trial, before Vaughan, B., the plaintiff proved the loss of a boat slung from the quarter, outside the ship, in the course of the voyage, which, with other damage, subsequently incurred by stress of weather, amounted to more than £3 per cent. It was also proved, on the part of the plaintiff, that such slinging was proper and necessary in voyages of the description insured against. The defendants offered evidence of a usage that boats slung in the manner proved were not protected by the policy. Vaughan, B., was of opinion that such evidence of usage was inadmissible, and he accordingly rejected it.

The defendants then contended that several partial losses, each in itself less than £3 per cent., but amounting in the aggregate to more than £3 per cent., could not be lumped together, so as to take the case out of the exception contained in the memorandum. Vaughan, B., reserved the point; and the plaintiff had a verdict, with leave for the defendants to move on the rejection of evidence of usage, and on the construction of the memorandum. *Sir Thomas Denman* for the defendants obtained a rule accordingly, citing *Pelly* v. *Royal Exchange Assurance Co.* (1) on the first point; and Stevens on Average, p. 205, on the last.

Serjeant Spankie and *Maule* for the plaintiff, showed cause against the rule.

Sir Thomas Denman, *Campbell* and *Follett* for the defendants, supported the rule.

Cur. adv. vult.

LORD LYNDHURST, C.B., delivered the following judgment of the court.—There were two questions in this case, one, whether parol evidence of a usage was admissible to show that, for boats on the outside of the ship, slung upon the quarter, underwriters never paid; the other, upon the construction of the clause—"free from average under £3 per cent.," whether the underwriter is answerable for every instance of damage, however small, if the aggregate in toto amount to £3 per cent., or whether each instance, where the damage it occasions can be ascertained and is under £3 per cent., is to be excluded; and we are against the defendants upon both.

The policy is in the usual form as to ship and goods, and, as far as regards the ship, imports to be upon the ship (that is, the body), tackle, apparel, ordnance, munition, boat, and other furniture of the ship called the *Thames*. There is no exception, and the policy is, therefore, upon the face of it, upon the whole ship, on all her furniture and on all her apparel. It was in evidence in the cause, and admitted upon the argument, that, upon such voyages as that insured, ships invariably carry a boat in the place in which this boat was carried, and slung as this boat was slung; and that the ship would not be properly furnished or equipped, unless it had a boat in that place, and so slung. The objection, then, to the parol evidence is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used. That, whereas the policy imported to be upon the ship, furniture, and apparel generally, the usage is to say that it is not upon all the furniture and apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain.

The cases which are collected in Phillips on Evidence (7th Edn.), vol. 1, pp. 553-559, and Starkie upon Evidence (1st Edn.), pp. 1032-1038, clearly establish this proposition; and a reference is made to the same subject in the second volume of Mr. Phillips' book, pp. 36, 37. The authority referred to in the argument, as

to goods lashed upon the deck, seems to be plainly distinguishable, and to proceed upon a different principle. On an insurance upon goods, the underwriter is entitled, in general, to expect that they shall be carried in that part of the ship usually appropriated to the stowage of goods, not in a more dangerous part; or, if they be goods which ought not to be placed in the ordinary stowage, but in a more perilous situation, he ought to be apprised, either of the nature of the goods, or of the part of the ship in which they are to be put. If he is left to suppose that they are ordinary goods, he will naturally suppose they will be placed where ordinary goods are placed, and that they will incur the hazard only of ordinary goods; and if he were to be made answerable for extraordinary peril, he would be answerable for a peril he had not contemplated, and for which he had not received an adequate compensation.

This, as it seems to us, is the true principle upon which evidence of usage is admitted as to goods lashed upon deck. They are not in the part of the ship where goods are usually carried, they are in more than usual peril, and a usage that they are not covered by an ordinary policy upon goods, but that they require a distinct explanation to the underwriter of the part of the ship in which they are to be carried, or (where that will imply the same information) of the nature of the goods, is not at variance with any part of the policy, is essential to that information which the underwriter ought to receive to enable him to estimate the risk and calculate the premiums, and is a portion of that fairness which ought to be rigidly observed upon all these contracts. The policy is upon goods generally, and the usage explains what description of goods is intended, viz., goods of ordinary, not of extraordinary danger. We are, therefore, of opinion that the evidence of usage was properly rejected.

The next question is upon the effect of the memorandum "free from average under £3 per cent." The memorandum is in the nature of an exception. The policy is general, extending to all losses, the memorandum excepts losses where each or all, according to the construction to be put upon it, are under £3 per cent. The rule of construction as to exceptions is that they are to be taken most strongly against the party for whose benefit they are introduced. The words in which they are expressed are considered as his words, and, if he does not use words clearly to express his meaning, he is the person who ought to be the sufferer: *Earl of Cardigan* v. *Armitage* (2) (2 B. & C. at p. 207); *Bullen* v. *Denning* (3) (5 B. & C. at pp. 850, 851). The words here used are ambiguous, capable of excluding every average which per se is under £3 per cent. or capable of including every average, however minute, if the aggregate of different averages come up to that amount. Usage might perhaps explain the ambiguity and show which of the two alternatives was intended; but there was no evidence of usage. EMERIGON (TRAITÉ DES ASSURANCES, Chap. 12, s. 44, sub-division 4) speaks of averages in the plural, as if it was sufficient if the aggregate of the averages amounted to £3 per cent.; but he does not appear to us to speak upon the subject in such a manner as to justify a conclusion either way upon the point in question, and we are not aware of any other writer of authority that does.

In the absence, therefore, of usage and authority, it seems to us that we ought to rest upon the rule of construction we have mentioned, and according to that rule the defendants are responsible if the aggregate of different averages comes up to £3 per cent. The consequence is, that the rule must be discharged.

Rule discharged.

HARINGTON *v.* HOGGART

[Court of King's Bench (Lord Tenterden, C.J., Parke, Taunton and Patteson, JJ.), November 26, 1830]

[Reported 1 B. & Ad. 577; 9 L.J.O.S.K.B. 14; 109 E.R. 902]

Auctioneer—Deposit—Liability for interest—Stakeholder.

An auctioneer who is employed to sell an estate, and who receives a deposit from the purchaser, is a mere stakeholder, liable to be called upon to pay the money at any time; and, therefore, although he place the money in the funds and make interest of it, he is not liable to pay such interest to the vendor when the purchase is completed, though the vendor (without the concurrence of the vendee) gave him notice to invest the money in government securities.

Notes. Section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, 18 Halsbury's Statutes (2nd Edn.) 525, 526, provides that in any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment, subject to certain exceptions.

Distinguished: *Edgell* v. *Day* (1865), 35 L.J.C.P. 7.

As to the liability of an auctioneer as stakeholder, see 2 Halsbury's Laws (3rd Edn.) 76; and for cases see 3 Digest (Repl.) 26, 27.

Cases referred to:

(1) *Rogers* v. *Boehm* (1798), 2 Esp. 702; 1 Digest (Repl.) 519, *1531*.

(2) *Lord Salisbury* v. *Wilkinson* (undated), cited 8 Ves. 48; 32 E.R. 268; 1 Digest (Repl.) 521, *1544*.

(3) *Lord Chedworth* v. *Edwards* (1802), 8 Ves. 46; 32 E.R. 268; 1 Digest (Repl.) 497, *1349*.

(4) *Earl of Lonsdale* v. *Church* (1790), 3 Bro. C.C. 41; 7 Digest (Repl.) 219, *566*.

(5) *Browne* v. *Southouse* (1790), 3 Bro. C.C. 107; 29 E.R. 437; 1 Digest (Repl.) 519, *1530*.

(6) *Willis* v. *Appeals in Prize Causes Comrs.* (1804), 5 East, 22; 102 E.R. 977; 1 Digest (Repl.) 519, *1532*.

Also referred to in argument:

De Havilland v. *Bowerbank* (1807), 1 Camp. 50; 170 E.R. 872, N.P.; 35 Digest (Repl.) 206, *131*.

Farquhar v. *Farley* (1817), 7 Taunt. 592; 1 Moore, C.P. 322; 129 E.R. 236; 3 Digest (Repl.) 26, *194*.

De Bernales v. *Wood* (1812), 3 Camp. 258; 170 E.R. 1375, N.P.; 40 Digest (Repl.) 259, *2179*.

Depcke v. *Munn* (1828), 3 C. & P. 112, N.P.; 12 Digest (Repl.) 642, *4965*.

Calton v. *Bragg* (1812), 15 East, 223; 104 E.R. 829; 35 Digest (Repl.) 204, *109*.

Page v. *Newman* (1829), 9 B. & C. 378; 4 Man. & Ry. K.B. 305; 7 L.J.O.S.K.B. 267; 109 E.R. 140; 35 Digest (Repl.) 204, *119*.

Maberley v. *Robins* (1814), 5 Taunt. 625; 1 Marsh. 258; 128 E.R. 835; 40 Digest (Repl.) 251, *2112*.

Edwards v. *Hodding* (1814), 5 Taunt. 815; 1 Marsh, 377; 128 E.R. 913; 3 Digest (Repl.) 25, *182*.

Gray v. *Gutteridge* (1828), 1 Man. & Ry. K.B. 614; 6 L.J.O.S.K.B. 154; 3 Digest (Repl.) 25, *178*.

Action of assumpsit for money had and received to the use of the plaintiff, Sir John Edward Harington, for interest, and on an account stated. The defendant pleaded the general issue, with a notice of set-off.

The defendant Hoggart and his partner Evan Phillips (who died in 1817), were employed by the plaintiff in July, 1813, as auctioneers to dispose of an estate in Monmouthshire, and not having sold it by auction on Aug. 10, they entered into an agreement for the sale of it by private contract to one F. Secretan, for the sum of £10,000. The agreement provided that the purchaser should pay immediately a deposit of £20 per cent. in part of the purchase-money and sign an agreement for payment of the remainder on or before Dec. 29, 1813, on having a good title. The purchaser paid the deposit of £2,000 on Aug. 20, 1813, and the contract was completed on April 12, 1822. The plaintiff in the interim gave notice to the defendant to invest the money in government securities and offered to indemnify him for so doing, but he did not obtain the consent of the purchaser to this arrangement. The defendant was in the habit of keeping a considerable sum at his bankers to answer any demands for deposits. On the remainder of these deposits he made a profit but it did not appear whether he made a profit of this particular sum, all trace of which was lost in its mixture with the bulk. The question for the opinion of the court was whether the plaintiff was entitled to recover interest on the sum of £2,000.

At the trial before LORD TENTERDEN, C.J., in 1829, the jury returned a verdict for the plaintiff awarding him the damages in the declaration, subject to the opinion of the court of a Case which stated the facts set out above.

Denman for the plaintiff.
Campbell for the defendant.

LORD TENTERDEN, C.J.—I am of opinion that the plaintiff is not entitled to recover. There is an essential distinction between the character of an agent and that of a stakeholder. *Rogers* v. *Boehm* (1) was the case of an agent, and what LORD KENYON there said must be understood to apply to a person filling that character. If an agent receive money for his principal, the very instant he receives it, it becomes the money of his principal. If instead of paying it over to his principal he thinks fit to retain it, and makes a profit of it, he may under such circumstances as occurred in that case be liable to account for the profit. Here the defendant is not a mere agent, but a stakeholder. A stakeholder does not receive the money for either party, he receives it for both; and until the event is known, it is his duty to keep it in his own hands. If he think fit to employ it and make interest of it, by laying it out in the funds or otherwise, and any loss accrue, he must be answerable for that loss; and if he is to answer for the loss, it seems to me he has a right to any intermediate advantage which may arise. The defendant here has not laid out or made a profit of the plaintiff's money, for at the time he laid it out it was not the plaintiff's and it was doubtful whether it would ever become so or not. Then there is the special circumstance of the requisition by the plaintiff to the defendant, that he should lay out the money. The answer given to that was: "I will do it if Mr. Secretan will consent;" which was saying in effect, though not in words: "I am a stakeholder. I am answerable to Mr. Secretan for the money or I may be in the result, and I cannot without his consent therefore do that which you ask." Mr. Secretan's consent was never obtained. As to the offer of an indemnity, it was not insisted upon, and it could not well be insisted that any person is bound to take the indemnity of another. Therefore, that special circumstance, in my opinion, does not take the case out of the general rule or deprive the defendant of the character of a stakeholder, or of the advantages, if there be any, which belong to that character, nor exempt him from the obligations arising from it.

As to the cases that have been cited upon this subject, there certainly is none in which interest has been recovered from an auctioneer. The strong inclination of LORD ELDON'S opinion was that it could not be recovered in this particular case, even although it should appear that a profit had been made, and all who know that Lord know that he was exceedingly cautious in delivering a positive opinion upon

any point, and that he forbore to do so until it became absolutely necessary for the decision of the cause. By deciding now that the defendant is not liable we certainly do not vary from any principle which has been laid down by a judge in equity, or make the law in this court different from the rule in equity. I have observed that there is no case in which interest has been recovered against an auctioneer. There has been as there may well be a recovery of interest by the purchaser against the vendor, where the latter has not been able to complete his contract; but that has been as part of the damage which the purchaser sustained by the non-completion of the contract. Part of that damage is the loss of the use of that money, which in the meantime has been lying idle in the hands of the auctioneer. There may be cases also in which the vendor may have a right of action for damages against a purchaser who has failed to complete his contract. But there being no authority to show that an auctioneer is liable to pay interest on a deposit, I am of opinion for the reasons already given that the defendant is not so liable, and consequently that he is entitled to the judgment of the court.

PARKE, J.—I am also of opinion that the plaintiff is not entitled to recover. The simple question for the consideration of the court is whether the defendant as an auctioneer and in that character having received a deposit of £2,000 for the estate sold by the plaintiff to Mr. Secretan, is liable to pay interest to the vendor of the estate for any part of the time during which the money was in his hands before the purchase was completed. He has paid into court interest for the subsequent period.

It appears to me that the situation of an auctioneer is this. He receives a sum of money which is to be paid in one event to the vendor, that is, provided the purchase is completed; and in the other, if it is not completed, to the vendee: he holds the money in the meantime as stakeholder; and he is bound to keep it and pay it over upon either of those events immediately. He is clearly not responsible for interest upon that money if he makes it (as he is supposed to have done in this case), and the principle upon which he is exempt from responsibility was settled in *Lord Salisbury* v. *Wilkinson* (2), cited and recognised by Lord Eldon in *Lord Chedworth* v. *Edwards* (3), and by Lord Alvanley in the *Earl of Lonsdale* v. *Church* (4) (3 Bro. C.C. at p. 44). These cases, and that of *Browne* v. *Southouse* (5), which is to the same effect, establish that a man who holds money as an agent or banker, bound to produce it at a moment's notice to the person who deposits the money in his hands, is not liable to pay interest if he makes it. Here the auctioneer was liable to produce the money deposited with him at a moment's notice, when the event took place on which he was to pay it to one party or the other; he would be responsible in case the fund was lost during any part of the time he ought to keep it in his possession; and if he was responsible for loss he had a right to the interest accruing if he employed the fund. That appears to me to have been the original situation of the defendant as auctioneer.

Then another question arises in this case, whether his liability was varied in consequence of the request of one of the parties to have the money invested. One party was not competent by himself to alter the contract on which the money was placed in the defendant's hands. If the plaintiff wished to vary that contract and make the fund productive to either party, according as one or other would be entitled to receive the money, whether the purchase was completed or not—if he had the intention of altering the terms of the contract, meaning to take to the fund, whether it was diminished or increased at the end of the time—it was his duty to procure the consent of the other party; but certainly it was not the duty of an auctioneer to procure the consent of the other party to alter the terms of the contract on which he received the money: and, therefore, it appears to me that a notice from the plaintiff only could not alter the original situation in which the defendant stood. There is no case in which it has been decided that interest is recoverable under such circumstances. Certainly it cannot be recovered here

upon the ground of the money having been the plaintiff's because at the time it was laid out it was not his money and he had no title to it until the purchase was completed. In *Willis* v. *Appeals in Prize Causes Comrs.* (6), the party made responsible for interest was a mere agent to the captors of a prize, the net proceeds of which were in dispute and the principal question before this court was whether the Admiralty Court had jurisdiction to decree interest. It, therefore, appears to me no authority to influence our judgment in the present case.

With respect to the liability of one of the contracting parties to pay interest, that stands upon a different footing. Interest is then recovered in the nature of damages for a breach of the original contract on the part of the vendor, by whose failure to make good title the vendee has for a time lost the use of his money.

TAUNTON, J.—I am of opinion that the sum of money is not recoverable, either in the nature of interest or as money had and received by the defendant to the use of the plaintiff.

First, with respect to the claim of it as interest. It has been conceded, that, until April 12, 1822, when this contract was at length completed, the right to the money was in abeyance. The defendant did not stand in the character of a debtor nor the plaintiff in that of a creditor with reference to each other until that period. How is it possible to say, if no debt was due from the defendant to the plaintiff and the plaintiff was not the creditor of the defendant in respect of this sum of money, that anything could be payable as interest? The indebitatus count for interest states:

> "that the defendant is indebted to the plaintiff for a certain sum due and payable from the defendant to the plaintiff for interest upon and for the forbearance of divers sums of money before then lent and advanced by the plaintiff to the defendant, and by the plaintiff forborne to the defendant for a time then elapsed; and also for other money due and payable from the defendant to the plaintiff, for interest upon and for the forbearance of divers sums of money before then due and owing from the defendant to the plaintiff, and by him the plaintiff forborne, etc."

In this case there was no money lent and advanced by the plaintiff to the defendant, nor any money due and owing from the defendant to the plaintiff until the time when the contract was completed.

With respect to this being money had and received to the plaintiff's use, it is perfectly clear that when the defendant laid the money out he did so at his peril. If he laid the money out in the funds and received the intermediate dividends he must have borne the loss, if between the investment and the completion of the contract the funds had fallen. If the money was laid out at the risk and peril of the defendant, it appears to me that in conscience and equity he is entitled to any profit which he may have derived from running that risk. Under these circumstances I am of opinion the plaintiff is not entitled to recover the sum claimed, either as interest or as money had and received to his use.

PATTESON, J.—I am of the same opinion. The defendant, being a stakeholder, was bound to pay to the party ultimately entitled the sum deposited with him, without any deduction, as soon as it was determined which of the parties was entitled to it. It seems to me wholly inconsistent with such a liability, that he should be bound to pay interest, for if he were bound to pay interest, and to make interest, by laying out the principal, the principal should be laid out at the risk of the party entitled to it.

Judgment for defendant.

HORNER *v.* GRAVES

[Court of Common Pleas (Tindal, C.J., Park, Gaselee and Bosanquet, JJ.), June 13, 1831]

[Reported 7 Bing. 735; 5 Moo. & P. 768; 9 L.J.O.S.C.P. 192; 131 E.R. 284]

Contract—Illegality—Public policy—Restraint of trade—Dentist—Agreement not to practice within 100 miles.

An agreement entered into by the assistant of a dentist, which was to continue for a term of five years determinable on three months' notice and under which the assistant agreed that, in consideration of his receiving a salary and instructions, he would not after the termination of the agreement practise as a dentist within 100 miles of the City of York so long as his employer was alive and practising as a dentist **held** to be an unreasonable restraint of trade and void.

Notes. Not Followed: *Archer* v. *Marsh* (1837), 6 Ad. & El. 959. Distinguished: *Proctor* v. *Sargent* (1840), 2 Man. & G. 20. Considered: *Mallan* v. *May* (1843), 11 M. & W. 653; *Rogers* v. *Maddocks*, [1892] 3 Ch. 346; *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co., Ltd.*, [1891–4] All E.R. Rep. 1; *Underwood* v. *Barker*, [1899] 1 Ch. 300; *Tivoli, Manchester, Ltd.* v. *Colley* (1904), 52 W.R. 632. Referred to: *Hitchcock* v. *Coker*, [1835–42] All E.R. Rep. 452; *Boys* v. *Ancell* (1839), 5 Bing. N.C. 390; *Whittaker* v. *Howe*, [1835–42] All E.R. Rep. 143; *Price* v. *Green* (1847), 16 L.J.Ex. 108; *Tallis* v. *Tallis* (1853), 1 E. & B. 391; *Collins* v. *Locke* (1879), 4 App. Cas. 674; *Davies* v. *Davies* (1887), 36 Ch.D. 359; *Haynes* v. *Doman*, [1899] 2 Ch. 13; *Townsend* v. *Jarman*, [1900] 2 Ch. 698; *Dowden and Pook* v. *Pook*, [1904] 1 K.B. 45; *Leetham* v. *Johnstone-White*, [1907] 1 Ch. 322; *Russell* v. *Amalgamated Society of Carpenters and Joiners*, [1910] 1 K.B. 506; *North-Western Salt Co.* v. *Electrolytic Alkali Co., Ltd.* (1912), 107 L.T. 439; *A.-G. of the Commonwealth of Australia* v. *Adelaide Steamship Co., Ltd.*, [1911–13] All E.R. Rep. 1120; *Eastes* v. *Russ*, [1914] 1 Ch. 468; *Millers, Ltd.* v. *Steedman* (1915), 84 L.J.K.B. 2057; *Horwood* v. *Millar's Timber and Trading Co.*, [1916] 2 K.B. 44; *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; *Whitmore* v. *King* [1918–19] All E.R. Rep. 1063; *Rodriguez* v. *Speyer Bros.*, [1918–19] All E.R. Rep. 884; *Ropeways* v. *Hoyle* (1919), 35 T.L.R. 285; *British Reinforced Concrete Engineering Co.* v. *Schelff*, [1921] All E.R. Rep. 202; *English Hop Growers, Ltd.* v. *Dering*, [1928] All E.R. Rep. 396; *Connors Bros., Ltd.* v. *Connors*, [1940] 4 All E.R. 179.

As to reasonableness of contracts in restraint of trade, see 38 Halsbury's Laws (3rd Edn.) 22 et seq.; and for cases see 45 Digest (Repl.) 443 et seq.

Cases referred to:

(1) *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181; Fortes Rep. 296; 10 Mod. Rep. 130; 24 E.R. 347; 45 Digest (Repl.) 395, *110*.

(2) *Davis* v. *Mason* (1793), 5 Term Rep. 118; 101 E.R. 69; 45 Digest (Repl.) 494, *817*.

Also referred to in argument:

Young v. *Timmins* (1831), 1 Cr. & J. 331; 1 Tyr. 226; 9 L.J.O.S.Ex. 68; 148 E.R. 1446; 45 Digest (Repl.) 452, *328*.

Wickens v. *Evans* (1829), 3 Y. & J. 318; 45 Digest (Repl.) 397, *122*.

Homer v. *Ashford and Ainsworth* (1825), 3 Bing. 322; 11 Moore, C.P. 91; 4 L.J.O.S.C.P. 62; 130 E.R. 537; 45 Digest (Repl.) 457, *393*.

Hayward v. *Young* (1818), 2 Chit. 407; 45 Digest (Repl.) 495, *821*.

Bunn v. *Guy* (1803), 4 East, 190; 1 Smith, K.B. 1; 102 E.R. 803; 45 Digest (Repl.) 500, *882*.

Benzon v. *Farlow* (1816), 1 Mer. 459; 35 E.R. 742; 45 Digest (Repl.) 522, *1072*.

Rule Nisi obtained by the defendant for a new trial and to arrest judgment in an action of debt in which the plaintiff sought to recover damages for breach of a covenant contained in articles of agreement under seal by which the defendant covenanted, inter alia, not to exercise or practise the profession of surgeon-dentist at or within 100 miles of the city of York without the consent in writing of the plaintiff, under the penalty of £1,000. The defendant pleaded non est factum.

The declaration stated that on April 17, 1828, by certain articles of agreement under seal made between the plaintiff, therein described as of the city of York, surgeon-dentist, of the one part, and the defendant of the other part the defendant, for himself, his heirs, executors, and administrators, covenanted, promised, and agreed with the plaintiff, his executors and administrators, that he, the defendant, would well and faithfully serve the plaintiff, as his assistant in the business or profession of a surgeon-dentist, for the term of five years, from Oct. 20 then next, according to the terms and conditions thereinafter expressed; and the plaintiff, in consideration of such service, and of the covenants and agreements on the part of the defendant, therein contained, covenanted with the defendant that he, the plaintiff, would pay or cause to be paid to the defendant, the following salaries or yearly sums for the first year of the said term of five years £120, for the second year £140, for the third year £160, for the fourth the sum of £180, and for the fifth and last year £200, to be paid half-yearly at the expiration of each successive half-year during the said term; and also that he, the plaintiff, would, during the said term of five years, teach and instruct the defendant in the business or profession of a surgeon-dentist, according to the best of his skill and knowledge.

The defendant, by the said articles of agreement, for himself, his heirs, executors and administrators, covenanted, promised, and agreed to and with the plaintiff, his executors and administrators, that he, the defendant would, for and during the said term of five years, from Oct. 20 thence next ensuing, faithfully and diligently serve him, the plaintiff, as his assistant in the business or profession of a surgeon-dentist, and would not depart from the service of the plaintiff without giving three calendar months' previous notice in writing to the plaintiff of such his intention: and that the defendant should not nor would, at the expiration or other sooner determination of the said term (provided the plaintiff were then living, and practising in the said profession or business of a surgeon-dentist) exercise or practise the profession or business of a surgeon-dentist at or within 100 miles of the said city of York, without the previous consent in writing of the plaintiff, under the penalty of £1,000 to be forfeited and paid by the defendant, his executors or administrators, and to be recoverable in any of His Majesty's Courts of Record at Westminster, as and for liquidated damages: that it should and might be lawful for the plaintiff, at any time during the said term of five years, to discharge and dismiss the defendant from his service, by giving to the defendant three calendar months' previous notice in writing for that purpose according to the terms more fully set out in the articles of agreement.

The plaintiff then alleged that the defendant entered the service of the plaintiff under the said articles and continued therein until, on May 3, 1830, when the said term was determined by the said parties; and that after the determination of the said term and on divers other days and times between that day and the day of exhibiting that bill, the defendant exercised the profession or business of a surgeon-dentist within 100 miles of the city of York, without the previous consent in writing of the plaintiff, although the plaintiff was, during all that time, living and practising in the said profession or business of a surgeon-dentist, and accordingly an action had accrued to the plaintiff, to demand from the defendant the said sum of £1,000.

At the trial before LITTLEDALE, J., the plaintiff resisted the claim on two grounds: (i) that the agreement was void, the distance prescribed by the plaintiff being unreasonable; (ii) that even if the agreement were not void, the sum stated

in it was a penalty, and not liquidated damages; and, therefore, the plaintiff was only entitled to recover such damage as he could prove.

The judge was of opinion, that under the plea non est factum, those questions could not be inquired into. He could only try on that plea whether the defendant had signed the agreement or not, of which fact there could be no doubt; and he directed the jury to find a verdict for the plaintiff which they accordingly did: debt £1,000, damages 1*s*. *Serjeant Wilde* for the defendant, moved for a new trial on the ground that evidence ought to have been received as to the amount of damages, for the reason suggested at the trial; and in arrest of judgment, that the agreement between the parties was void, as imposing an unreasonable restraint on the defendant.

Serjeant Russell for the plaintiff, showed cause against the rule.
Serjeant Wilde and *Serjeant Jones* for the defendant, supported the rule.

Cur. adv. vult.

TINDAL, C.J., delivered the following judgment of the court.—Two questions arise upon the deed on which this action is brought, and which is set forth upon the face of the declaration: (i) whether the deed is void, as being in restraint of trade; (ii) supposing the deed to be a valid deed, whether the sum therein mentioned to be payable upon breach of the covenant, is a penalty only, or is to be considered as the liquidated amount of damages to be recovered by the plaintiff.

The deed purports to be an agreement under seal between the plaintiff and defendant, whereby the defendant covenants with the plaintiff that he, the defendant, would faithfully serve the plaintiff as an assistant in the business and profession of a surgeon-dentist for five years. The said plaintiff, in consideration of such service, and of the covenants of defendant, covenanted with the defendant to pay him the yearly salaries therein mentioned, and to instruct him in the business or profession of a surgeon-dentist; and the defendant covenanted that he would, during the said term of five years, faithfully and diligently serve the plaintiff as his assistant, and would not depart from his service without giving him three calendar months' notice in writing of such his intention;

> "and that the said defendant should not nor would, at the expiration or other sooner determination of the said term (provided the said plaintiff were then living, and practising in the said business or profession) exercise and practise the said business or profession at or within the distance of 100 miles of the city of York, without the previous consent in writing of the said plaintiff, under the penalty of £1,000 to be forfeited and paid by defendant, his executors and administrators, and to be recovered in any of His Majesty's Courts of Record at Westminster as and for liquidated damages."

The deed then contained a clause by which the plaintiff might determine the service by giving three months' notice in writing.

The first question is whether this agreement is void in law. The law upon this subject has been laid down with so much authority and precision by PARKER, C.J., in giving the judgment of the Court of King's Bench in *Mitchel* v. *Reynolds* (1), which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. The rule laid down by the court in that case is:

> "That voluntary restraints, by agreement between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract,"

that is, so as it is a reasonable restraint only, "are good."

The present case does not fall within the first class of contracts, as it certainly does not amount to a general restraint of the defendant from carrying on his trade

or business; he may do so beyond the distance of 100 miles from the city of York, and he may do so within that distance after the plaintiff has ceased to practise. But the question is whether this contract, which is in particular and partial restraint of trade only, and is made upon some consideration, is made upon a good and sufficient consideration, and is in itself a reasonable restraint of the defendant's carrying on that trade in which the plaintiff had agreed to receive the defendant as his assistant.

As to the consideration, it must be confessed it is very small compared with the restraint under which the defendant consents to place himself. The plaintiff takes the defendant as his assistant for five years, at a salary of £120 for the first year, to be afterwards increased, with a power to dismiss him at any time by a three months' notice. The defendant covenants not to exercise or practise the profession within 100 miles of the city of York, if the plaintiff continues to carry on his business of a surgeon-dentist, under the penalty of £1,000. The defendant, in order to be capable of being employed by the plaintiff as an assistant in a profession requiring skill and experience, and at a considerable salary, must have been a person having some skill and experience, which he had before acquired. At the time of entering into this contract he was at liberty to set up his trade, and endeavour to gain his livelihood, within the city of York. But under the present contract, after being employed by the plaintiff for three months only, and receiving in consequence no more than the sum of £30, he was liable to be prevented from carrying on his business, and earning his livelihood, within the large space comprehended within a circle drawn with a distance of 100 miles from the city of York. Surely this appears a very slender and inadequate consideration for such a sacrifice.

But the greater question is whether this is a reasonable restraint of trade. We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy. In *Mitchel* v. *Reynolds* (1) PARKER, C.J., says:

> "A restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good;"

which are rather instances and examples, than limits of the application of the rule, which can only be at last what is a reasonable restraint with reference to the particular case. In that case the plaintiff had assigned to the defendant the lease of a house in the parish of A. for five years, and the defendant entered into a bond conditioned that he would not exercise the trade of a baker within that parish during that term: and the restraint was held good, because not unreasonable either as to the time or distance, and not larger than might be necessary for the protection of the plaintiff in his established trade.

No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond which, excessive. In *Davis* v. *Mason* (2), where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the plaintiff, 150 miles was considered as not an unreasonable restraint, where an attorney had bought the business of another who had retired from the profession. But it is obvious that the profession of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence or by agents. And unless the case was such that the restraint was plainly and obviously unnecessary, the court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to show them reasonable, bad in the eye of the law; and upon the bare inspection of this deed it must strike the mind of every man that a circle round York, traced with the

distance of 100 miles, encloses a much larger space than can be necessary for the plaintiff's protection.

The nature of the occupation, which is one that requires the personal presence of the practiser and the patient together at the same place, shows at once that the plaintiff has shut out the defendant from a much wider field than can by possibility be occupied beneficially by himself. There is, therefore, on the one hand, no reason why the defendant should not gain his livelihood; nor, on the other, why the public should not receive the benefit of his skill and industry through so wide a space. The contract appears still further unreasonable on this ground—as it is to hold good during the whole time the plaintiff continues to carry on his business, wherever he may be; so that if the plaintiff removed from York, to places where the practice at York by the defendant could not injure him, still the restriction continues.

We, therefore, think that the contract is one which contains a restraint of the defendant to carry on his trade, far larger than is necessary for the protection of the plaintiff in the enjoyment of his trade; and, consequently, that the covenant creating such restraint cannot form the subject of an action. The opinion we have formed on this point makes it unnecessary that we should discuss the other ground of objection. Indeed, that objection would only go to an assessment of damages by a suggestion of breaches on the present record. Upon the whole, we think the judgment upon this record should be arrested.

Rule absolute.

TRAFFORD AND OTHERS *v.* REGEM

[COURT OF EXCHEQUER CHAMBER (Tindal, C.J., and other judges), January 30, 1832]

[Reported 8 Bing. 204; 2 Cr. & J. 265; 1 Moo. & S. 401; 2 Tyr. 201; 1 L.J.Ex. 90; 131 E.R. 379]

Water—Flooding—Nuisance—Custom—Damage to land and aqueduct—Protection of neighbouring land.

Owners of land, in order to protect their property from damage by flood water, raised artificial banks called fenders which restrained the flood water from their land. The height of these fenders resulted in water pressing against and damaging a public canal and the aqueduct which carried it over a river and adjoining land, and threatened the navigation of the canal. On appeal to the Exchequer Chamber,

Held: in order for the court to determine the issues between the parties, the judge should have found: (i) whether the raising of the fenders was an ancient and rightful usage enjoyed from time to time or whether it had commenced since the construction of the canal; (ii) whether the course taken by flood water was an ancient and rightful course; and (iii) whether or not the raising of the fenders to their present heights had become necessary in consequence of the construction of the aqueduct, and the case was remitted for a new trial.

Notes. Considered: *Gerrard* v. *Crowe*, [1920] All E.R. Rep. 266. Referred to: *R.* v. *Great North of England Rail. Co.* (1846), 9 Q.B. 315; *Campbell* v. *R.* (1847), 11 Q.B. 814; *R.* v. *Charlesworth* (1861), 1 B. & S. 460; *Ridge* v. *Midland Rail. Co.* (1888), 53 J.P. 55; *Marriage* v. *East Norfolk Rivers Catchment Board*, [1949] 2 All E.R. 1021.

As to the duty of landowners erecting works to prevent damage by water, see 28 HALSBURY'S LAWS (3rd Edn.) 162, 163; and for cases see 36 DIGEST (Repl.) 289, 290.

Appeal by the defendants from a decision of the Court of King's Bench (1 B. & Ad. 874) in favour of the Crown on an indictment for nuisance to a public canal

navigation, which came before that court on a special verdict found at the trial before BAYLEY, J., at the Lancaster Summer Assizes, 1829.

The first count of the indictment stated, that after the passing of the statute 2 Geo. 3, c. xi, in 1763, a canal was made pursuant to the statute, which from that time had been used by all the king's subjects with vessels not exceeding thirty tons burden, on payment of certain reasonable tolls; that the canal, by means of an aqueduct made pursuant to the Act, passed over the River Mersey, near the junction of a brook called Chorlton Brook; and that the defendants, on Jan. 1, 1770, and other days, raised divers mounds near the ancient banks of the river and brook in parts thereof near the aqueduct, whereby water was at divers times forced against the aqueduct, and the sides and foundations thereof, and the sides and foundations of the said canal adjacent thereto, which water, but for the said mounds, would have flowed and escaped by other ways, namely, over parts of the banks of the river and brook: and as a result of the actions of the defendants the said aqueduct, and the sides and foundations thereof; and the canal adjoining it had been injured, and were in danger of being broken down and destroyed, to the damage and common nuisance of the King's subjects using the said canal, and of the inhabitants and occupiers of the adjacent lands.

There were other counts, charging the defendants with severally raising and erecting the mounds, and wrongfully continuing the mounds injuriously erected. One count stated the injury to be done by confining the water, and causing it to break down the banks of the river and damage the adjacent lands, as well as the aqueduct and canal. The defendants pleaded not guilty.

At the trial before BAYLEY, J., the jury acquitted some of the defendants, and, as to others, found a special verdict. The special verdict stated that in 1763 the navigable canal mentioned in the indictment was made from Longford Bridge in the township of Stretford, to the river Mersey, at a place called the Hemp Stones in the township of Halton, in pursuance of an Act of 2 Geo. 3, c. xi, enabling the then Duke of Bridgwater to make the same; and the King's subjects had, ever since the making of the canal, navigated it with boats not exceeding thirty tons burden, at their free will and pleasure, paying the duty by law established. The canal extended for half a mile north and south across a vale through which the river Mersey runs in a westerly direction; it was upon the same level throughout, and raised by artificial embankments on each side through the whole half mile, and was carried across the river by an aqueduct of one arch, built at the time of making the canal. At the distance of 430 yards from the river, towards the north, the canal was supported upon three arches, also built at the last-mentioned time; on the south side it had two culverts at 160 and 460 yards' distance from the river, one made at the same time with the canal, the other built by the trustees of the late Duke of Bridgewater (the proprietors of the canal) in 1806. About 800 yards above the aqueduct the river was joined from the east by Chorlton Brook, the capacity of which, at the junction, was equal to one tenth of the capacity of the river at the same point; and after this junction, the river, which had before flowed northward, turned immediately to the west.

On each side of the river, and also of the brook, there were artificial banks called fenders made to prevent the water in times of floods from overflowing the adjacent lands. These fenders had from time to time been raised, as occasion required, by the proprietors and occupiers of adjoining lands; and the fenders on the north banks of the river were now three feet higher than they were twenty years ago; the fenders on the north banks of the brook two feet three inches higher than they were at the same period. Before the banks of the river and of the brook were so raised, the water of the river, in times of flood, was frequently penned back up the brook, and, together with the water of the brook, ran over the north bank of the brook, and inundating certain lands made its way to the three arches on the north side of the river. After passing through these, it flowed along a low tract of land, until it fell into the river again at a place called Ernston, two miles from the said three arches, inundating in its

course, both above and below the arches, many hundred acres of land, throwing down hedges, and otherwise doing much damage. No regular watercourse was ever kept open for the flood water. Since the banks of the river and of the brook had been raised, the flood water, whenever it overflowed or broke down the banks of the brook, had taken the same course to the three arches. The whole three arches were not necessary for any purpose other than the passage of such flood water; one small arch being sufficient for the passage of all other water collected at that place.

Since the making of the canal, the water of the river had at times overflowed the banks above its junction with the brook, and inundated a tract of land on the south and west of the river; and by reason of the embankment on which the canal was raised, and of the want of sufficient outlets underneath, the flood water had (particularly in the year 1806) broken down the south bank of the river between the aqueduct and the brook, passed across the river, and broken down the north bank; and then, after inundating the adjoining lands, flowed down to the said three arches.

In 1806 the trustees of the Duke of Bridgewater (the then proprietors of the canal) on complaint from the landowners on the north bank of the river, made them compensation for the damage so sustained; and had since that time paid an annual rent or compensation for a piece of land on the south side, which was on that occasion washed away. They had also, from time to time repaired the south bank of the river and the fender thereon, to the extent of fifty yards eastward from the canal.

The verdict then described the particular fields and fenders belonging to the several defendants, and it appeared that every fender was much higher than the land to the north of it, and that the fenders on the banks of the river and brook had been raised from time to time within the last six years, and kept and continued so raised by the defendants severally in their respective occupations, but not jointly. It also described the level of the lands through which the flood water was accustomed to escape in the direction of the three arches, and the level of the river bed for some miles above its junction with the brook. A statement was given of injuries sustained in July, 1828, when the flood-water broke the banks of the river and canal (the navigation of which was stopped), and ultimately flowed down to the three arches.

The improved drainage of the country higher up the river for many miles had occasioned a greater quantity of water to flow down the river to the aqueduct than had been accustomed to flow to it for several years after it was built, but the aqueduct was still wide enough for the river water to pass at all times except in high floods. The raising of the fenders on the banks of the river and of the brook, had occasioned a much greater quantity of water to flow to the aqueduct in high floods than had or could have flowed to it for several years immediately after it was built, and had rendered it insufficient for the passage of the water in high floods, and thereby greatly endangered the canal. If the fenders on the banks of the river and of the brook were reduced to the height at which they were twenty years ago, a great part of the waters of the river and brook in high floods would overflow the banks of the brook, and inundate the neighbouring lands, and would take the direction in which the flood-water used formerly to flow to the said three arches, and thence to Ermston; but many hundred acres of land would thereby be inundated, and great injury done to the owners and occupiers of that land. The fenders on the banks of the river and of the brook had not been raised more than was necessary to prevent the lands being so inundated.

The case was removed into the Exchequer Chamber, on error, after judgment had been given for the Crown by the Court of King's Bench.

Wightman for the plaintiffs.

F. Pollock for the defendants.

Cur. adv. vult.

TINDAL, C.J., delivered the following judgment of the court.—Upon this special verdict, in which judgment has been given for the Crown by the Court of King's Bench, such judgment appears to have proceeded expressly on the principle, that the ancient course and outlet of the flood water had been obstructed by the wrongful raising from time to time of the fenders therein described, by the defendants.

While, however, we agree in the principle so laid down by the court, we are unable to discover, upon this special verdict, a finding of sufficient facts to warrant its application to the present case. In order to show the defendants to have been guilty of the offence charged in this indictment, we think, in the first place, it ought to appear distinctly upon the special verdict that the raising and heightening of the fenders on the lands of the respective defendants, was not an accustomed and rightful usage which has obtained from time to time; that it was an enjoyment commencing since the construction of the canal in 1763; not sanctioned by ancient usage, or by the ordinary right which every man possesses, prima facie, to protect his own property, provided he can do it without injury to others: and that it ought also to appear distinctly that the course which the floodwater is stated in the special verdict to have taken, and by which it was carried again into the river at a lower point, was the ancient and rightful course which it ought to take.

We think, in the second place, it ought not to be left in doubt, upon the facts found in the verdict, whether the raising the fenders to their present height has or has not become necessary in consequence of the construction of the aqueduct and embankment. On the contrary, that it ought to appear distinctly upon the finding by the jury, either that the embankment and the aqueduct have not wrongfully penned back more water upon the low lands of the defendants than was formerly collected in times of flood; or, that the banks of the river and brook have been raised without any necessity, and not in self-defence against the consequences of the construction of the embankment and aqueduct; or, at all events, that the banks have been raised by defendants to an unreasonable and unnecessary height. If these facts are left in doubt upon the special verdict, we think no judgment can be given against the defendants.

Upon the point first above suggested, there appears no doubt but that at common law the landholders would have the right to raise the banks of the river and brook from time to time, as it became necessary, upon their own lands, so as to confine the flood-water within the banks, and to prevent it from overflowing their own lands; with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons. If this right had actually been exercised and enjoyed by them before the passing of the Act, then the construction of the aqueduct and embankment may be considered as having taken place subject to the enjoyment of such rights as the landholders possessed at the time of passing the Act, unless so far as the Act of Parliament may have restrained the exercise of such rights.

It appears, therefore, to us to be indispensable, in order to determine whether the acts of the defendants stated in the indictment are wrongful or not, that the jury should find such facts as will enable us to say with certainty, whether, before the making of the canal and embankment, there was any exercise by the landowners of the right of raising and heightening the banks from time to time, as occasion required, so as to confine the water at all times to the ordinary channel, and prevent it in times of flood from overflowing the banks; or, whether the passage over the banks in times of flood was the usual and ordinary course.

The present special verdict leaves the commencement of the enjoyment of this right in complete uncertainty. It states only that there " now are " on each side of the river and brook, artificial banks called "fenders," which have from time to time been raised, as occasion has required. It finds, indeed, in one part, that these banks are not raised higher than is necessary, a fact very strongly in favour of the defendants. But it gives no date whatever to the origin of these acts of enjoyment on the part of the owners of land adjacent to the river. Upon such a finding

A we do not feel ourselves competent to say whether the acts complained of in the indictment amount to a nuisance or not.

Again, the jury find, that before the banks of the river and brook were raised, the water of the river and brook was frequently penned back, and flowed over the north bank, by a track or course which is described in the verdict, and which is stated to fall into the river again at a place called Ermston, about two miles below B the three arches. It nowhere appears whether the flood-water was carried in that course before the aqueduct was made; nor whether it had been so carried for such a period of years over the lands of different persons, as to constitute a right of watercourse in time of flood in the direction described by the special verdict. In order to establish the charge against the defendants, it was essential to show that by their raising and heightening the banks of the river and brook, C they prevented the water in time of flood from flowing in this particular course. We ought, therefore, to see upon the face of the verdict, that there was an existing right of this course for the flood water over the lands described in the special verdict, before we hold the defendants guilty of the offence charged.

Again, upon the second ground above suggested, we think this special verdict deficient. The special verdict leaves it questionable whether the nuisance com- D plained of, i.e., the danger to the aqueduct and the canal, is not attributable in some degree at least, if not entirely to the act of the owners of the canal. The special verdict states in terms, that since the making of the canal, the water of the river has at different times flowed over the banks much higher up the within mentioned river than the point of its junction with the brook: and then proceeds to state an instance of damage done in 1806, for which the commissioners named E in the Act of Parliament awarded compensation on account of the insufficiency of the outlets under the canal embankments.

Again, in the statement made of the levels of the river above the aqueduct, and of the fall immediately below, an inference at least is afforded that the embankment and the canal have contributed to the penning back the water, thus creating F a necessity and justifiable ground for raising and heightening the banks. Without, however, in any manner asserting that such has been the case, or that such is the necessary inference from the facts stated, we only observe that this special verdict does not state with sufficient certainty what is the real cause of the penning back of the water in time of flood, nor whether the raising and heightening of the banks by the defendants had a legal and justifiable commencement, nor what is the rightful course of the flood water, nor generally does it lay before us such facts, G as will enable us to say whether the acts done by the defendants are lawful or not, or to give any judgment, satisfactory to ourselves, that should bind the rights of the contending parties.

Under these circumstances, the only course we can pursue is, to reverse the judgment which has been given for the Crown, and to award a venire de novo; and H if another special verdict should be found, we think it would be desirable that it should contain an express finding of the jury upon the several points to which we have above adverted, rather than the statement of facts from which the finding of the jury is only to be inferred.

Venire de novo awarded.

WHITWORTH *v.* HALL

[Court of King's Bench (Lord Tenterden, C.J., Littledale, Parke and Taunton, JJ.) Trinity Term, 1831]

[Reported 2 B. & Ad. 695; 9 L.J.O.S.K.B. 297; 109 E.R. 1302]

Bankruptcy - Petition - Malicious presentation—Right of action by bankrupt.

In an action for maliciously and without probable cause suing out a commission of bankrupt, **held** that it must be averred and proved that the commission was superseded before the commencement of the action. If this fact be not proved, the plaintiff ought to be nonsuited, although it was not averred in the declaration and though the defendant, who might have demurred from the omission, had not done so.

Per Littledale, J.: There is no distinction between an action for malicious prosecution by indictment or for a malicious arrest and one for maliciously suing out a commission of bankrupt. In all of them it is necessary to show that the original proceeding which formed the alleged ground of the action is at an end.

Notes. Considered: *Mellor* v. *Baddeley* (1834), 2 Cr. & M. 675. Distinguished: *Steward* v. *Gromett* (1859), 7 C.B.N.S. 191; *Gilding* v. *Eyre* (1861), 10 C.B.N.S. 592. Approved: *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210. Referred to: *Johnson* v. *Emerson* (1871), L.R. 6 Exch. 329; *Everett* v. *Ribbands*, [1951] 2 All E.R. 818.

As to malice in presenting bankruptcy petition, see 2 Halsbury's Laws (3rd Edn.) 300; and for cases see 5 Digest (Repl.) 1072, 1073.

Case referred to in argument:

Matthews v. *Dickinson* (1817), 7 Taunt. 399; 1 Moore, C.P. 104; 129 E.R. 160; 5 Digest (Repl.) 1072, *8642*.

Rule Nisi obtained by the defendant to enter a nonsuit in an action on the case for maliciously and without probable cause suing out a commission of bankrupt against the plaintiff.

At the trial before Alexander, C.B., counsel for the plaintiff having stated his case, counsel for the defendant objected that the action was not maintainable because it was not averred in the declaration, nor could it be proved that the commission had been superseded. Alexander, C.B., thought the objection fatal, but refused to nonsuit the plaintiff on the ground that the defendant ought to have demurred to the declaration; and he made the cause a remanet, to give the bankrupt an opportunity of obtaining a supersedeas before the next assizes. *Serjeant Goulburn* for the defendant, obtained a rule nisi for entering a nonsuit.

Sir Thomas Denman and *Fynes Clinton* for the plaintiff, showed cause against the rule.

Serjeant Goulburn for the defendant, supported the rule.

LORD TENTERDEN, C.J.—If a commission of bankrupt be sued out without any reasonable or probable cause, we must assume that the Lord Chancellor would supersede it. There is no sound distinction as to the point raised in this case between a malicious prosecution by indictment or a malicious arrest, and a malicious suing out of a commission of bankrupt. As to the want of the averment in question being cured after verdict, in this case there was no verdict, and the objection was not merely that the declaration did not contain such an averment, but that, if it had been there, it was not capable of proof.

LITTLEDALE, J.—There is no distinction between an action for a malicious prosecution by indictment or for a malicious arrest, and one for maliciously suing out a commission of bankrupt. In all of them it is necessary to show that the original proceeding which formed the alleged ground of the action is at an end.

PARKE, J.—It seems to be involved in the proposition that the commission was sued out without reasonable and probable cause, that such commission must be superseded before the action be commenced, for the very existence of the commission would be some evidence of probable cause. The rule for entering a nonsuit must be made absolute.

TAUNTON, J., concurred.

Rule absolute.

BOWMAN *v.* TAYLOR AND OTHERS

[COURT OF KING'S BENCH (Lord Denman, C.J., Taunton, Patteson and Williams, JJ.), November 21, 1834]

[Reported 2 Ad. & El. 278; 4 Nev. & M.K.B. 264; 4 L.J.K.B. 58; 111 E.R. 108]

Estoppel—Estoppel by deed—Effect of recital—Recital that plaintiff owner of invention—Defendants estopped from denial.

A deed of covenant for the use by the defendants of a patent recited, inter alia, that the plaintiff was the inventor. In an action for non-performance the defendants alleged that the recitals in the deed were incorrect. The plaintiff demurred.

Held: the defendants were estopped by the recital in the deed from contradicting the facts recited.

Notes. Considered: *Greer* v. *Kettle*, [1937] 4 All E.R. 396. Referred to: *Cutler* v. *Bower* (1848), 11 Q.B. 973; *Young* v. *Raincock* (1849), 7 C.B. 310; *Stroughill* v. *Buck* (1850), 14 Q.B. 781; *Hills* v. *Laming* (1853), 9 Exch. 256; *Smith* v. *Scott* (1859), 6 C.B.N.S. 771; *Orley* v. *Holden* (1860), 8 C.B.N.S. 666; *Ashpitel* v. *Bryan* (1864), 5 B. & S. 723.

As to estoppel by deed, see 15 HALSBURY'S LAWS (3rd Edn.) 215, 216; and for cases see 21 DIGEST (Repl.) 324 et seq.

Cases referred to:

(1) *Lainson* v. *Tremere* (1834) 1 Ad. & El. 792; 3 Nev. & M.K.B. 603; 4 L.J.K.B. 207; 110 E.R. 1410; 21 Digest (Repl.) 332, *856*.

(2) *Hayne* v. *Maltby* (1789), 3 Term Rep. 438; Dav. Pat. Cas. 156; 100 E.R. 665; 21 Digest (Repl.) 362, *1065*.

(3) *Oldham* v. *Langmead* (1789), cited in 3 Term Rep. at p. 439; 100 E.R. 665; 36 Digest (Repl.) 819, *1771*.

Also referred to in argument:

Rainsford v. *Smith* (1560), 2 Dyer, 196 a; 73 E.R. 432; 7 Digest (Repl.) 200, *344*.

Taylor v. *Zamira* (1816), 6 Taunt. 524; 2 Marsh. 220; 128 E.R. 1138; 31 Digest (Repl.) 269, *4029*.

Pope v. *Biggs* (1829), 9 B. & C. 245; 4 Man. & Ry. K.B. 193; 7 L.J.O.S.K.B. 246; 109 E.R. 91; 35 Digest (Repl.) 389, *862*.

Palmer v. *Ekins* (1728), 2 Ld. Raym. 1550; 1 Barn. K.B. 103; 2 Stra. 817; 11 Mod. Rep. 407; 92 E.R. 505; 21 Digest (Repl.) 326, *804*.

Taylor v. *Hare* (1805), 1 Bos. & P.N.R. 260; 127 E.R. 461; 12 Digest (Repl.) 255, *1975*.

Currants' Case (1575), cited in 2 Dyer, 196 a; 73 E.R. 432; 21 Digest (Repl.) 345, *926*.

Demurrers in an action of covenant.

The declaration stated that by indenture of May 10, 1824, after reciting that the plaintiff had invented certain improvements in the construction of weaving

looms, commonly termed "power looms," that he had obtained letters patent for the invention, that he had caused an instrument in writing describing the invention to be enrolled in chancery as required by the letters patent, and that he had agreed with the defendants to permit them to use the invention for a certain part of the term granted by the letters patent in consideration of certain covenants on the part of the defendants, the plaintiff covenanted to permit the defendants to have the use and benefit of the invention and patent and the defendants covenanted to make certain payments to the plaintiff. The defendants failed to fulfil their covenants, and in an action for breach of covenant they pleaded (i) that the supposed invention was not new; (ii) that the plaintiff was not the first or true inventor; and (iii) that he had not enrolled the description of the invention. The plaintiff demurred to these pleas.

Tomlinson for the plaintiff.
Wightman for the defendants.

LORD DENMAN, C.J., stated the substance of the declaration and pleas and continued: The plaintiff contends that these pleas are bad because the defendant is estopped by his deed from pleading them. It is answered as to the first plea that it is not inconsistent with the deed, but we think it is so, and if not, that it is no defence. If by saying that the supposed invention is not new it is only meant that it was discovered by the plaintiff fifty years ago, that is no reason that he should not now have taken out a patent for it. So as to the second plea that the plaintiff was not the first or true inventor: that averment either denies that he invented the contrivance or denies that he was the sole inventor. The answer is the same as that just given: in the one case the defendant states what he is estopped from alleging, because it contradicts the recital of his own deed, in the other he gives no answer to the declaration. The third plea puts a fact in issue in direct contradiction to the recital of the deed.

The doctrine of estoppel has been guarded with great strictness, not because the party enforcing it necessarily wishes to exclude the truth, for it is rather to be supposed that that is true which the opposite party has already recited under his hand and seal, but because the estoppel may exclude the truth. However, it is right that the construction of that which is to create an estoppel should be very strict. As to the doctrine laid down in Co. Litt. 352 b, that a recital doth not conclude because it is no direct affirmation, the authority of Sir Edward Coke is a very great one; but still, if a party has by his deed recited a specific fact, though introduced by "whereas," it seems to me impossible to say that he shall not be bound by his own assertion so made under seal. This point was much considered in *Lainson* v. *Tremere* (1). There could have been no case in which the court would have been more strongly inclined to struggle against the doctrine of estoppel than that. The action was upon a bond. The condition set out on over recited that by indenture of lease between the plaintiff's testator and the defendant, the testator demised premises to the defendant at the yearly rent of £170, and the condition was, payment to the testator of that sum. The defendant pleaded that the lease in the condition mentioned was a lease the reddendum of which was £140 only and that that sum had always been paid, to which the plaintiff replied that the yearly sum of £170 had not been paid. On demurrer it was held that the defendant was estopped from pleading a lease of £140, which was in effect the same as saying that there was no lease at £170 as mentioned in the bond. This was as strong a case as can be conceived, and the averment creating the estoppel was introduced by way of recital. Yet this court upon the greatest consideration of the cases ancient and modern decided for the estoppel. I do not think it necessary in deciding the present case to enter into a minute examination of the authorities. They were fully considered on that occasion and I think that *Hayne* v. *Maltby* (2) has been sufficiently distinguished from the case before us in the course of the argument.

TAUNTON, J.—The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The principle is that where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is whether there is a matter so asserted by the defendant under his hand and seal that he shall not be permitted to deny it in pleading. It is said that the allegation in the deed is made by way of recital, but I do not see that a statement such as this is the less positive because it is introduced by a "whereas." Then the defendant has pleaded that the supposed invention in the declaration and letters patent mentioned was not nor is a new invention. The words, "was not nor is a new invention," must be understood in the same sense as the words "had invented" in the recital of the deed set out in the declaration, and must refer to the time of granting the patent: and if the invention could not then be termed a new invention, it could not I think have been truly said in the deed that the plaintiff "had invented" the improvements in the sense in which the deed uses the words. Then the plea directly negatives the deed and comes within the rule that a party shall not deny what he has asserted by his solemn instrument under hand and seal. As to *Hayne* v. *Maltby* (2) I acknowledge with unfeigned respect, that it does not become me to criticise the opinions of judges so great and eminent as those who sat here when that case was decided, but it is not necessary to examine into the grounds of the judgments there delivered, because I think counsel for the plaintiff has distinguished that case from the present. Here there is an express averment in the deed that the plaintiff is the inventor of the improvements; there the articles of agreement averred nothing as to the originality of the invention, but merely stated that the plaintiffs were the assignees of the patent, which they might have been, though the assignor was not the original inventor. Besides, though I do not rely much upon that, the judges there differed in the reasons which they assigned for their judgments. It is sufficient, however, to say without derogating from the authority of those judges, that that case is very distinguishable from the present. I am of opinion that the demurrers here are well grounded and the plaintiff entitled to judgment.

PATTESON, J.—The third plea distinctly raises the question of estoppel, the first and second not so directly. The declaration sets out a recital in the deed between these parties, and it is necessary to consider the meaning of the words there used. It is said that in a case of estoppel nothing is to be taken by way of intendment. But before we come to the question of estoppel we must examine the construction of the deed. The words are "that the plaintiff had invented certain improvements," and had obtained His Majesty's letters patent for the sole use of the said invention. This recital can only mean that he has invented a new machinery for which he had obtained the patent. If it meant that he was not the first inventor it would be absurd. That being so the pleas are first, that the invention is not new, secondly, that the plaintiff is not the first inventor. Then, if those assertions are used in the same sense as the words "had invented" in the deed, they contain a direct denial of the matter there recited; if not used in the same sense, they are no answer to the declaration. The only authority cited for the proposition that no estoppel can be by recital is that from Co. LITT. 352 b. It is not denied however, that there have been many cases in which matter of recital has been held to estop, but then it is said that the recital in those cases has been inseparably mixed with the operative parts of the deed. But if that be a test the case is so here. The deed recites that the plaintiff has invented improvements and obtained a patent for the invention, and then it proceeds to a demise of the very subject-matter for which the patent is so granted. I cannot separate these things, and I, therefore, think the recital here comes within the description which counsel for the defendants has given of the law laid down by the old cases. The passage in SIR EDWARD COKE must be taken with some little qualification, and

Lainson v. *Tremere* (1) is a direct authority to show that there may be an estoppel by matter of recital. In *Hayne* v. *Maltby* (2) the recital contained no assertion of right in the plaintiffs except as assignees; and the plea did not deny that. The case was not properly one of estoppel. How far the principle of eviction was applicable it is not now material to consider. In *Oldham* v. *Langmead* (3) there cited where the action was brought by the assignee of the patentee against the patentee, LORD KENYON would not allow the latter to show that the invention was not a new one, against his own deed. As estoppels are mutual that is a strong authority to show that the assignee, if he had by deed admitted the invention to be new, would have been estopped from pleading the contrary. The current of authorities, and particularly the recent case of *Lainson* v. *Tremere* (1), show that there may be an estoppel by recital in a deed. The plaintiff is entitled to judgment.

WILLIAMS, J. I am of the same opinion. A passage has been cited from SIR EDWARD COKE in which he says that an estoppel must be certain, and not to be taken by argument or inference. But to give the words of this recital the sense ascribed to them by the plaintiff is no argument; it is only making use of the common understanding of a phrase in the English language. When it is said, as in this deed, that a party "had invented" an improvement it means that he was the inventor of it so as to make that invention available under the law of patents. The words "had invented" must then, without any argument, mean that, the contrary of which is averred in the first and second pleas. The question, therefore, upon these is the same as upon the third plea, as to which there is no doubt. Then the only question is whether a recital, not being a direct assertion, can estop the party who has made it: no decision has been cited to the contrary. The court lately determined in favour of such an estoppel in *Lainson* v. *Tremere* (1), where the doctrine of estoppels was carefully and fully considered, and where the estoppel in question depended as much upon a recital as that in the present case.

Judgment for plaintiff.

NOTE

BOWMAN v. ROSTRON AND ANOTHER

[COURT OF KING'S BENCH (Lord Denman, C.J., Littledale, Patteson and Coleridge, JJ.), January 29, 1835]

[Reported 2 Ad. & El. 295, n.; 1 Har. & W. 221; 4 Nev. & M.K.B. 551; 4 L.J.K.B. 62; 111 E.R. 114]

Estoppel—Estoppel by deed—Necessity for pleading.

In an action on a deed similar to that in *Bowman* v. *Taylor* the defence alleged facts contradictory of the recitals without pleading estoppel. At the trial all evidence in contradiction of the recitals was excluded and a verdict directed for the plaintiff.

Held: the defendants were entitled to have the issues tried by the jury, the plaintiff not having pleaded the recitals by way of estoppel.

Notes. Referred to: *R.* v. *Johnson* (1836), 5 Ad. & El. 488; *Carpenter* v. *Buller* (1841), 8 M. & W. 209; *Pilgrim* v. *Southampton and Dorchester Rail. Co.* (1849), 18 L.J.C.P. 139; *Young* v. *Raincock* (1849), 7 C.B. 310.

As to necessity for pleading estoppel, see 15 HALSBURY'S LAWS (3rd Edn.) 202, and for cases see 21 DIGEST (Repl.) 365.

Cases referred to in argument:

Vaught v. *Winch* (1819), 2 B. & Ald. 662; 106 E.R. 507; 21 Digest (Repl.) 312, *712*.

Hayne v. *Maltby* (1789), 3 Term Rep. 438; Dav. Pat. Cas. 156; 100 E.R. 665; 21 Digest (Repl.) 362, *1065*.

Doe d. Bullen v. *Mills* (1834), 2 Ad. & El. 17; 4 Nev. & M.K.B. 25; 4 L.J.K.B. 40; 111 E.R. 7; 30 Digest (Repl.) 379, *223*.

Rule Nisi obtained by the defendants to set aside the verdict for the plaintiff or for a new trial in an action of covenant, brought by the plaintiff in the preceding case on a similar indenture but against different defendants.

The declaration was the same as in *Bowman* v. *Taylor*. The defendants pleaded (i) non est factum; (ii), (iii) and (iv), the same pleas as (i), (ii) and (iii) in *Bowman* v. *Taylor*; and (v), a further breach of the conditions of the letters patent. The replication took issue on all these pleas.

At the trial before LORD DENMAN, C.J., at the sittings at Guildhall after Hilary Term, 1834, the plaintiff put in the counterpart of the indenture which had been executed by the defendants. The Lord Chief Justice held the recital to be conclusive on the issues joined on the second and third pleas so as to preclude the defendants from giving evidence in support of these pleas; and (the defendants not insisting on the fourth and fifth issues) a verdict was taken generally for the plaintiff, leave being given to move for a new trial, on the ground that the inference to be drawn from the deed, as to the truth of the allegations in the pleas, ought to have been left to the jury, with such evidence as the defendants might have brought forward in support of their second and third pleas. *F. Pollock* for the defendants obtained a rule accordingly.

Sir W. W. Follett and *Tomlinson* for the plaintiff, showed cause against the rule.
Sir F. Pollock and *Wightman* for the defendants, supported the rule.

LORD DENMAN, C.J.—We are all clearly of opinion that there must be a new trial, a specific issue in fact having been joined, and evidence offered upon it at the trial, which was not received.

Rule absolute.

WILMOT *v.* SMITH

[COURT OF KING'S BENCH (Lord Tenterden, C.J.), December 2, 1828]

[Reported 3 C. & P. 543; Mood. & M. 238; 172 E.R. 498]

Sale of Goods—Price—Stipulated price—Use of material superior to that agreed—Right of seller to increased price.

Where the parties to a contract agree that an article shall be made of certain material for a stipulated price, and the maker puts in material of a better kind, he is not at liberty on that account to charge more than the stipulated price, nor can he require the article to be returned because the buyer will not pay an increased price on account of the better material.

Debt—Payment—Tender—Tender after receipt of attorney's letter demanding payment—Tender to clerk.

If an attorney sends a letter demanding payment and the debtor makes a tender to him, that is a good tender unless the attorney disclaims his authority at the time. If the attorney be absent, he is bound by the acts of those whom he allows to represent him at his office. Therefore, after a letter demanding payment has been received, a tender to the clerk of the attorney at his office, in the absence of the attorney, is a good tender.

Notes. Referred to: *Pennell* v. *Stephens* (1849), 7 C.B. 987.

As to the price, see 34 HALSBURY'S LAWS (3rd Edn.) 38 et seq.; and for cases see 39 DIGEST (Repl.) 496 et seq. As to the requisites of a valid tender, see 8 HALSBURY'S LAWS (3rd Edn.) 170; and for cases see 12 DIGEST (Repl.) 359 et seq. As to the authority of an agent to receive a tender, see 1 HALSBURY'S LAWS (3rd Edn.) 165; and for cases see 1 DIGEST (Repl.) 377.

Cases referred to:

(1) *Anon.* (1795), 1 Esp. 349; 1 Digest (Repl.) 377, *445*.
(2) *Goodland* v. *Blewith* (1808), 1 Camp. 477; 1 Digest (Repl.) 377, *437*.

(3) *Muffatt* (*Moffat*) v. *Parsons* (1814), 1 Marsh. 55; 5 Taunt. 307; 128 E.R. 707; 1 Digest (Repl.) 377, *439*.

(4) *Blow* v. *Russell* (1824), 1 C. & P. 365, N.P.; 12 Digest (Repl.) 364, *2842*.

(5) *Cash* v. *Giles* (1828), 3 C. & P. 407; 172 E.R. 477; 39 Digest (Repl.) 724, *2069*.

Action to recover the price of goods sold and delivered. The defendant denied liability for the amount claimed, and alleged that he had tendered £4 10s. The plaintiff denied the tender.

In this action brought to recover the sum of £5 5s., being the price of a printing press with a wrought iron bottom, the defence was that the plaintiff had agreed to furnish a press with a cast iron bottom, at the price of £4 10s. It was admitted that wrought iron was considered to be the best, but that cast iron would also answer the purpose very well; and it was further proved that the plaintiff had offered to take the press back again.

To support the plea of tender it was proved that the defendant, accompanied by another person, called at the office of the plaintiff's attorney, where they found two of his clerks, and that the defendant then stated, that he came in consequence of a letter from Mr. Platt, demanding £5 5s.; upon which one of the clerks said, that Mr. Platt was not at home, but was expected soon. It further appeared that, shortly after this, a person came in (who was in fact an articled clerk of Mr. Platt), and that, on his coming in, one of the other clerks said to him: "This is Mr. Smith, come to offer £4 10s.," to which the articled clerk, without stating that he was not Mr. Platt, replied, "I cannot receive less than £5 5s.—Mr. Wilmot [the plaintiff] will not take less;" and upon this the defendant tendered £4 10s., not being aware that the person to whom he tendered it was not the plaintiff's attorney.

J. Williams and *Platt* for the plaintiff.—A tender to the clerk of the plaintiff's attorney is not good; a tender even to the attorney himself would not be good.

Brodrick for the defendant.

LORD TENTERDEN, C.J.—Where the tender is made after a letter sent by the attorney to demand payment, the case is different. If I were to hold, that a tender to an attorney who had authority to write for payment (he not disclaiming his authority at the time), was not a good tender, the defendants would be deluded, as they would not think it necessary to go to the plaintiff and make a tender to him. And, if the attorney is absent from his office, I shall hold that he is bound by the acts of those persons whom he allows to represent him in his office.*

J. Williams in his reply, contended that, as the defendant did not return the press when he had the opportunity of doing so, he was bound to pay a fair price for it, which was £5 5s.

LORD TENTERDEN, C.J. (in summing-up).—Although the putting in of the superior materials may have fairly enhanced the price of the press; yet, if the plaintiff has stipulated to complete it with materials of an inferior value, but which would still have been sufficient for use, he is bound by his bargain, and cannot charge more than the stipulated price; and I am of opinion, that he cannot compel the defendant to rescind the contract by returning the press [see *Cash* v. *Giles* (5)].

Verdict for defendant.

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* In *Anon.* (1), it was proved, in support of a plea of tender, that the defendant had sent a sum of money by a servant to the plaintiff's house; this servant took it there and gave it to a servant of the plaintiff, who retired, and appeared to go with the money to the master. LORD KENYON left it to the jury to say whether the money had been tendered, and they found that it had. In *Goodland* v. *Blewith* (2), it was held, that a tender to an agent authorised to receive payment, is as good as a tender to the creditor in person. In *Moffat* v. *Parsons* (3), a creditor had told his clerk, previously authorised to receive money, not to receive a sum from the defendant, and the clerk, on the sum being tendered, refused to receive it, and assigned the reason; this was held to be a good tender, and MANSFIELD, C.J., observed that a tender to a managing clerk would suffice. See also *Blow* v. *Russell* (4).

R. *v.* CARLILE

[CENTRAL CRIMINAL COURT (Park, J., Bolland, B., and Sir John Cross), December 1, 1834]

[Reported 6 C. & P. 636]

Highway—Obstruction—Footway—Nuisance—Exhibition in windows of house—Crowd attracted on footway.

If a party, having a house in a street, exhibits effigies at his windows and thereby attracts a crowd to look at them, which causes the footway to be obstructed so that the public cannot pass as they ought to do, this is an indictable nuisance. It is not essential that the effigies should be libellous, and, semble, it is not necessary to show that the crowd consisted of idle, disorderly, and dissolute persons.

Notes. Considered: *Rich* v. *Basterfield* (1847), 16 L.J.C.P. 273; *Walker* v. *Brewster* (1867), L.R. 5 Eq. 25; *Fritz* v. *Hobson* (1880), 14 Ch.D. 542; *Barber* v. *Penley*, [1893] 2 Ch. 447; *Lyons, Sons & Co.* v. *Gulliver*, [1911–13] All E.R. Rep. 537; *Dwyer* v. *Mansfield*, [1946] 2 All E.R. 247.

As to nuisances on the highway arising from exhibitions, see 19 HALSBURY'S LAWS (3rd Edn.) 277, 278; and for cases see 26 DIGEST (Repl.) 489, 490.

Cases referred to:

(1) *R.* v. *Cross* (1812), 3 Camp. 224, N.P.; 26 Digest (Repl.) 485, *1707*.
(2) *R.* v. *Jones* (1812), 3 Camp. 230, N.P.; 26 Digest (Repl.) 479, *1655*.
(3) *R.* v. *Russell* (1805), 6 East, 427; 2 Smith, K.B. 424; 102 E.R. 1350; 26 Digest (Repl.) 484, *1701*.

Also referred to in argument:

R. v. *Moore* (1832), 3 B. & Ad. 184; 1 L.J.M.C. 30; 110 E.R. 68; 26 Digest (Repl.) 489, *1746*.

Indictment for nuisance.

The defendant, Richard Carlile, was charged with exhibiting in the windows of his shop in Fleet Street three effigies, representing a bishop, a tradesman and the devil, together with certain inscriptions and placards, thus causing a crowd to collect and so obstruct the highway.

Adolphus, *Bullock* and *R. Gurney* for the prosecution.

The defendant appeared in person.

PARK, J., in summing-up said: The gravamen of a charge like this is not whether those effigies were libellous, but whether the defendant, by the exhibition of them at his windows, caused the footway of Fleet Street to be obstructed so that the public could not pass as they ought to do; and the main question is whether His Majesty's subjects have been annoyed in this respect. There are in substance two charges against the defendant: one for putting up the first two effigies and the other for having on Nov. 9 added the figure of the devil, with the arm of the figure of the bishop put through the arm of this figure. It is not necessary that it should be proved that this was a scandalous libel, but if it were, it would be for you to say whether it was not a scandalous libel to represent a bishop of the Church of England leaning upon a devil.

The defendant says that if his neighbour be injured he ought to bring his action. No doubt if a man does an act which injures a particular neighbour he is not liable to be indicted if no one else but that neighbour be injured; but if a place is situate near a highway and the defendant do that which causes the persons passing to be prevented from passing as they ought to do, and besides this people are annoyed in the occupation of their houses, this is a nuisance for which the party is indictable. It may be said that Mr. Gray, the coach proprietor [a witness for the prosecution], takes up passengers at his coach-office, but if he does he must do it in a reasonable

time. LORD ELLENBOROUGH draws this very distinction, for he says, in *R.* v. *Cross* (1), that a stage-coach may set down and take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time. In *R.* v. *Jones* (2), LORD ELLENBOROUGH said (3 Camp. at p. 231):

> "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance; a cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance."

There is no doubt that a tradesman may expose his wares for sale; but he must do it in such a way as not by so doing to cause obstruction in the public streets. In *R.* v. *Russell* (3), the party was merely exercising his lawful trade, and he used to let packages stand on the footpath. He was held indictable, but if he had merely carried his packages out he would not have been liable to have been prosecuted. In *R.* v. *Cross* (1) LORD ELLENBOROUGH uses the words "unauthorised obstruction." Were not these figures unauthorised? In the course of his defence the defendant has mentioned the case of a print-seller named Tregear, who was found guilty of a nuisance, and he stated that no sentence was passed, as the recorder was dissatisfied, and thought it an improper conviction. In the latter part of the statement the defendant has been completely misinformed. It is totally unfounded. I have seen the recorder and he desired that I would relieve him from the imputation of the bad law that is ascribed to him. He says that he never had any doubt about the law of the case, or the perfect propriety of the conviction but that as the defendant submitted and abated the nuisance no sentence was passed.

In the present case one question is whether this act of the defendant was at all necessary for the bona fide carrying on of his trade. If it was and he did not take up more time in the doing of it than was necessary the law would do what it could to protect him. The defendant is so far from thinking that this exhibition is essential to the carrying on of his trade, that he has told us today that he considers his trade to be injured by it. The defendant has compared this exhibition to the procession of the judges going to St. Paul's. However, in that case the crowd who look at the procession move on with it and do not stand obstructing the street as they have done in this case. The defendant has also observed upon the Lord Mayor's Day. However, that is but one day in the year and if instead of that the Lord Mayor's Day lasted from October to December I should say it ought to be put a stop to. The defendant has also said that Bartholomew Fair is a nuisance, and from what I have heard of it I very much suspect that it is so. The defendant has also said a great deal about the persons assembled not being idle, disorderly and dissolute. I am not prepared to say that it was necessary to show that they were disorderly persons, but Alderman Farebrother, who was called as a witness for the defendant, has told us that he never saw such a set of fellows in his life both for behaviour and conversation.

The defendant has asked whether he has not a right to do what he will on his own premises. No doubt he has, but he must not do anything there that injures his neighbours so as to be a private nuisance; nor anything which annoys the public which is a public nuisance. The defendant has published placards (which have been read) complaining of a grievance inflicted on him respecting the church rates. He may do so and so a man may publish a true and bona fide account of a trial. But if he puts a libellous heading to his account of the trial, such as "most infamous transaction," that vitiates the whole. Here the defendant has headed one of his placards in large letters "battle of the church rates," and another in letters larger still, "church robbery." However, in this indictment the whole object of describing the figures, inscriptions and placards is to show what it was that the defendant did

to cause the obstruction of the highway. If this be a nuisance, the defendant ought to be convicted, and if there were 500 other nuisances, they will not justify this. The question, therefore, really is, whether you think the defendant has by the acts proved caused an obstruction of the public highway to the nuisance of persons passing along that way and to the persons residing in that neighbourhood.

Verdict: Guilty.

DOE d. PEARSON *v.* RIES AND ANOTHER

[COURT OF COMMON PLEAS (Tindal, C.J., Park, Bosanquet and Alderson, JJ.), January 23, 1832]

[Reported 8 Bing. 178; 1 Moo. & S. 259; 1 L.J.C.P. 73; 131 E.R. 369]

Landlord and Tenant—Agreement for lease—Future lease—All terms of future lease agreed—Future payment of rent—Immediate possession—Interest of tenant.

A stipulation for a future lease which contains all the terms of the future lease does not come within the principle of those cases in which a stipulation for a future lease has been held to render the agreement containing it executory, for in those cases the terms of the future lease have been unascertained at the time of entering into the agreement. The fact that no precise day has been fixed whence the rent might commence does not necessarily imply that the tenant takes no interest in the premises until the time when the rent is to accrue, for such a postponement may be explicable on the ground that the tenant is put into possession of premises requiring considerable repairs, to be done at the expense of the tenant, and, therefore, has been excused from paying rent for the period which he will devote to those repairs, he not having during that time the enjoyment of the premises. The grant of the immediate possession of premises in such a state with a stipulation that the tenant is to insure and to have the benefit of an insurance lately paid is evidence that the tenant is intended to take an immediate interest.

Evidence—Document—Parol evidence as to effect—Ambiguity—Evidence of acts done under document.

Per TINDAL, C.J.: We are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties.

Notes. Followed: *Chapman* v. *Bluck* (1838), 4 Bing. N.C. 187. Referred to: *Alderman* v. *Neate* (1839), 4 M. & W. 704; *Doe d. Morgan* v. *Powell* (1844), 7 Man. & G. 980; *Watcham* v. *A.-G. East Africa Protectorate*, [1918–19] All E.R. Rep. 455.

As to the requirements for an agreement to amount to a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 435–437; and for cases see 30 DIGEST (Repl.) 461, 462. As to evidence of conduct and acts under an instrument to explain it when doubtful, see 11 HALSBURY'S LAWS (3rd Edn.) 410; and for cases see 17 DIGEST (Repl.) 335, 336.

Cases referred to:

(1) *Staniforth* v. *Fox* (1831), 7 Bing. 590; 5 Moo. & P. 589; 9 L.J.O.S.C.P. 175; 131 E.R. 228; 30 Digest (Repl.) 461, *1027*.

(2) *Doe d. Walker* v. *Groves* (1812), 15 East, 244; 104 E.R. 837; 30 Digest (Repl.) 462, *1037*.

(3) *Barry* v. *Nugent* (1782), 3 Doug. K.B. 179; 99 E.R. 601; 30 Digest (Repl.) 462, *1044*.

(4) *Goodtitle d. Estwick* v. *Way* (1787), 1 Term Rep. 735; 99 E.R. 1349; 30 Digest (Repl.) 386, *304*.

(5) *Pinero* v. *Judson* (1829), 6 Bing. 206; 3 Moo. & P. 497; 8 L.J.O.S.C.P. 19; 130 E.R. 1259; 30 Digest (Repl.) 463, *1050*.

(6) *Doe d. Jackson* v. *Ashburner* (1793), 5 Term Rep. 163; 101 E.R. 93; 30 Digest (Repl.) 464, *1066*.

(7) *Doe d. Coore* v. *Clare* (1788), 2 Term Rep. 739; 100 E.R. 398; 30 Digest (Repl.) 390, *340*.

(8) *Tempest* v. *Rawling* (1810), 13 East, 18; 104 E.R. 272; 30 Digest (Repl.) 387, *325*.

(9) *Poole* v. *Bentley* (1810), 12 East, 168; 2 Camp. 286; 104 E.R. 66; 30 Digest (Repl.) 461, *1026*.

Also referred to in argument:

Morgan d. Dowding v. *Bissell* (1810), 3 Taunt. 65; 128 E.R. 27; 30 Digest (Repl.) 385, *298*.

Hamerton v. *Stead* (1824), 3 B. & C. 478; 5. Dow. & Ry. K.B. 206; 107 E.R. 811; sub nom. *Hammerton* v. *Stead*, 3 L.J.O.S.K.B. 33; 30 Digest (Repl.) 412, *553*.

Dunk v. *Hunter* (1822), 5 B. & Ald. 322; 106 E.R. 1209; 30 Digest (Repl.) 388, *326*.

Rule Nisi obtained by the defendants to set aside the verdict for the plaintiff in an action of ejectment.

The lessor of the plaintiff sought to obtain possession of certain premises in the Strand by virtue of the following instrument:

"Memorandum of an agreement made this 21st day of September, 1829, between Messrs. John, James, William, and Henry Knapp, of Cirencester Place and Foley Street, in the parish of St. Mary-le-bone, and county of Middlesex, builders, on the one part, and Mr. William Pearson, of London Wall, in the city of London, auctioneer, on the other part.

"The said John, James, William, and Henry Knapp agree to let, and the said William Pearson agrees to take, all that house and premises, exhibition-room, vaults, and cellars, in the unfinished state they are now in, situate on the south side of the Strand, and known as numbered 101 and 102, the same being in depth from the Strand to Fountain Court, and in the parish of St. Clements Danes, and county aforesaid, for the term of sixty years, or thereabouts; being the whole term that they the aforesaid John, James, William, and Henry Knapp have the same premises leased unto them; at the yearly rent or sum of £525, clear of the land-tax, sewers rate, and all other rates, taxes, and assessments whatsoever, that now are or may be hereafter imposed by Act of Parliament or otherwise, whether Parliamentary or parochial; the said rent to be paid quarterly on the four most usual days of payment of rent; the first payment to be made for the half quarter at Christmas next. The said William Pearson also agrees to insure the whole of the premises in the Westminster Fire Office in the sum of £5,000 in the joint names of William Pearson and John, James, William, and Henry Knapp, or such other name or names as they may appoint. The said lease and counterpart to be prepared by the attorney of the said John, James, William, and Henry Knapp, and at the expense of the said William Pearson, and to contain all the clauses, covenants, and agreements that they the said John, James, William, and Henry Knapp have entered into and agreed upon in the lease granted unto them of the aforesaid premises.

"Mr. Pearson to have the benefit of the insurance which has been lately paid, without any charge or expense to himself for the same. In witness whereof the aforesaid parties have hereunto set their hands the day and year first above named.

W. Pearson.
J., J., W., and H. Knapp."

A At the trial before TINDAL, C.J., it appeared that at the time of the agreement the Knapps had mortgaged the premises. Also, that the premises were partly unfinished, and stood in need of considerable repairs, and that the lessor of the plaintiff was let into immediate possession, to finish them at his own expense. The defendants resisted the action on the ground that the above instrument was only an agreement for a lease, and not a demise per verba de præsenti. The jury returned B a verdict for the plaintiff, and *Serjeant Storks* for the defendants, obtained a rule nisi to set it aside.

Serjeant Wilde (*Serjeant Bompass* with him) for the plaintiff, showed cause against the rule.

Serjeant Storks (*Serjeant Stephen* with him) supported the rule.

C **TINDAL, C.J.**—Both on the form of the instrument itself, and on the authority of decided cases, I think this agreement is not executory, but conveys a present interest to the lessor of the plaintiff. Upon the general and leading principle in such cases, we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was: if the words of the instrument be ambiguous we may call in aid the acts done under it as a clue to the intention of D the parties.

The instrument in question undoubtedly does contain a stipulation for a future lease and counterpart, and that rent shall not be paid for the first half quarter after the date of the instrument. Those are the points chiefly relied on by the defendants. The lessor of the plaintiff contends that the instrument contains words which have E been decided to be words of present demise (see *Staniforth* v. *Fox* (1)); that the agreement for a future lease is not incompatible with a present demise (*Doe d. Walker* v. *Groves* (2); *Barry* v. *Nugent* (3)), particularly where, as in the present case, the party is let into immediate possession, although no precise day is mentioned from which rent is to commence.

First then, as to the stipulation for a future lease. In all the cases in which such F a stipulation has been held to render the agreement containing it executory, the terms of the future lease have been unascertained at the time of entering into the agreement, whereas here, the future lease is to be prepared by the attorney of the defendant Knapp, and to contain "all the clauses, covenants, and agreements that they, the Knapps, have entered into and agreed upon in the lease granted to them of the aforesaid premises:" clauses, therefore, which were either in the possession G of the Knapps, or, at least, within their knowledge. This agreement for a future lease, therefore, leaves nothing uncertain, and does not fall within the principle of those cases which have held an agreement with a clause for a future lease executory, on the ground of present uncertainty.

The next point is that no precise day is fixed from whence the rent is to commence. If that had been left quite uncertain, there might, perhaps, have been some ground H for contending that the lessor of the plaintiff took no interest in the premises until the time when rent was to accrue. But taking all the circumstances of the case together, the observation rather makes the other way. For on the execution of the agreement at the end of September the party is put into immediate possession of premises requiring considerable repairs, and at the Christmas following he is to pay half a quarter's rent. We cannot but infer from this that he was to be excused I paying any rent for the half quarter which he would probably be obliged to devote to repairs, and during which, consequently, he would have no enjoyment of the premises.

What are the arguments on the other side? "Agrees to let" and "agrees to take," have been held words of present demise from *Goodtitle d. Estwicke* v. *Way* (4) to the present time. Then, the party is put into immediate possession; and what circumstance can guide us with more certainty to the conclusion that it was intended to pass an immediate interest? If the landlord meant that the instrument

should be only executory, at least by giving possession, he furnishes the strongest evidence the other way.

There are other circumstances to lead us to the same conclusion. The premises were unfinished; the tenant was to put them in repair. If the agreement were only executory, the landlord might exclude the tenant before he had derived any benefit from the expense incurred; a risk to which no prudent person would be likely to expose himself. Then, there is a stipulation that the tenant is to insure, and to have the benefit of an insurance lately made. What does that show, but that, as he takes the former insurance, he is to be responsible for the premises from the time of the transfer; and he could only be called on to be so responsible on the supposition of his taking an immediate interest. There is, indeed, good reason to contend, that the agreement was meant to be an absolute assignment of all the interest the Knapps had in the premises.

It was, at all events, a legal demise, with a right to immediate possession, and, therefore, the rule which has been obtained on the part of the defendants, must be discharged.

PARK, J.—The intention of the parties must be collected from the instrument they have executed, and looking at that, as far as the term is concerned, there seems to have been an intention to assign it. But the lessor of the plaintiff was to complete the premises, and to have the benefit of an insurance already effected, and those circumstances, taken together, are almost conclusive to show an intention to pass an immediate interest. I refrain from going into the cases, because we have so recently considered them in *Pinero* v. *Judson* (5) and *Staniforth* v. *Fox* (1), where they were all collected. In *Doe d. Jackson* v. *Ashburner* (6) ASHURST, J., said (5 Term Rep. at p. 168):

> "I entirely agree to the position, that whether an agreement of this kind shall or shall not be considered as a lease, ought to depend on the intention of the parties; which must be collected from the words of the agreement, and from collateral circumstances. Where the words are de præsenti, 'I demise, etc.,' or an agreement that 'the party shall hold and enjoy,' and the party is immediately put into possession, the landlord shall not afterwards turn him out of possession, and say that it was not a present demise; for the permitting the party to enter is strong evidence to show that the landlord intended to give a present interest."

That is the ground on which we decide here. If these be words of present demise, it is immaterial whether the instrument be called a lease, an agreement, or a memorandum of agreement.

In *Goodtitle d. Estwicke* v. *Way* (4), the duration of the term was not settled, nor the covenants of the lease. In *Doe d. Coore* v. *Clare* (7) the lessor had no power to grant a lease. In *Tempest* v. *Rawlings* (8) the covenants for the future lease were not ascertained, and the party was not let into possession; but *Poole* v. *Bentley* (9) is not distinguishable from the present case.

BOSANQUET, J.—I am of the same opinion. The question is whether it was the intention of these parties that the lessor of the plaintiff should take an immediate interest, or wait until the execution of a future lease. However desirable it may be to find a certain criterion for ascertaining the intention of parties upon such occasions, the difference between instruments is so great that none such has yet been discovered. The stipulation to grant a future lease has been considered insufficient for that purpose, for though a circumstance to be looked at, it is of itself inconclusive. The language adopted in the present instrument has always been held to import a present demise, and that inference is borne out by the acts of the parties.

The lessor of the plaintiff takes a large unfinished house at a considerable rent; he enters immediately, and at the end of the first quarter is to pay only half a

quarter's rent: but nothing is more common than an abatement out of the first payment of rent, where the tenant is to begin by laying out money on the premises. Then, the transfer of the existing assurance could scarcely have been agreed on if the tenant was not to take an immediate interest in the premises. There is no validity in the objection that the covenants in the future lease were left uncertain, for it was to contain the same covenants as that which the Knapps either had in their possession, or had the means of referring to.

ALDERSON, J.—There is nothing in the circumstance that the rent was not to commence from the date of the agreement. It is accounted for by the fact that the lessor of the plaintiff was to complete an unfinished house; and it was the obvious intention of the parties that an allowance should be made for the time during which he should have no useful occupation.

It would be most unjust to hold that on this account the immediate interest did not pass; for, if that were so, the party might incur expense in repairs, and then be deprived of the fruits.

There are many parts of the agreement which go to show an intention to pass an immediate interest, and there is nothing but the stipulation for a future lease that has an aspect the other way. A stipulation to that effect, however, has been holden to show an intention of giving further security, but not of deferring the interest to be acquired, unless where the terms of the future lease are left in uncertainty. Here the terms of the lease may be said to be comprised within the four corners of the agreement; for reference is there made to a lease in the possession of the grantors, the terms of which are to be transferred to the lease to be granted to the lessor of the plaintiff.

Rule discharged.

ALCOCK *v.* COOKE AND ANOTHER

[COURT OF COMMON PLEAS (Best, C.J., Park, Burrough and Gaselee, JJ.), February 6, 1829]

[Reported 5 Bing. 340; 2 Moo. & P. 625; 2 State Tr. N.S. 327; 7 L.J.O.S.C.P. 126; 130 E.R. 1092]

Crown—Grant—Grant of estate—Estate subject of prior grant—Avoidance of later grant.

Where the Sovereign, having already leased the right of possession of an estate to one person, purported by a subsequent grant, in which the prior grant was not recited, to convey the same right of possession to another person,

Held: the later grant was void.

Crown Property—Estates held as Duke of Lancaster—Application of prerogative, privileges, and immunities attaching to holding of Crown lands.

Although the Sovereign holds certain estates as the Duke of Lancaster and not as Sovereign, all the prerogative, privileges and immunities belong to him with reference to those lands which belong to him with reference to lands held by him immediately in right of the Crown.

Notes. Considered: *Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927; *Vancouver City* v. *Vancouver Lumber Co.*, [1911] A.C. 711. Referred to: *Morgan* v. *Seaward* (1837), 2 M. & W. 544; *Gledstanes* v. *Sandwich* (1842), 4 Man. & G. 995. *Eastern Archipelago Co.* v. *R.* (1853), 2 E. & B. 856.

As to royal grants and the rights of the Sovereign as Duke of Lancaster, see 7 HALSBURY'S LAWS (3rd Edn.) 312–326, 544–546. For cases see 11 DIGEST (Repl.) 640 *et seq.*, 673.

Cases referred to:

(1) *R.* v. *Archbishop of York and Buck* (1591), Cro. Eliz. 240; 78 E.R. 496; sub nom. *R. and Archbishop of York's Case*, 1 Leon. 226; 11 Digest (Repl.) 673, *976*.

(2) *Duchy of Lancaster Case* (1561), 1 Plowd. 212; 75 E.R. 325; 11 Digest (Repl.) 564, *24*.

(3) *Alton Woods' Case* (1600), 1 Co. Rep. 40 b; 76 E.R. 89; 11 Digest (Repl.) 642, *657*.

(4) *Earl of Rutland's Case* (1608), 8 Co. Rep. 55 a; 77 E.R. 555; 11 Digest (Repl.) 647, *706*.

Rule Nisi obtained by the defendants to enter a nonsuit in an action in which the plaintiff claimed a bowsprit under a right to take wreck in the parish of Sutton, in Lincolnshire.

The plaintiff adduced the following evidence in support of his title. First an extract from Domesday Book, by which it was proposed to show that Sutton was part of the manor of Grendham or Greetham. Secondly, a grant by Charles I in 1631 under the Duchy of Lancaster seal, to Charles Harbord, Christian Favell and Thomas Young, and their heirs (under whom the plaintiff claimed), of (among other manors, lordships, castles, hundreds, etc.) the manor of Greetham, with all its rights, including, it was alleged, a right to wreck. Thirdly, to show that the reversion of the right to wreck was vested in King Charles at the date of the grant, the plaintiff gave in evidence a lease from King James I to one Livingstone, of (inter alia) all wrecks of the sea within the honour of Bolingbroke, which, by other evidence, was shown to comprise the manor of Greetham. Testimony was given of the undisputed exercise of the right by those under whom the plaintiff claimed until about 1760, after which it appeared that the defendant Cooke and those from whom he inherited had claimed the wreck over the district in question, and had frequently taken it.

On the part of the defendants it was objected that wreck was a royal prerogative, and, therefore, would not pass by the general words in the grant of 1631; even if it could pass by such words, Sutton not being mentioned in that grant, no intention appeared to convey wreck in Sutton; and, that in point of fact Sutton was not within the manor of Greetham.

At the trial before Best, C.J., at the Lincolnshire Summer Assizes, a verdict was taken for the plaintiff, subject to the decision of the question on the grant which was reserved for the consideration of the court and whether if the grant were void the evidence of user were sufficient to establish a right by prescription. Accordingly counsel for the defendants moved for a rule nisi to set aside the verdict and enter a nonsuit, or have a new trial, on the grounds stated. A rule nisi was granted.

Serjeant Wilde for the plaintiff, showing cause against the rule.—The authorities which have been cited on the subject of the grant of a prerogative right by the Crown are not disputed, but the grant on which the plaintiff relies is not a grant from the Crown. It is a grant from the Duke of Lancaster; and by charter of 1461 it is enacted that the duchy of Lancaster shall be held by the king separate and perpetually as an inheritance distinct from the Crown, as largely as ever it had been held by the Duke of Lancaster. This was enacted to secure the king in those unsettled times an honourable retreat in case of his being deprived of the Crown: 4 Co. Inst. c. 36, p. 205. Grants of duchy lands are made not under the great seal, but under the duchy seal, and are subject to the same incidents as a grant by a private person. Although Sutton is not mentioned in the grant, it is clear that it is part of the manor of Greetham, and the intention to pass all that belonged to the duchy in that manor is abundantly manifest. That the right to wreck was in the duke, at least in reversion, appears from the lease of it to

Livingstone. The general words in the grant are as comprehensive as it is possible to employ.

Serjeant Adams for the defendants, in support of the rule.—Although the duchy of Lancaster is holden separately from the Crown, a grant of duchy property is subject to all the incidents of a grant of Crown property: *R.* v. *Archbishop of York and Buck* (1); PLOWDEN'S COMMENTARIES, at p. 217 [*Duchy of Lancaster Case* (2)]; 4 Co. INST. 209. Not only is it clear that in a grant by the Crown wreck will not pass under general words, but it is equally clear that an immediate grant by the Crown in fee or tail of property in the possession of a person other than the grantee under an unexpired lease from the Crown, not recited in the grant, is void: *Alton Woods' Case* (3); *Earl of Rutland's Case* (4), COMYNS' DIGEST, tit. Grant, 9, 10; ROLLE'S ABRIDGMENT, tit. Prerogative, 9. Even if Sutton were within the grant of 1631 and wreck would pass under the general words of that grant, yet the grant was void, for it is a grant to Harbord and others in fee with immediate possession, although the right to wreck was in the possession of Livingstone under an unexpired term of years which is not recited in the grant.

Feb. 6, 1829. **BEST, C.J.,** delivered the following judgment of the court.—The points which were reserved at the trial were, first, whether, under the deed of 1631 (supposing Sutton to be within the manor of Greetham), wreck is conveyed to the person to whom that grant was made, and through that person to the plaintiff, and, secondly, supposing wreck not to be conveyed, whether the parol evidence is sufficient to support a prescriptive claim.

I will shortly dispose of the second question. The parol evidence cannot support a prescriptive right to wreck because it appears clearly from the information in the Duchy Court that all this property was in the Crown as late as in the reign of Charles I. If it was in the Crown as late as the time of Charles I, the plaintiff could not have evidence whence a jury might infer that it was in those whose estates the plaintiff holds from time of memory. It seems to me, therefore, to be impossible (strong as the evidence may be) that the plaintiff can make out a title to wreck by prescription.

That brings me to the other question, whether or not the deed of 1631 conveys wreck. The two points have been made on that deed—first, that wreck will not pass under general words; and secondly, that the grant is void as granting in possession that of which the Crown had only the reversion. There can be no doubt that Sutton was a place the wreck in which was leased by indenture in 1616 to Livingstone. That indenture is a lease from the king, and it is material to attend to the circumstance that every lease from the king must be enrolled. This has on its title, "from the 9th to 13th James I, folio 140." It is made between King James of the one part, and John Livingstone, one of the grooms of the chamber of the king, of the other part. It grants wreck, and also all and singular the profits and commodities happening and arising within the whole honour of Bolingbroke (it is taken that Greetham is a part of the honour of Bolingbroke) parcel of the duchy of Lancaster, in the county of Lincoln, to Livingstone, for thirty-one years. In the decree in the Duchy Court of Lancaster, this lease to Livingstone is recited as an existing lease. At the time the decree in the Duchy Court of Lancaster was pronounced, the grant of 1631 had been executed. The lease, therefore, was an existing lease at the time of the grant.

This brings us to the question whether, as the king had granted a lease of this property and had not recited that lease in the grant of the fee in perpetuity, the latter grant was not, by the common law of England, altogether void? We are of opinion that it was altogether void. We take it to be a principle of the common law of this country that, if the king makes a grant which cannot take effect in the manner in which it ought to take effect according to its terms, we must conclude that the king has been deceived in that grant, and, therefore, that the grant is void. The grant, indeed, does not contain the word Sutton, but I am taking it now that

Sutton is a part of Greetham, and the conveyance applies to Greetham in all its parts. If Sutton be not part of Greetham, the plaintiff is a perfect stranger, and cannot have the least pretence to maintain this action. Assuming, however, that Sutton is within Greetham, in our opinion, it is not well conveyed because, having been before granted by lease, and that lease not being recited, the king has proposed a grant which he cannot carry into effect. Having already leased the right of possession, he proposes, by this grant, to convey the same right of possession to another person. It would be inconsistent with the king's honour (and, as it is stated in a case to which I shall presently refer, the common law has no object that is dearer to it than to preserve that honour), it would be inconsistent with the king's honour that he should grant the right of possession in the same thing to two. Therefore, the latter grant is altogether void. If the king is deceived in his grant, it is perfectly clear the grant is void. It cannot be supposed, unless he is deceived in his grant, that he would grant to A. that which he has already granted to B. That would be giving occasion to litigation, which it is always the object of the king to prevent.

I must, however, guard the observation I am now making. The attention of the court has been called to the circumstance of this being a lease from the king, which must be enrolled, and the doctrine which I am now laying down is applicable only to grants so enrolled because, if an individual grants a lease and the estate of which that individual grants a lease afterwards comes to the king, if the king re-grants that, as the subject could not know with certainty that there was a previously existing lease, the position I have been laying down would not apply. The doctrine that I am delivering is applicable to a case where the subject cannot be deceived and he must be deceiving the king, for, if the king's prior lease be enrolled, the subject has the means of knowing the existence of that lease, and it is his duty to inform the king of its existence. The lease, granted by James I was a lease enrolled, and the persons under whom the plaintiff claims, when they accepted the grant of 1631 had the means of knowing of the existence of the lease.

In *Earl of Rutland's Case* (4) it was decided that where one is an officer for life, if the king, without reciting that such a one was an officer for life, grants the office to another for life, the second grant is void for want of such recital, but no book says that, if the king recites the first grant and also recites that the officer is alive, his last grant shall be void for want of certainty. It will be seen that the present case turns on precisely the same principle. If the king grants an office for life and grants the same office to another, it might be argued that the two estates might co-exist, because the second grant might give an interest after the first life is determined. But still, it is void altogether. Why? Because it professes to give an immediate interest and that immediate interest the king cannot give because the office is full, and there is a possibility that the king has been deceived. But if there had been a recital of the former grant and also a statement of the fact that the former grantee was still alive, it is then clear that the king could not have been deceived and the grant will have the effect of giving to the person in whose favour it is made, the estate, the office, after the life of the first grantee. Applying that principle to the present case, if the king had recited this lease, although he had granted the fee-simple during the existence of that lease, it would have been clear from the recital that he knew of the lease, but he does not recite the lease, and, therefore, it must be taken, when he makes another grant which cannot be immediately carried into effect, although according to its terms it is immediately to be carried into effect, that the king is deceived, and that therefore the second grant is void.

The next case, *Alton Woods' Case* (3), is entitled to the greatest consideration, because it came on, on a writ of error, before eight judges, that is, all the judges of England except the barons of the Exchequer. The opinion of the judges has also the confirmation of SIR THOMAS EGERTON, Lord Keeper, afterwards LORD ELLESMERE. The judges in that case say that when the king makes a lease for life or years,

A and afterwards, without reciting this lease, grants the land in fee or in tail, although the king is stated to make this grant ex certa scientia et mero motu, the said grant, without recital, is void by reason of the common law, because the king is deceived in his grant when he intends to grant that in possession which cannot take immediate effect which the king doth propose and intend. Afterwards LORD KEEPER EGERTON says: "The opinions of the judges are perfectly satisfactory B to me." The Lord Treasurer expressed the same opinion, and the Lord Keeper says, that the king ought to be informed of his own estate, whether it be in possession or reversion. So the Lord Keeper distinctly states the principle on which we are now putting this case: "You, the subject, who knew of the lease, ought to inform the king of the lease, and then you will see whether he will make a grant which he cannot completely carry into effect during the existence of that lease."

C In COMYNS' DIGEST, tit. Grant (G.) 10, and in ROLLE'S ABRIDGMENT, tit. Prerogative of the King, 9, a great number of cases, which it would be a waste of time to state to the court, are collected, in which the distinction is taken which I have before mentioned—that if a lease from the king be enrolled, a subsequent grant of the same estate, not reciting the lease, is void. So that the doctrine of these two cases, which has been confirmed by several others, has become the settled law of the land, and D has been adopted into the most respectable text-books.

It has been argued that these lands belonged to the Duke of Lancaster, and that the statute of Henry IV separates the lands of the Duke of Lancaster from the lands of the king. That is perfectly true, but, although the lands are separate, by whom are they held? Are they held by a mere Duke of Lancaster? Or, when E the king, as Duke of Lancaster, is the identical person, are they held by the king? Does the king descend from his high estate to hold lands in any part of the kingdom upon different terms from those on which he holds all his estates? It would be inconsistent with the dignity of the king that he should do so, and, therefore, it has been decided that, although he holds lands as Duke of Lancaster, he holds them as king also, and that all the prerogative and privileges of the king F belong to him with reference to those lands, the same as they do with reference to lands which belong to him immediately in right of his Crown.

In *R.* v. *Archbishop of York and Buck* (1), the question was whether a double and treble usurpation of an advowson put Queen Elizabeth out of possession of an advowson which she had in the right of the duchy of Lancaster. It was adjudged that it did not. What is the reason given for it?—"for she had her G privilege in this as if it had been in her in right of the Crown." Here is an express opinion of the whole court that the king or queen has the same privilege with respect to the duchy lands that they have with respect to lands which belong to the Crown.

In 1 PLOWDEN'S COMMENTARIES, 212, which is called the great case of the duchy of Lancaster [*Duchy of Lancaster Case* (2)], in which a question was referred to H all the judges to give their opinion with respect to certain leases that had been granted by King Edward VI, during his minority, the judges used these words (1 Plowd. at p. 217):

> "and so it seemed to them that the intent of Henry IV and the charter and Act of Parliament were only to separate the lands, etc., of the duchy of Lancaster from the hereditaments of the Crown in order that they might remain I in the person of the king so long as God granted that the Crown and the duchy do continue together in the blood of the Duke of Lancaster and the mother of Henry IV, and if the Crown should be taken from the blood of the duke, that the duchy should remain his, and thus the charter and Act are satisfied without derogation to the person of the king, or the destruction of the dignity or pre-eminence which the law attributes to the king."

Nothing can be more express than this. The king has separate estates—estate A. belonging to his Crown estate, and B. belonging to his duchy of Lancaster.

Although he holds A. as belonging to his duchy, he holds it also as king, and he has the same privileges and immunities as he has with respect to his other property, and so the judges determined in that case. Although Edward VI had granted a lease of the estate before he was twenty-one, that lease, which would have been bad in case he had been mere Duke of Lancaster, yet, as he was also king of England at the same time, was good.

SIR EDWARD COKE puts this very strongly in 4 Co. INST. 209:

"All this appeareth by that great and grave resolution of the case of the duchy of Lancaster, reported by MR. PLOWDEN, that no statute now in force doth separate the duchy from the person of the king, nor to have the person of the king separate from the duchy, nor to make the king Duke of Lancaster, having regard to the possessions of the duchy, nor to alter the quality of the person of King Henry VII, but only that the king should have to him and his heirs the said duchy separate from his other possessions. In which case the duchy at least was joined to the person of Henry VII and to his heirs, and the person of the king remains as it did before;—for nothing is said to the quality of the person of the king, nor to the alteration of his name, and the person of the king shall not be enfeebled because the duchy is given to the king and his heirs, but remains always of full age as well as to gifts as grants by him made as to administration of justice; whereupon it was resolved, that leases made by Edward VI being within age, of lands, either within the county of Lancaster, or without, parcel of the duchy (the royall and politick capacity of the king being not altered), were not voidable by his not being of age: a just resolution, as tending to the safety and quiet of purchasers and farmers, and proveth directly that the royal and politic capacity of the king being not altered (as to these possessions), the letters-patent of the king of these possessions under the duchy seal are of record: and we find no opinion in our books, or any thing in any record, that we remember, against this."

This is abundantly satisfactory, and sufficient to show that there is no distinction between the privileges of the king as Duke of Lancaster, and the prerogatives of the king as King of England. If it be so, then reverting to what I have already stated that by the prerogative of the king, if the king is deceived in his grant, the grant is altogether void, it appearing by decided cases that it must be taken that the king is deceived in his grant when he grants that which he cannot give according to the terms of his grant; and, it appearing also that at the time the grant of 1631 was executed, the property granted was already in the possession of LIVINGSTONE, under a lease for years and that that lease had several years to run the grant of 1631 is altogether void. For these reasons we are of opinion a nonsuit should be entered.

Rule absolute.

LYME REGIS CORPORATION *v.* HENLEY

[HOUSE OF LORDS (Lord Brougham, L.C., and Lord Wynford), May 21, June 25, 1834]

[Reported 2 Cl. & Fin. 331; 1 Bing. N.C. 222; 8 Bli. N.S. 690; 1 Scott, 29; 6 E.R. 1180]

Corporation—Liability to repair property—Duty imposed by charter—Corporation bound by acceptance of charter—Failure to perform duty—Matter of general and public concern—Competency of indictment against corporation—Action by person peculiarly injured.

Sea—Encroachment on land—Duty of corporation to maintain protection—Duty imposed by charter—Failure to perform duty—Competency of indictment against corporation—Action by person peculiarly injured.

Where, on its true construction, the charter of a corporation is found to create a duty on the part of the corporation to repair certain property and the corporation have accepted the charter and enjoyed the benefits of it, they are as strongly bound to perform the duty as if they had expressly covenanted to perform it by an indenture. Where the matter is of general and public concern, e.g., the protection of the lands and buildings of the inhabitants from the inroads of the sea, an indictment will lie against the corporation for non-performance of the duty to repair. And where an individual suffers peculiar damage an action will lie at his suit against the corporation.

Notes. Applied: *Nicholl* v. *Allen* (1862), 1 B. & S. 934. Considered: *Young* v. *Davis* (1862), 7 H. & N. 760. Applied: *Esher and The Dittons U.D.C.* v. *Marks* (1902), 71 L.J.K.B. 309. Referred to: *R.* v. *Beeby* (1839), 3 J.P. 241; *McKinnon* v. *Penson* (1853), 8 Exch. 319; *Parsons* v. *St. Matthews, Bethnal Green Vestry* (1867), 37 L.J.C.P. 62; *Winch* v. *Thames Conservators* (1872), L.R. 7 C.P. 458; *Hudson* v. *Tabor*, [1874–80] All E.R. Rep. 897; *A.-G.* v. *Tomline* (1879), 12 Ch.D. 214; *Bathurst Borough* v. *Macpherson*, [1874–80] All E.R. Rep. 703; *Simpson* v. *A.-G.*, [1904] A.C. 476; *Blundy, Clark & Co.* v. *London and North Eastern Rail. Co.*, [1931] All E.R. Rep. 160.

As to the creation of corporations by charter and liability thereunder, see 9 HALSBURY'S LAWS (3rd Edn.) 21–28, and as to coast protection see ibid., vol. 39, pp. 572 et seq. For cases see 13 DIGEST (Repl.) 202 et seq.; 44 DIGEST 81–83.

Cases referred to:

(1) *Brett* v. *Cumberland* (1619), Cro. Jac. 521; Bulst. 164; 1 Roll. Rep. 359; 79 E.R. 446; 11 Digest (Repl.) 663, *886*.

(2) *Lynn Corpn.* v. *Turner* (1774), 1 Cowp. 86; 98 E.R. 980; 44 Digest 84, *654*.

(3) *Churchman* v. *Tunstal* (1659), Hard. 162; 145 E.R. 432, Exch.; 24 Digest (Repl.) 1150, *116*.

(4) *Payne* v. *Partridge* (1690), 1 Salk. 12; 1 Show. 255; 91 E.R. 12; sub nom. *Paine* v. *Partrich*, Carth. 191; Comb. 180; Holt, K.B. 6; 3 Mod. Rep. 289; 1 Show. 243; 24 Digest (Repl.) 1148, *92*.

(5) *Earl of Lonsdale* v. *Nelson* (1823), 2 B. & C. 302; 3 Dow. & Ry. K.B. 556; 2 L.J.O.S.K.B. 28; 107 E.R. 396; 44 Digest 96, *771*.

Also referred to in argument:

R. v. *Kerrison* (1815), 3 M. & S. 526; 105 E.R. 708; previous proceedings (1813), 1 M. & S. 435; 26 Digest (Repl.) 646, *2921*.

R. v. *Kent (Inhabitants)* (1811), 13 East, 220; 104 E.R. 354; 38 Digest (Repl.) 442, *944*.

R. v. *Lindsey (Inhabitants)* (1811), 14 East, 317; 104 E.R. 623; 26 Digest (Repl.) 646, *2920*.

R. v. *Staughton* (1670), 2 Wm. Saund. 157; 85 E.R. 896; sub nom. *R.* v. *Staughton*, 2 Keb. 665; 1 Sid. 464; 26 Digest (Repl.) 416, *1240*.

R. v. *Liverpool Corpn.* (1802), 3 East, 86; 102 E.R. 529; 26 Digest (Repl.) 398, *1041*.

R. v. *Duchess of Buckingh* (1704), 1 Salk. 358; 6 Mod. Rep. 150; 91 E.R. 312; sub nom. *R.* v. *Bucknall*, 2 Ld. Raym. 804; Holt, K.B. 128; 7 Mod. Rep. 98; 26 Digest (Repl.) 402, *1089*.

Popham v. *Prior of Bremour* (1410), Y.B. 11 Hen. 4, fo. 82, pl. 28.

Keighley's Case (1609), 10 Co. Rep. 139 a; 77 E.R. 1136; 44 Digest 82, *635*.

Russell v. *Men of Devon* (1788), 2 Term Rep. 667; 100 E.R. 359; 26 Digest (Repl.) 654, *2993*.

Harris v. *Baker* (1815), 4 M. & S. 27; 105 E.R. 745; 26 Digest (Repl.) 456, *1513*.

R. v. *Westwood* (1825), 4 B. & C. 781; affirmed sub nom. *Lovell* v. *Westwood* (1830), 2 Dow. & Cl. 21; 6 E.R. 637; sub nom. *R.* v. *Westwood*, 4 Bli. N.S. 213; 7 Bing. 1, H.L.; 11 Digest (Repl.) 663, *885*.

Herbert v. *Pagett* (1662), 1 Lev. 64; sub nom. *Herbert* v. *Paget*, 1 Keb. 288; 1 Sid. 77; 83 E.R. 95; 38 Digest (Repl.) 63, *379*.

Lane v. *Cotton* (1701), 12 Mod. Rep. 472, 488; 1 Com. 100; 1 Ld. Raym. 646; Carth. 487; Holt, K.B. 582; 1 Salk. 17; 88 E.R. 1458; 1 Digest (Repl.) 784, *3132*.

Pelts v. *Kendal* (1827), 6 B. & C. 703; 5 L.J.O.S.K.B. 282; 108 E.R. 610; 16 Digest (Repl.) 396, *1908*.

Earl of Devonshire v. *Gibbons* (1660), Hard. 169.

Appeal by Lyme Regis Corporation from a decision of the Court of King's Bench in an action brought against the corporation by the respondent, Henry Hoste Henley, for damage sustained by him through the neglect of the corporation to repair, according to their charter, certain banks, buildings, seashores, and other mounds which, he alleged, protected his property from the sea.

The King granted by letters patent to the mayor and burgesses of Lyme Regis, the borough and also the pier-quay or cob, with all liberties and profits belonging to the same, and remitted part of their ancient rent payable to the King, and he willed that the mayor and burgesses and their successors, all and singular the buildings, banks, seashore, mounds and ditches, within the borough, or thereto belonging, or situate between the same and the sea, and also the said pier, etc., at their own costs and charges thenceforth for ever should repair, maintain and support. This the respondent, plaintiff in the action, alleged that the corporation had failed to do, with the result that

> "the sea, and the waves and waters thereof, ran and flowed with great force and violence in, upon, under, over and against several messuages, buildings and closes of the plaintiff, and thereby greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled and destroyed the said several messuages and buildings, and the materials of the same, together with divers cart-loads of earth and soil, and divers acres of the said several closes, were washed and carried away, by means of which the plaintiff not only lost and was deprived of the use, benefit and enjoyment of his said messuages, buildings and closes above mentioned, but was also thereby greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said several messuages, buildings and closes in this count secondly above mentioned."

The cause came on to be tried before LITTLEDALE, J., at the Spring Assizes for the county of Dorset, in 1828, when the jury found a verdict for the respondent on the first count, with £100 damages, and were discharged from giving any verdict upon the other counts. In the following Easter Term a motion in arrest of judgment was made in the Court of Common Pleas (5 Bing. 91), but judgment was given for the respondent. The corporation thereupon brought a writ of error in the Court of King's Bench where the judgment of the Court of Common Pleas was affirmed

(3 B. & Ad. 77). From that decision the corporation appealed to the House of Lords. The following judges of the common law courts, besides LORD DENMAN, attended in the House when the case was argued, viz.,: TINDAL, C.J.; PARK, J., BAYLEY, B.; and BOSANQUET, J., GAZELEE, J., and TAUNTON, J.; PARKE, B.; PATTESON, J.; and ALDERSON, B., VAUGHAN, B., and GURNEY, B.

Serjeant Merewether and *Erle* for the corporation.
Follett for the respondent.

LORD BROUGHAM, L.C., suggested a question (infra) for the learned judges, and the further consideration of the case was adjourned.

June 25, 1834. **PARK, J.,** delivered the following opinion of the judges.– The question proposed by your Lordships for the opinion of the judges is as follows:

"The declaration in an action on the case against the corporation states that before the committing of the grievances by the said defendants the King, by his letters patent duly sealed, did give, grant and confirm to the corporation and their successors the borough or town of Lyme Regis; also all that the building called the pier-quay or cob of Lyme Regis, with the liberties, franchises, privileges and immunities to the same town, pier-quay or cob, in anywise belonging, to the only proper use and behoof of the corporation, in fee farm for ever, yielding of fee farm to the King as in the letters patent mentioned; and that the King thereby released to the corporation part of an ancient farm of a sum of money due from them annually, willing that the corporation should be thereof acquitted, and that the corporation and their successors, all and singular of the buildings, banks, seashores, and all other mounds and ditches within the said borough or to the said borough in anywise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pier-quay or the cob, at their own proper costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain and support as often as it should be necessary or expedient. That the King also by the same charter granted fines and amercements before the clerk of the market without account, and a licence to dig stones within the borough and parish of the town, out of the sea and on the seashore, for the reparation and amendment of the port and the said pier-quay or cob and other necessary reparations and common works of the same town and borough and belonging and appertaining to the buildings aforesaid."

The declaration then avers that the charter was duly accepted and from thence hath been and still is a governing charter of the borough, and that the corporation from the time of that acceptance hitherto have had, held, received and enjoyed all the benefits, profits and advantages granted to them by the said letters patent.

It then proceeds to state that the plaintiff was, at the time of the committing of the grievances, lawfully possessed of a messuage and land in the county aforesaid, to wit, in the said borough, which were before and at those times abutting on or near the seashore. That a building, bank and seashore within the borough, a building, bank or seashore belonging and appertaining to the borough, and a building, bank or seashore situate between the said borough and sea, all which were there at the time of the sealing and acceptance of the letters patent, and at the time of the committing of the grievances, and at the last-mentioned time, were near to, and constituted and formed and were a protection and safeguard, and still of right ought to be so, to the plaintiff's messuage and land aforesaid, and then hindered the sea from flowing upon and over that messuage and land, which buildings, bank, seashores and mounds the defendants were at those times, by virtue of the said letters patent and acceptance, liable to repair at their own proper costs and charges as often as it might be necessary and expedient to do so. A breach is then assigned that the corporation wrongfully permitted the said buildings, banks, seashores and mounds to be out of repair, for want of due, proper and necessary repairing of the

same, by means of which the plaintiff's house and land was inundated and injured.

After a verdict upon a plea of not guilty, is this declaration good, and does it disclose a sufficient cause of action by the plaintiff against the corporation? In order to make this declaration good it must appear, first, that the corporation are under a legal obligation to repair the place in question; secondly, that such obligation is matter of so general and public concern that an indictment would lie against the corporation for non-repair; thirdly, that the place in question is out of repair; and lastly, that the plaintiff has sustained some peculiar damage beyond the rest of the King's subjects by such want of repair. The third and last requisites are admitted to be averred in this declaration, and with sufficient words, at least after verdict. The doubt in the case arises upon the first and second requisites. With regard to the first it is argued that the corporation have not by the acceptance of the charter stated in the declaration incurred any legal obligation whatever as to the repair of the place in question, and that the charter does not contain a grant on condition that the corporation shall repair, but merely an expression of the King's will that they shall repair.

Looking at the words of the charter, as stated in this declaration, we are of opinion that it does cast upon the corporation an obligation to repair, which they, by accepting the charter, have adopted. The King grants and confirms to the corporation the town or borough and pier, with the liberties, franchises and privileges, and immunities to the same belonging, in fee farm for ever, yielding of fee farm to the King as therein mentioned, and the King remits part of an ancient rent, willing that the corporation should be thereof acquitted. Then the charter goes on in these words:

> "and that the corporation and their successors, all and singular of the buildings, banks, seashores, and all other mounds and ditches within the said borough or to the said borough in anywise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pier-quay or the cob, at their own proper costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain and support as often as it should be necessary or expedient."

These words are undoubtedly an expression of the King's will that the corporation should repair, but they are not the less a condition on that account. On the contrary, they show the consideration for the grant, the motive inducing the King to make the grant, and, consequently, the terms and conditions on which the grant was to be accepted. What effect such words might have in a grant from one subject to another it is not necessary to determine. Such a grant between subjects is a matter of contract and bargain, strictly so speaking, but a grant from the King to a subject is a matter of favour, and the language used will be found to vary accordingly.

Independently of authorities we should have come to this conclusion, but *Brett* v. *Cumberland* (1) seems to us to be decisive of the question. That was an action of covenant by the assignee of King James I against the executors of the lessee of a mill under letters patent of Queen Elizabeth, sealed with her seal only, and containing these words:

> "Et prædictus Willielmus, executores et assignati sui, prædictum molendinum et domus et ædificia inde sufficienter reparabunt."

The first question was whether these words in the letters patent to which the Queen's seal only was affixed should enure as a covenant to bind the lessee and his assigns, and it was resolved

> "that it should, for the lessee takes thereby, because it is a matter of record although in show they be the words of the lessor only, yet he accepting thereof and enjoying it, it is as well his covenant in fact and shall bind him as strongly as if it had been a covenant by indenture."

So, in the charter in question the words are in show the words of the King only, but, the corporation having accepted the charter and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture.

The second requisite is, in truth, that upon which this case wholly turns, viz., that the obligation must be matter of so general and public concern that an indictment will lie for the breach of it. This depends principally upon the construction which ought to be put upon the words of the charter. They are undoubtedly of a very general nature: "all and singular of the buildings, banks, seashores, and all other mounds and ditches within the said borough or to the said borough in anywise belonging or appertaining, or situate between the said borough and the sea." It is asked, do these words embrace every little ditch or bank within the limits of the borough, whether public or private, and, if not, where is the limit? The answer is that they embrace only such buildings, banks, seashores, mounds and ditches within or belonging to the borough, or situate between the borough and the sea, as form part of the defences and safeguards of the borough against the encroachments of the sea. This may be gathered from the context, from the word "seashores," from the expression "situate between the borough and the sea," and from the obvious intention and scope of the charter as stated in the declaration. It seems to us that such construction and limitation of the words is necessary in order to give this part of the charter any meaning, and that no violence is done either to the grammatical or reasonable sense of the words by such construction.

If so, the next question which arises is whether the keeping up the sea defences of a town or borough is a matter of general and public concern. It is said that the repair of a highway or a bridge is matter of public concern, because all the King's subjects may have occasion to use it. Why may not all the King's subjects have occasion to reside in, or to pass through, the borough of Lyme? It may be difficult to define precisely over what quantity of land, or to how large a district, any benefit must be extended in order to render such benefit a matter of general and public concern, but surely no danger or inconvenience can arise from holding that it is sufficient if such benefit extended to a whole town or borough.

HIS LORDSHIP dealt with a question arising under the old rules of pleading, and continued: It is further urged, that whatever engagement the corporation may be under as between them and the Crown so as to render them liable either to forfeiture of their charter or any other proceeding by the Crown, yet that no stranger can take advantage of such engagement and maintain an action. It is admitted that, if their liability arose by prescription, they would be indictable, and also an action would lie for special damage, as in *Lynn* v. *Turner* (2), *Churchman* v. *Tunstal* (3), *Paine* v. *Partridge* (4), and many other authorities, which it is unnecessary to cite, because it is clear and undoubted law that wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage. We are unable to see any sound distinction between a liability by prescription and a liability arising within time of memory, but legally created. We do not say that prescription necessarily implies a charter or grant, but it necessarily implies some legal origin, and charter would be a legal origin. Suppose that a prescriptive obligation were alleged and that a charter granted before time of memory were produced, and so the legal origin were shown, would that destroy the prescription? Certainly not. Would the obligation arising from that charter have been less binding within a few years after it was granted than it is now, after a great lapse of time? Certainly not. If, then, the origin be legal, how can it be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between A. and B., nor even of a charter granted by the King, where no matter of general and public concern is involved, but where that is the case, and the King, for the benefit of the public, has made a certain grant imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured,

by action. If it were otherwise, many inconveniences would follow, and among them in the case in question, is this—that, as the duty and the right to repair the sea defences of the town and borough are cast upon the corporation, no other person would be justified in interfering and doing repairs, however necessary, or, at all events, not until the corporation had been called upon, and neglected to do them: *Earl of Lonsdale* v. *Nelson* (5); and it is doubtful whether he would be justified even then, the proper remedy being, as there stated, by indictment or action, for nuisances of commission cannot in general be abated.

Two of the judges have entertained considerable doubts whether the declaration contains sufficient words in this case to show that the mounds or banks were of such public benefit as that an indictment would lie for not repairing them, but, agreeing in the general view of the law, they, as well as the rest of the judges who heard the argument, are of opinion that the question proposed by your Lordships must be answered in the affirmative.

LORD BROUGHAM, L.C., said, after the unanimous judgment of the Court of Common Pleas, and the concurring judgment of three of the judges in the Court of King's Bench upon the writ of error brought there, the fourth judge giving no opinion, it was matter of satisfaction to him that all the judges now agreed in the opinion which their Lordships heard now delivered. Two of the learned judges entertained some doubt upon the pleadings, in respect to a point which did not affect the main question. He should move that the judgment of the court below be affirmed, but although the two courts below concurred in the judgment, yet it was not a case in which costs ought to be charged against the plaintiffs in error, as there was some doubt, and the question was one of difficulty.

LORD WYNFORD concurred.

Appeal dismissed.

WILSON AND OTHERS *v.* MOORE AND OTHERS

[ROLLS COURT (Sir John Leach, M.R.), December 17, 18, 1832, February 12, 1833]

[LORD CHANCELLOR'S COURT (Lord Brougham, L.C.), March 11, 12, 14, 15, 22, 1834]

[Reported 1 My. & K. 126, 337; 39 E.R. 629, 709]

Trustee—Breach of trust—Liability—Stranger aiding commission of breach—Liability of stranger.

A person who knowingly aids in the commission of a breach of trust by trustees by receiving from the trustees trust property and dealing with it—e.g., by selling it and paying the proceeds to the trustees for their own private purposes—in a manner inconsistent with the provisions of the trust himself becomes liable as for a breach of trust, and proceedings can be taken against him by the cestuis que trust.

Trustee—Breach of trust—Liability—Equal liability of all parties to breach.

Per SIR JOHN LEACH, M.R.: All parties to a breach of trust are equally liable. There is between them no primary liability.

Notes. Applied: *Collinson* v. *Lister*, [1843-60] All E.R. Rep. 1053; *Gray* v. *Lewis* (1869), L.R. 8 Eq. 526; *Piercy* v. *Fynney* (1871), L.R. 12 Eq. 69. Considered: *Child* v. *Thorley* (1880), 16 Ch.D. 151. Applied: *Forton* v. *Manchester and Liverpool District Banking Co.* (1881), 44 L.T. 406; *Cowper* v. *Stoneham* (1893), 68 L.T. 18. Referred to: *Fairlie* v. *Hartwell* (1839), 3 Jur. 791; *Fyler* v. *Fyler* (1841), 3 Beav. 550; *Pannell* v. *Hurley* (1845), 2 Coll. 241; *Bank of Bengal* v. *Fagan* (1849), 5 Moo. Ind. App. 27; *Rolfe* v. *Gregory* (1863), 9 L.T. 250; *Piercy* v. *Fynney* (1871), L.R. 12 Eq. 69; *Macbryde* v. *Eykyn* (1871), 24 L.T. 461; *Blyth* v. *Fladgate*; *Morgan* v. *Blyth*, *Smith* v. *Blyth*, [1891] 1 Ch. 337; *Soar* v. *Ashwell*, [1891 4] All E.R. 991; *Mara* v. *Browne* (1895), 73 L.T. 638.

As to liabilities of strangers for breaches of trust, see 38 HALSBURY'S LAWS (3rd Edn.) 1037–1044; and for cases see 43 DIGEST 961 et seq.

Cases referred to:

(1) *Nugent* v. *Gifford* (1738), West temp. Hard. 491; 1 Atk. 463; 26 E.R. 294, L.C.; 24 Digest (Repl.) 622, *6176.*

(2) *Mead* v. *Lord Orrery* (1745), 3 Atk. 235; 26 E.R. 937, L.C.; 24 Digest (Repl.) 623, *6179.*

(3) *Farr* v. *Newman* (1792), 4 Term Rep. 621; 100 E.R. 1209; 21 Digest (Repl.) 589, *785.*

(4) *Bonney* v. *Ridgard* (1784), 1 Cox, Eq. Cas. 145; 29 E.R. 1101; 24 Digest (Repl.) 629, *6233.*

(5) *Scott* v. *Tyler* (1788), 2 Bro. C.C. 431; 2 Dick. 712; 29 E.R. 241, L.C.; 24 Digest (Repl.) 619, *6157.*

(6) *Crane* v. *Drake* (1708), 2 Vern. 616; 1 Eq. Cas. Abr. 240; 23 E.R. 1004, L.C.; 24 Digest (Repl.) 627, *6218.*

(7) *McLeod* v. *Drummond* (1810), 17 Ves. 152; 34 E.R. 59, L.C.; 24 Digest (Repl.) 624, *6195.*

(8) *Hill* v. *Simpson* (1802), 7 Ves. 152; 32 E.R. 63; 24 Digest (Repl.) 623, *6181.*

(9) *Keane* v. *Roberts* (1819), 4 Madd. 332; 56 E.R. 728; 43 Digest 959, *3992.*

(10) *Paterson* v. *Tash* (1743), 2 Stra. 1178; 93 E.R. 1110; 1 Digest (Repl.) 397, *578.*

(11) *Martini* v. *Coles* (1813), 1 M. & S. 140; 105 E.R. 53; 1 Digest (Repl.) 397, *582.*

(12) *Fielding* v. *Kymer* (1821), 2 Brod. & Bing. 639; 129 E.R. 1112; sub nom. Gill v. Kymer, 5 Moore, C.P. 503; 1 Digest (Repl.) 398, *588.*

(13) *Guerreio* v. *Peile* (1820), 3 B. & Ald. 616; 106 E.R. 786; 1 Digest (Repl.) 440, *993.*

(14) *De Bouchout* v. *Goldsmid* (1800), 5 Ves. 211; 31 E.R. 551; 1 Digest (Repl.) 396, *566.*

(15) *Lawson* v. *Weston* (1801), 4 Esp. 56, N.P.; 6 Digest (Repl.) 397, *2841.*

(16) *Gill* v. *Cubitt* (1824), 3 B. & C. 466; 5 Dow. & Ry. K.B. 324; 3 L.J.O.S.K.B. 48; 107 E.R. 806; 6 Digest (Repl.) 397, *2844.*

(17) *Down* v. *Halling* (1825), 4 B. & C. 330; 6 Dow. & Ry. K.B. 455; 3 L.J.O.S. K.B. 234; 107 E.R. 1082; 6 Digest (Repl.) 397, *2846.*

Also referred to in argument:

Townsend v. *Townsend* (1783), 1 Cox, Eq. Cas. 28; 1 Bro. C.C. 550; 29 E.R. 1047; 32 Digest (Repl.) 543, *1389,*

Morony v. *O'Dea* (1809), 1 Ball. & B. 109; 35 Digest (Repl.) 410, **411.*

Marquis of Cholmondeley v. *Lord Clinton* (1823), Turn. & R. 107, L.C.

Andrew v. *Wrigley* (1792), 4 Bro. C.C. 125; 29 E.R. 812; 24 Digest (Repl.) 619, *6156.*

Humble v. *Bill* (1703), 2 Vern. 444; 1 Eq. Cas. Abr. 358, pl. 4; reversed sub nom. *Savage* v. *Humble*, 3 Bro. Parl. Cas. 5; 1 E.R. 1140; H.L.; 24 Digest (Repl.) 623, *6178.*

Ewer v. *Corbet* (1723), 2 P. Wms. 148; 24 E.R. 676; 24 Digest (Repl.) 626, *6207.*

Langley v. *Earl of Oxford* (1743), Amb. 17, L.C.; (1748), Amb. 795; 2 Hov. Supp. 98; 27 E.R. 505, L.C.; 23 Digest (Repl.) 401, *4728.*

Ithell v. *Beane* (1748), 1 Ves. Sen. 215; 27 E.R. 990; sub nom. *Ithell* v. *Bean*, 1 Dick. 132, L.C.; 23 Digest (Repl.) 514, *5782.*

Whale v. *Booth* (1784), 4 Term Rep. 625, n.; 4 Doug. K.B. 36; 100 E.R. 1211; 24 Digest (Repl.) 618, *6139.*

Appeal to the Lord Chancellor by the defendants, Joseph Marryat the younger and the representatives of Joseph Marryat the elder.

A bill was filed by the younger children of the testator, John Crawford, who were pecuniary legatees under his will, which was made in the Scottish form, and

by the husbands of such of them as, being daughters, were married, against the personal representatives of Joseph Marryat the elder, deceased, Joseph Marryat the younger, and the widow and three eldest sons of the testator, who were executrix and executors under his will and resided in Scotland. The bill, which was revived for the purpose of bringing the representative of Samuel Marryat, a deceased executor of Joseph Marryat the elder, before the court, prayed that the defendants, the representatives of Joseph Marryat the elder and the defendant, Joseph Marryat the younger, might replace and make good to the estate of the testator, John Crawford, two principal sums of £19,395 Navy five per cent. annuities and £14,000 Irish five per cent. bank annuities, and the sum of £2,078 10s. 3d. cash, and that the same sums of stock and cash might be applied under the will of the testator in a due course of administration.

The testator, by his will dated April 19, 1811, gave to his wife certain property absolutely and the interest for life in all other his property real and personal, and after her death he directed his real or heritable property to be divided between his sons in manner therein mentioned, gave pecuniary legacies to the plaintiffs, his younger children, made all his sons his residuary legatees, and appointed his wife Jane Tucker Crawford, and his sons James Crawford, Andrew Crawford (who died in 1825 intestate and insolvent), and Joseph Tucker Crawford, his executrix and executors. The testator had for some time carried on the business of a merchant at Port Glasgow and in Newfoundland in partnership with his three sons, James, Andrew, and Joseph, under the firm of John Crawford & Co. On May 16, 1810, the testator retired from the partnership, and the business was carried on by his three sons under the same name. The testator died on Aug. 3, 1813.

Joseph Marryat the elder, who was in partnership with his son Joseph Marryat the younger, had for some years previously to 1813 been the correspondent and agent in London of the firm of John Crawford & Co. He had also during the same period been the agent of the testator in his separate capacity, and had in that character, by virtue of a power of attorney, been in the habit of receiving the dividends on the two sums of stock mentioned in the prayer of the bill which were the separate property of the testator, and in respect of such dividends the firm of Marryat & Son kept a separate account with the testator. The sum of cash mentioned in the prayer was alleged to be the balance of such separate account. On October 22, 1813, James Crawford, the eldest son of the testator, remitted to Joseph Marryat the elder, the testator's will, with a request that he would give the necessary instructions for proving it in the court of the Bishop of London. Mr. Marryat took the necessary steps for procuring probate of the will, which was granted, on Nov. 11, 1813, to James Crawford, Andrew Crawford, and Jane Tucker Crawford, the widow. Joseph, who was at that time abroad did not prove the will. On Jan. 7, 1814, James Crawford remitted to Joseph Marryat the elder two powers of attorney, dated on that day and executed by the widow and the two sons, James and Andrew, which authorised Joseph Marryat the elder not only to receive the dividends, but to sell the sums of stock before mentioned, but in the letter of James Crawford which enclosed the powers of attorney it was stated that they were sent to Mr. Marryat to enable him to receive the dividends which he was requested to place to the credit of the testator's estate with Joseph Marryat & Son.

On Jan. 19, 1814, a meeting of all the members of the family of John Crawford, the testator, interested under his will took place in pursuance of certain directions contained in the will, at which meeting a minute was signed by all the parties present, whereby it appeared that the real property of the testator amounted to £50,712, and the personal property to £40,092, and it was agreed that James Crawford should take the management of the testator's estate, as acting executor. Messrs. Marryat & Son continued, after the death of the testator, to be the correspondents of the testator's sons trading under the firm of John Crawford & Co., and from time to time accepted bills drawn on them in the name of that

firm to be provided for by remittances in the usual course of commercial agency.

On Mar. 21, 1814, Messrs. Marryat received a letter signed by the firm of John Crawford & Co., who had extended their commercial speculations by the establishment of a house at Lisbon, stating that, from the conduct of the Regency of Portugal, they had been deprived of funds which they expected thence, and requesting that they might be permitted to draw upon Messrs. Marryat at three months for £5,000 or £6,000. This permission was given by Messrs. Marryat. On May 4, 1814, Messrs. Marryat sent their account to John Crawford & Co., by which it appeared that the balance then due to them, taking credit for their acceptances, was £3,188 9s. About this time, the firm of John Crawford & Co. applied to Messrs. Marryat to give a credit to their Lisbon house, and, Messrs. Marryat having complied with that request, John Crawford & Co. expressed their obligations for that accommodation by a letter to Messrs. Marryat, dated May 14, 1814.

On May 17, 1814, John Crawford & Co. wrote a letter to Messrs, Marryat giving notice that they had drawn two bills for £2,000 each on Messrs. Marryat, and requesting them to sell £10,000 stock in the Irish or Navy annuities, as they should think best, and to hold the proceeds at their disposal. On May 21, 1814, Messrs. Marryat wrote to John Crawford & Co., stating that they would watch the stock market and would sell the £10,000 at the first favourable opportunity, and adding:

> "With respect to the proceeds, the more regular way would be to credit your father's estate, in the first instance, and afterwards, to transfer to your account, on your forwarding to us an order from the executors to do so."

Messrs. Marryat, accordingly, sold the sum of £10,000 Navy five per cent. annuities for a sum of £9,711 6s., and, on May 28, 1814, James Crawford wrote a letter to Messrs Marryat, signed by him as acting executor for his father, requesting them to transfer the £9,711 6s. to the account of John Crawford & Co.

From this time onwards John Crawford & Co. continued to draw largely on Messrs. Marryat, and the commercial connection between the two firms continued until John Crawford & Co. became bankrupts in February, 1826, when the debt due from them to Messrs. Marryat amounted to upwards of £20,000, after giving them credit for the produce of the Navy and India stock which had then been sold. A sequestration, in the Scottish form, issued against them, and one William Bennett was duly appointed trustee under the sequestration. In that character he acquired the legal interest in the testator's real estates, which, by a decree of the Court of Session in Scotland, affirmed upon appeal by the House of Lords, were adjudged to be sold by Bennett, and were declared to be in the first place applicable to the payment of the unsatisfied debts of the testator which were stated to exceed the value of the estates. The widow of the testator proved under the sequestration as a creditor of John Crawford & Co. for the amount of the stock sold, and received a dividend of 3s. 4d. in the pound.

The cause first came on to be heard before the Master of the Rolls, on Mar. 17, 1829, when an objection was taken that the widow of the testator, who was his sole solvent representative, was not actually before the court, but was merely named as a defendant and stated to be out of the jurisdiction. The Master of the Rolls being of opinion that, if the claim of the plaintiffs succeeded, the amount recovered by them must be applied in a due course of administration, and that the executrix was, therefore, to be considered as an active, and not as a passive party, allowed the cause to stand over, with liberty to amend by adding parties. A bill of revivor and supplement was afterwards filed, the revivor becoming necessary upon the death of Thomas Wilson, the surviving executor of Joseph Marryat the elder, who had died, in order to bring the representatives of the former before the court. The supplemental part of this bill stated the proceedings in Scotland under the sequestration, and in relation to the administration of the assets of the testator

John Crawford, and the proceedings in the House of Lords upon the appeal from the decision of the Court of Session. It charged that Jane Tucker Crawford and Joseph Tucker Crawford were still out of the jurisdiction of the court, and that Jane Tucker Crawford was in collusion with the defendants and refused to institute proceedings against them for the purpose of compelling the replacement of the sums of stock in question. William Bennett, the trustee under the sequestration, was named as a defendant, and stated to be out of the jurisdiction of the court. To this bill James Crawford appeared. Jane Tucker Crawford also appeared, and put in an answer whereby she denied collusion, but admitted that she had not instituted any proceedings against the defendants to compel the re-investment of the sums of stock in question, though she had been requested to do so.

Bickersteth for representatives of surviving executor of Joseph Marryat the elder.
Bickersteth, *Tinney*, *Burge*, *Wray*, and *Jacob* for the defendants.
Lovat for Jane Tucker Crawford.

SIR JOHN LEACH, M.R., delivered the following judgment.—The Statute of Limitations has no application to this case. If Messrs. Marryat are chargeable, it is because, in the consideration of a court of equity, they, by being parties to a breach of trust, have themselves become trustees for the purposes of the testator's will, and it is further to be observed that, if this were a legal demand, the Statute of Limitations could not avail the defendants because the title of the plaintiffs will not accrue in possession until the death of the widow, and their claim is, not for payment, but for security of the fund. All parties to a breach of trust are equally liable. There is between them no primary liability, and, if the widow were a party to the breach of trust, that circumstance will not in any manner protect the defendants from the plaintiffs' demand. The plaintiffs make no charge against the widow, and, as far as appears in this cause, there seems no ground for any charge against her. The sale of the stock might well be required for the payment of the testator's debts. It was a reasonable, not an improvident, act, therefore, on the part of the widow to authorise a sale, and it was clearly her duty to prove the amount of the stock under the sequestration even if she considered that Messrs. Marryat were liable.

The correspondence between Messrs. Crawford & Co. and Messrs. Marryat, referred to as establishing the ignorance of the latter regarding the dissolution of the partnership between the testator and his sons, does not appear to me to warrant that inference, but the fact is not material. Messrs. Marryat well knew that the stock in question belonged to the estate of the testator, and they were parties to the application of the produce of the stock to relieve the embarrassments of the sons in payment of a debt due from the sons to themselves without even a representation from the sons that they had acquired a personal title to the stock and without the least reason to believe that it was required directly or indirectly for the purposes of the testator's will. The circumstance of Messrs. Marryat having had the testator's will remitted to them and of their having been the agents in obtaining the probate of the will makes this case stronger than any similar case which has been reported, but without regard to that circumstance it would be my duty to declare that for the amount of the stock sold, and the cash balance transferred from the credit of the testator's estate to the credit of John Crawford & Co., the defendant Joseph Marryat and the estate of his father are responsible, and the accounts must be taken accordingly.

The sum resulting from the account so taken will be assets of the testator, to be applied in a due course of administration, and for that purpose an account of the testator's debts and personal estate must be taken, and an inquiry must be directed as to the produce of the real estate sold by the defendant Bennett, the trustee under the sequestration, and of the application of that produce. Messrs. Marryat will be entitled to credit for the dividend paid to the widow on the proof made by her under the sequestration, and they will take such measures as they

may be advised with respect to the widow, and as to the interests of the sons composing the firm of John Crawford & Co., under the testator's will: and they must pay to the plaintiffs, and to the widow, the costs of this suit.

The defendants appealed to the Lord Chancellor.

Mar. 11, 12, 14, 15, 1834. *Sir Edward Sugden*, *Sir William Horne*, *Tinney*, *Burge*, *Wray* and *Jacob* for the defendants.

Sir Charles Pepys, *Knight*, and *Stuart* for the plaintiffs.

Lovat for Jane Tucker Crawford.

Mar. 22, 1834. **LORD BROUGHAM, L.C.,** stated the facts and continued: In these circumstances, this suit was commenced by the five younger children of John Crawford, pecuniary legatees under his will as well as sharers in the residue, against the representatives of Joseph Marryat the elder and Joseph Marryat the younger, his partner in the house, to have the proceeds of the stock, sold in the manner which I have described, with the dividends, replaced to the estate of John Crawford, the testator and owner of the stock, and the cash balance of £2,078, due to the estate for dividends received by Joseph Marryat & Son under the power of attorney, paid to the credit of the estate, and that both proceeds and balance might be applied in a due course of administration. To this bill the widow and William Bennett, trustee under the Scottish sequestration, answering to an assignee under a commission, were made nominal parties and stated to be out of the jurisdiction. The Master of the Rolls, however, being of opinion that the former was an active party, she has since been brought before the court by a bill of revivor and supplement, and I think that the evidence of Bennett, being out of the jurisdiction, is sufficient for the purpose for which it is given.

[HIS LORDSHIP disposed of two questions which do not call for report, and continued:] The main part of the case remains to be considered. The case is one of considerable importance, though of no material doubt or difficulty, whether we regard the fact or the law, and, concerning the law, whether we weigh the authorities or look to the general principles which courts of equity apply to cases of this description and upon which courts of law act as far as their forms of proceeding will permit, for to the same common principles of sound morality and of natural justice must the decisions both of courts of law and equity be referred.

The facts of the case are clear, nor is there any dispute whatever upon those parts of the case which are essential to the determination of its merits. Whether John Crawford ceased to be a partner or not during his lifetime, or whether Joseph Marryat & Son were cognizant of any dissolution of partnership, I do not stop to inquire. He may, for anything that concerns the substance of the present case, have died a partner. But this is certain—the stock was his private property; Joseph Marryat & Son had known it to be so all along: they had received the dividends for his private account; and they continued to treat it as part of his separate estate after his decease. They saw his will, of which they obtained probate, and we cannot for a moment suffer it to be said that they were ignorant of its contents. Upon the face of this instrument they saw that a sum of £27,000, besides their eventual share of the residue, was bequeathed to the younger children, who were not executors and had no concern whatever in the house of business. Indeed, the correspondence shows that Mr. Marryat must have known that some of them were infants and three of them daughters. It is also immaterial to inquire what, at the death of the testator, was the state of the account between John Crawford & Co. and Joseph Marryat & Son, for, to make the latter answerable, it is not necessary that the transaction should have assumed the form of a misappropriation with a view to pay a debt antecedently due to them. This is certain, that five months after the testator's death and two after they had proved his will, Messrs. Marryat received a letter from the executors which ought to have put them on their guard, for it sent a power of attorney to sell the stock as well as

receive the dividends, and it desired the latter to be carried to the account of the trading firm in which all the executors save one were partners. A short time afterwards, large drafts were made by the house of John Crawford & Co. upon Messrs. Marryat and honoured by the latter, and about seven months after the will had been proved, and when Messrs. Marryat were in advance above £3,000 and were about increasing that advance to £7,000, they are desired, by three of the executors, in their capacity of co-partners trading with and indebted to Messrs. Marryat, to sell £10,000 of the testator's stock and hold the proceeds at the disposal, not of the executors, but of the trading firm of John Crawford & Co. Were Messrs. Marryat aware of the nature of this transaction? Did they perceive its meaning? Past all doubt they did, because the thing spoke for itself, but they showed how accurately they understood it to be an irregular proceeding by desiring to have the authority of the executors under whose administration they well knew the fund was. The four executors having, by a previous arrangement, empowered one to act for all, and that one, with two of the others, forming the house of trade, the authority required is easily given. Under this authority, repeated as often as the necessities of the partnership required, the stock is sold piece by piece until the whole £33,000 and upwards is converted into money, and the whole is applied to pay the advances from time to time made by Joseph Marryat & Son to John Crawford & Co., who, indeed, afterwards obtained still further credit to about two thirds of the same amount.

Two things here are abundantly evident, and they are sufficient to decide the whole question. First, that the executors were taking a fund which did not belong to them as traders, but was entrusted to them as representing its owner, and were using it for the purposes of their trade, and, next, that Joseph Marryat & Son were fully aware of that fact, and lent themselves, as far as it was possible for them, to the proceedings of the executors, by which they themselves more or less profited. They received commission, of course, and had the other advantages of an agency, in the course of which large sums were received and paid. It is said that they only received the money from the sale of the stock, and paid it over. There can be no doubt, however, that these operations began when they were creditors to the Scottish house to a considerable amount, and that the first sale of stock reimbursed them that advance. It is manifest, then, that a breach of trust was committed by the executors, for what can be a greater than that they should employ the estate committed to their care in the speculations of their own commerce? Nor can there be any doubt that Joseph Marryat & Son were accessories to this breach of trust, for how could they more directly abet it than by making themselves instrumental in its accomplishment and partakers of its advantages? The moral impropriety, indeed, if any, is extremely slight, because they were all along supplying large sums of money, were wholly without suspicion of the Scottish house being in difficulties till the moment of its failure, and were aware of the whole estate of Mr. Crawford being distributable among his widow and children, the male adults of these children and principal legatees among them, being the partners in the firm. But these circumstances make no difference at all in the legal contemplation of the proceedings, nor can I believe that, if it had ever struck Messrs. Marryat & Son in the light in which, wise by the event, they must afterwards have viewed it, they would have hesitated in withholding their consent to and co-operation in a course of dealing which really consisted in repeated misappropriations of a fund belonging to women and infants by embarking it in all the risks of trade.

[His Lordship dealt with certain of the evidence, and continued:] If we look to the authority of adjudged cases, we shall find that those which have been decided in favour of the party receiving from the executor had not certain material circumstances existing in the present case, and that those which have been decided against the party receiving are far less strong against him than this. The cases which have always been considered as going furthest in protecting the party dealing

with an executor, are *Nugent* v. *Gifford* (1) and *Mead* v. *Lord Orrery* (2). It is, however, impossible to read the argument of LORD HARDWICKE in each of these decisions without being satisfied that he considered the knowledge of the executor's misappropriation as not distinctly brought home to the party. That there was notice of the representative character is clear, and that there was notice of the executor dealing with testamentary assets we may also admit, nevertheless, the whole argument appears to assume that the party dealing with the executor might suppose the executor had a right so to dispose of the property. In *Nugent* v. *Gifford* (1) he says (1 Atk. at p. 464):

> "A purchaser from an executor has no power of knowing the debts of the testator."

Again in *Mead* v. *Lord Orrery* (2) (3 Atk. at p. 242):

> "If you can follow the property into the hands of the assignee, this would be saying that no man could have an assignment from executors without coming into the Court of Chancery to have an account how he has distributed the assets of his testator."

But there can be no doubt that subsequent decisions are difficult if not impossible to be reconciled with these two cases. What LORD HARDWICKE lays down in *Nugent* v. *Gifford* (1), would probably not have been so stated if *Farr* v. *Newman* (3) had then been decided. LORD KENYON had at the Rolls, in *Bonney* v. *Ridgard* (4), expressed himself as strongly of opinion that *Mead* v. *Lord Orrery* (2) went too far, and he held that, though a person purchasing from an executor is not bound to see to the application of the money, yet that a purchaser taking with the knowledge that the money was to be misapplied had no protection. LORD THURLOW in *Scott* v. *Tyler* (5), says that *Nugent* v. *Gifford* (1) cannot be reconciled with *Crane* v. *Drake* (6), and LORD THURLOW is known to have formed an opinion clearly against the bankers in *Scott* v. *Tyler* (5), though the matter was compromised.

It is clear from what LORD ELDON says in the elaborate judgment in *M'Leod* v. *Drummond* (7), where he minutely examined all the cases—that he considered *Bonney* v. *Ridgard* (4) to have shaken *Nugent* v. *Gifford* (1) and *Mead* v. *Lord Orrery* (2), in so far as these cases may be supposed to establish any general principle. Although the case itself of *M'Leod* v. *Drummond* (7) was decided on the circumstances, LORD ELDON plainly holds that a purchaser from an executor has no protection if an intended misapplication of the money is evident on the face of the transaction. *Hill* v. *Simpson* (8), in one respect, carried the law somewhat further than before against the purchaser, that is, it gave the relief to general legatees, and so far LORD ELDON, in *M'Leod* v. *Drummond* (7), considered it as a case of the first impression, expressing at the same time, however, his entire concurrence. It falls short of the present case in two material particulars. All knowledge of the property not being absolutely the executor's own was expressly denied by the answer, and the plaintiff gave no evidence to prove such knowledge. The will too, in that case, had not been seen by the defendants, whereas here the circumstance of the will having been proved by the defendants brings home to them a knowledge of its contents. In *Keane* v. *Robarts* (9), the vice-chancellor, the present Master of the Rolls [SIR JOHN LEACH], though, upon the circumstances of the case, he decided in favour of the bankers as not having been privy to the executor's intention of misapplying the fund, yet laid down, and very luminously, the principles upon which cases of this class ought to rest. The following passage conveys at once the opinion of his Honour and of LORD ELDON upon the point and appears to decide the present case in express terms (4 Madd. at pp. 358, 359):

> "I cannot but lean strongly to LORD ELDON's view of *M'Leod* v. *Drummond* (7). If a party dealing with an executor for the personal assets, pays his money to the executor, so that it may be applied to the purposes of the will, he is not

responsible for the executor's misapplication of it; but if, in dealing with the executor, he does in truth pay his money for the private purposes of the executor, he is equally a party to the breach of trust, whether he applies his money to the private debt of the executor, or to the private trade of the executor."

Let us ask where is the mischief of holding parties bound by such obvious rules of common justice and honesty? It is true, that a purchaser must not be held bound at every step of each transaction in business to pause and institute inquiries, to try issues, and to take accounts. But if the proof be thrown on those who would impeach his dealings with the executor, if they be held bound to show that in those dealings he knew the executor was misapplying the trust funds, and that he aided him in the malversation, surely no hardship is inflicted, should he be held answerable for a conduct plainly improper.

The course and progress of the decisions in all the courts of law as well as equity have been to restrict rather than enlarge the facilities of misapplication by persons entrusted with other men's property, and the facility of persons putting it away who have illicitly come into possession of it. Far from this greater strictness being regarded by the judges as interfering with commercial dealings, they have held it wiser to make the rules more rigid which check fraudulent transactions in proportion as the system of traffic has become more extensive, and this, notwithstanding all the difficulty thrown in their way by the nature and incidents of negotiable securities. The progress of the law as to pledges made by factors and as to notes wrongfully come by, while it illustrates what has been stated, lends the strongest confirmation to the principles on which this judgment rests. Nor has anything been urged in respect of consequences ab inconvenienti in the present case that was not again and again pressed upon the courts in those instances, and pressed without effect. Ever since *Paterson* v. *Tash* (10) the law was held to be that a factor could not pledge the goods consigned to him for his own debt, and the judges have frequently expressed some doubts—as LORD ELLENBOROUGH and LE BLANC, J., in *Martini* v. *Coles* (11)—whether it would not have been better had it been otherwise. Yet none have ever hinted the least inclination of opinion, that where the pawnee was cognizant of the factor's misappropriation he could be allowed to take any interest whatever by the transaction. Such knowledge is in all the cases assumed to be out of the question; if it had been proved, no one ever supposed it possible that the party cognizant of the misapplication could be protected. It is sometimes expressly stated, as in *Fielding* v. *Kymer* (12), that where the party is cognizant, all pretence of hardship is at an end. It has further been decided, that a factor cannot barter goods on his principal, any more than he can pledge them, although the party he deals with is ignorant of his being a factor: *Guerriero* v. *Peile* (13). [See now Factors Act, 1889 (1 HALSBURY'S STATUTES (2nd Edn.) 29].

When the courts of law were holding these doctrines, it was to be expected that equity would not be slow to follow in the same course, and, accordingly, *De Bouchout* v. *Goldsmid* (14) was decided on the same principle—a principle not distinguishable from that of the case at Bar. The plaintiffs had given Messrs. Muilman a power of attorney to sell, assign, and transfer to any person certain shares in an insurance company's stock standing in their names. Messrs. Muilman transferred the shares to the defendant as a security for an advance of £5,000, which they required in their trade, and they afterwards became bankrupt. The defendant positively denied all knowledge of the shares not being Messrs. Muilman's property excepting that he was aware of the stock standing in the plaintiffs' names. A good deal appears to have been said of the importance of the question to traders in the city, but the court ordered the stock to be replaced to the plaintiffs with the dividends and costs.

It is well known that the laws of most foreign countries differ from that of

England—at least from what was the law of England—upon this subject. But POTHIER, CONTRACT DE NANTISSEMENT, (Œuv. tom. 2, p. 945, CASAREGI, DISCURSUS DE COMMERCIO, 106, tom. i, p. 334, and ANSALDUS DE COMMERCIO, ET MERCATURA, 371, show clearly that the law applied to dealings with factors is an exception to the general law, and that a deference to the custom of merchants has introduced this variation. Nor have all the jurisconsults been equally patient of what they consider so great an infringement of principle. VAN LEEWIN, having a controversy with GROENWEGEN on this point, upon the latter citing a statute of Antwerp protecting purchasers, exclaims:

> "Sed irrationabilis et odiosa mehercule hac in re est dicti statut ratio in favorem forte mercaturæ ibidem contra dispositionem juris communis introducti, quod sane ultra ejusdem civitatis terminum, extendi minime potest": CENSURA FORENSIS, lib. iv, c. 7, § 17.

The same favour towards commerce which the learned writer so strongly reprehends, influenced our legislature a few years ago to alter the law in this respect—first, to the extent of the factor's lien, and afterwards to the whole value of the goods [the former Act, passed in 1823, and the latter Act, passed in 1825, were both repealed by the Factors Act, 1889]. But it is material to observe that the receiving the goods bona fide and without any notice of their belonging to the principal is expressly required to pass the property, and an exception is carefully introduced against any pledge for antecedent debt. These legislative provisions are important to our present purpose, for they show that with every desire to give the trader new facilities no one thought of protecting parties who were accessory to the factor's breach of duty towards his principal, and I believe the [later] Act, even so restrained, has been, generally speaking, a greater favourite with the city than with the profession.

The course of the late decisions upon negotiable instruments leads to similar observations. At one time it was thought that the circulation and commerce of the country would be paralysed if a banker were bound to make inquiry concerning every bill brought to be discounted, and LORD KENYON so expressed himself in *Lawson* v. *Weston* (15), where, however, as in all the cases of this class, there was no evidence of knowledge that the note was unfairly come by, but only a ground shown for suspicion and inquiry because an unknown person brought it to be discounted. But that case is no longer to be considered as law, and *Gill* v. *Cubit* (16), *Down* v. *Halling* (17), and other decisions, have established the rule that though there be no fraud, yet the tradesman or other person taking a note in the course of business but in any circumstances which ought to excite suspicion, and making no inquiry, can gain no property in it [see now s. 30 (2) of the Bills of Exchange Act, 1882: 2 HALSBURY'S STATUTES (2nd Edn.) 505]. In many discussions which took place while these cases were deciding, and the law upon the point assuming its present form, the courts were pressed repeatedly with the consequences to the commercial interests of the country which must result from exacting from tradesmen and bankers such a scrutinising course of inquiry in their ordinary dealings. But the answer given appears to be a sound one, and it is applicable to the present question. No correct dealer can complain that he is only required to exercise such a degree of caution as strict honesty suggests and the safety of others requires. In the particular cases I have referred to, the knowledge was, of course, denied, but the alleged inconvenience to trade of exacting the inquiry was the topic of argument.

In the present case the knowledge is admitted, but it is said that, if executors shall not have the absolute power of validly transferring the property of their testators, no man can safely deal with them because he will become liable for their malversation. I am of opinion, that neither will trade suffer nor will traders have a right to complain, nor will executors be unduly embarrassed in their administration of estates, if it be distinctly understood that anyone proved to have

abetted them in a misapplication of the funds committed to their care, and thus to have obtained possession of those funds, though for a valuable consideration, shall be accountable to the creditors of the estate and to the legatees, whether general or specific under the will, whether the transfer has been made to pay an antecedent debt of the executor or to secure new advances of money intended by them to be misapplied, provided the misappropriation or intended misappropriation be known to the party.

Appeal dismissed.

BOULTON *v.* CROWTHER

[Court of King's Bench (Abbott, C.J., Bayley, Holroyd and Littledale, JJ.). May 7, 1824]

[Reported 2 B. & C. 703; 4 Dow. & Ry. K.B. 195; 2 L.J.O.S.K.B. 139; 107 E.R. 544]

Local Authority—Statutory powers—Exercise—Injury to individual—Right to compensation—Premises abutting on highway—Obstruction—Level of road altered by turnpike trustees under statutory powers.

By the Turnpike Roads Act, 1822, s. 83, the trustees of roads were authorised to divert, shorten, alter, or improve the course or path of any road under their management, without making satisfaction for the same. The road adjoining the plaintiff's land was banked up and the level raised in one part and lowered in another part by the trustees, not acting arbitrarily, carelessly or oppressively, and in consequence the plaintiff's land was diminished in value and the access to his premises through gates from the road was obstructed.

Held: the trustees were authorised by the section to lower hills and raise hollows and they were not liable to an action for consequential injury for an act which they were authorised to do.

Notes. The Turnpike Roads Act, 1822, was in part made local and personal by the S.L.R. Act, 1890, and the remainder repealed by the Highways Act, 1959, s. 312 (2), Sched. 25; but all statutory turnpike trusts have now expired and turnpike roads no longer exist as such and most have become county roads (19 Halsbury's Laws (3rd Edn.) 19). The Highways Act, 1959, s. 18 (2), (39 Halsbury's Statutes (2nd Edn.) 432) makes provision where access to premises on or near special roads have been stopped up.

Considered: *Duncan* v. *Findlater* (1839), 6 Cl. & Fin. 894. Explained: *Dawson* v. *Paver* (1847), 5 Hare, 415. Considered: *Pilgrim* v. *Southampton and Dorchester Rail. Co.* (1849), 7 C.B. 205. Distinguished: *Metcalf* v. *Hetherington* (1855), 24 L.J.Ex. 314; *Scott* v. *Manchester Corpn.* (1857), 29 L.T.O.S. 233. Followed: *Bold* v. *Williams* (1857), 28 L.T.O.S. 269. Considered: *Whitehouse* v. *Fellowes* (1861), 10 C.B.N.S. 765; *Holliday* v. *St. Leonards, Shoreditch Vestry* (1861), 11 C.B.N.S. 192; *A.-G.* v. *Colney Hatch Lunatic Asylum* (1868), 4 Ch. App. 146; *Nutter* v. *Accrington Local Board of Health* (1878), 4 Q.B.D. 375; *Howard-Flanders* v. *Maldon Corpn.*, [1926] All E.R. Rep. 110; *East Suffolk Rivers Catchment Board* v. *Kent*, [1940] 4 All E.R. 527. Referred to: *Gibbs* v. *Liverpool Docks Trustees* (1858), 31 L.T.O.S. 22; *Coe* v. *Wise* (1864), 5 B. & S. 440; *Nutter* v. *Accrington Local Board* (1878), 4 Q.B.D. 375; *Southwark and Vauxhall Water Co.* v. *Wandsworth District Board of Works* (1898), 79 L.T. 132; *East Fremantle Corpn.* v. *Annois*, [1900–3] All E.R. Rep. 73; *Dell* v. *Chesham* U.D.C., [1921] 3 K.B. 427; *Provender Millers (Winchester), Ltd.* v. *Southampton County Council*, [1939] 3 All E.R. 882.

As to remedies for interference with private rights of access from highways, see 19 Halsbury's Laws (3rd Edn.) 79; and for cases see 26 Digest (Repl.) 550 et seq. As to statutory authorisation causing inevitable interference with private

rights, see 30 HALSBURY'S LAWS (3rd Edn.) 690 et seq.; and for cases see 38 DIGEST (Repl.) 19 et seq.

Cases referred to:

(1) *British Cast Plate Manufacturers' Co.* v. *Meredith* (1792), 4 Term Rep. 794; 100 E.R. 1306; 26 Digest (Repl.) 524, *2008*.

(2) *Sutton* v. *Clarke* (1815), 6 Taunt. 29; 1 Marsh. 429; 128 E.R. 943; 38 Digest (Repl.) 13, *49*.

(3) *Leader* v. *Moxon* (1773), 3 Wils. 461; 2 Wm. Bl. 924; 95 E.R. 1157; 26 Digest (Repl.) 624, *2741*.

(4) *Jones* v. *Bird* (1822), 5 B. & Ald. 837; 1 Dow. & Ry. K.B. 497; 106 E.R. 1397; 41 Digest (Repl.) 70, *460*.

Also referred to in argument:

Roberts v. *Read* (1812), 16 East, 215; 104 E.R. 1070; 38 Digest (Repl.) 138, *971*.

Motion by the plaintiff for a rule nisi for a new trial in an action on the case for nuisance.

The plaintiff claimed compensation from the defendant, as clerk of road trustees, exercising powers under the Turnpike Roads Act, 1822, relating to roads from Birmingham through Wednesbury to High Bullen, alleging that the defendant wrongfully and injuriously caused to be banked up, raised and elevated, the high road adjoining the plaintiff's land and thereby obstructed and stopped up entrances from the high road through his gates to his land; and that large quantities of gravel and stones on the raised road fell onto the plaintiff's land and injured his pleasure-ground and premises. The defendant denied liability.

At the trial before Park, J., at the assizes for the county of Warwick, it appeared that the high road adjoining the plaintiff's pleasure-ground had been lowered in one part and raised in another by the order of the trustees of the roads so that the entrance gates to his premises from the road could not be used by persons coming to his premises with carts and other carriages; and that part of the materials of the road had fallen into the plaintiff's premises, and damaged his hedge and plantations. The plaintiff contended that he was entitled to recover whether the work was done carefully or not. By the Turnpike Roads Act, 1822, s. 83,

> "the trustees of turnpike roads were authorised to make, divert, shorten, vary, alter, and improve the course or path of any of the roads under their care and management; . . . without making satisfaction for the same; . . ."

It was contended, that although the trustees had not taken any of the plaintiff's land, yet as they had rendered it of less value to him in consequence of raising the road in some parts and lowering it in others, they were liable, although the Act had not provided compensation for consequential damage accruing to a party in a case where no part of his land was taken. The learned judge was of opinion that the action was not maintainable if the trustees used proper care and caution, and did nothing oppressive or arbitrary; and he directed the jury to find for the plaintiff, if they were of opinion that the trustees acted arbitrarily, oppressively, or carelessly; but if they were of a different opinion, then to find for the defendant. The jury found a verdict for the defendant.

Jervis for the plaintiff, moved for a new trial.

ABBOTT, C.J.—I think the question left to the jury by the learned judge was the most favourable for the plaintiff that by law he could have propounded and left to their decision. This action was brought against the clerk to the trustees of a turnpike road, for an act which was done by them, which, in some respects, turned out to be injurious to the property of the plaintiff. The case, therefore, presents two questions. First, whether the act done by the trustees was an act which, by the Turnpike Roads Act, 1822, they were authorised to do; for if they were not authorised to do it, then undoubtedly they would be liable to an action for any injurious consequences resulting from it. If, however, they were authorised

to do what they did, then it raises the question, whether an action can be maintained against persons who, in the execution of a public trust, and for the public benefit, do an act which by law they may do, but which act works some special injury to a particular individual.

The first question is whether the act done was an act which the trustees had an authority to do. That depends on the words of the Turnpike Roads Act, 1822. By that section trustees are authorised,

> "from time to time, to make, divert, shorten, alter, and improve the course or path of any of the several roads, under their care and management, or any part or parts thereof. . . ."

Before this Act was passed, the lowering and levelling of hills had become one of the most common and ordinary modes of improving the course or path of the public roads; and when the legislature gave the trustees, in general words, the power to improve the course or path of the public roads, it must be understood as giving them the power to effect that improvement by the usual and ordinary mode, viz., by raising or lowering the roads. If, then, the Act of Parliament gives an authority in terms to the trustees to alter and improve the course of the path of the roads which are under their care and management, I am clearly of opinion that the lowering of hills in a public road was an act which they were authorised to do under the terms, "improve and alter the course or path of the road."

If the act done be an act which they were authorised to do, the next question is whether any individual who has sustained some special injury from the act done, can maintain an action at the common law. That he cannot is expressly laid down by LORD KENYON, C.J., and BULLER, J., in *British Cast Plate Manufacturers' Co.* v. *Meredith* (1). The language used by LORD KENYON, C.J., is very strong, and also very general. He lays it down as a principle, that if the commissioners act within their jurisdiction, the action at common law cannot be maintained, so that if the statute does not give the individual a remedy, he is without any; and the same rule is laid down by BULLER, J. It seems to me that that case is a distinct authority as to the second point now raised. The Act of Parliament, I think, authorised the trustees to do what they have done. If, in doing the act, they acted arbitrarily, carelessly, or oppressively, the law in my opinion has provided a remedy. But the fact of their having so acted is negatived by the finding of the jury. I am, therefore, of opinion, that the defendant was not liable to this action.

BAYLEY, J.—I am of the same opinion; and I think it would be most mischievous if any doubt could be entertained as to the liability of the trustees. *Sutton* v. *Clarke* (2) resembles the present case very closely. There the defendants had a public trust to perform, and a public duty cast upon them by Act of Parliament; and it was held, that they having acted without malice, and according to their best skill and diligence in the exercise of a public function which they were compelled to execute, although they had done an act which occasioned consequential damage to a subject, were not liable for such damage. It seems to me, that the learned judge in his address to the jury adhered to the letter of the law as laid down by GIBBS, C.J., in that case. As to the objection that the learned judge stated to the jury that the trustees were bound to do what they did, I am of opinion that if they found that a material benefit would result to the public from lowering a hill and filling up a vale; and that it could be done without any material injury to the individuals whose property adjoined, it was not only a sound exercise of the discretion of the trustees to direct the alteration to be made, but that it was their bounden duty to do so. There can be no doubt that the trustees would have been justified, if in the exercise of their discretion, they had thought proper to stop up the road entirely, unless it could be shown that it had been originally a parish road, of which there was no proof. In *Lauder* v. *Munro* (3) the decision proceeded upon the ground that the commissioners [for paving] had

exceeded their authority in raising the pavement so as to obstruct the plaintiff's windows. In this case it appears to me that the defendants have not exceeded their authority; and the jury having found that they did not act arbitrarily, wantonly, or oppressively, I am of opinion, that being public officers having a public duty to perform, they are not liable for a damage resulting to an individual from an act done by them in the discharge of that public duty.

HOLROYD, J.—I think that the law was most correctly laid down to the jury by the learned judge. The trustees had a public duty imposed upon them by an Act of Parliament. The act complained of was done by them in the execution of that duty, and was one which they had a competent authority to do. I am of opinion, that no action will lie for what they have done in the execution of that public duty, unless they exceeded the authority entrusted to them, or abused that authority, by acting arbitrarily, wantonly, or oppressively, in the mode of carrying it into execution. It would be absurd to hold, that an action would lie against them, for doing an act which they are empowered by Act of Parliament to do. The act done being itself lawful, can only become unlawful in consequence of the mode in which it is carried into execution; and here the jury have, by their verdict, negatived the fact of the act having been done carelessly, wantonly, or oppressively.

LITTLEDALE, J.—I also think that this action cannot be maintained. I agree that a private individual must so use his own land as not to injure that of another, but the private individual acts for his own benefit, and he ought not to obtain a benefit at the expense of his neighbour. But where an Act of Parliament vests a power in trustees or commissioners, to be exercised by them, not for their own benefit, but for that of the public, and gives no compensation for a damage resulting from an act done by them in the execution of that power, the legislature must be taken to have intended that an individual should not receive any compensation for the loss resulting to him from an act so done for the public benefit. The plaintiff may have sustained a minute injury in consequence of the act done, but it does not, therefore, follow that any action is maintainable against the commissioners. Suppose the Act of Parliament had authorised them to enter upon the land of an individual, and they had entered and done him an injury, by going over the land, I should doubt very much whether any action would be maintainable. Trespass would not be maintainable, because they might justify under the Act of Parliament, and, therefore, the act of entry could not be questioned. It might even be doubted, if the Act had authorised them to take the land, whether any action would lie against them for taking it. An ejectment would not lie, because the Act authorised them to take the land. If any action would be maintainable, it must be assumpsit, founded upon an implied promise. But surely the law would not imply a promise in them to pay for that from which they derived no benefit, and which the legislature authorised them to take. Here, however, they do not take the land; they only make some alterations in the road, from which a consequential injury arises to the plaintiff. *Leader* v. *Moxon* (3) is distinguishable from the present case, because there the commissioners [for paving] had exceeded their authority; and in *British Cast Plate Manufacturers' Co.* v. *Meredith*, LORD KENYON, C.J., and BULLER, J., both say that where the Act of Parliament does not provide for compensation, the action is not maintainable. In *Sutton* v. *Clarke* (2), GIBBS, C.J., lays it down, that trustees are not liable. In *Jones* v. *Bird* (4) the commissioners [of sewers] were held responsible for an act done by them in the discharge of their duty, but it was expressly found, that they had acted carelessly and negligently. It was assumed, however, that if they had acted with due care, they would not have been responsible. Upon the general principles of law, as well as upon the authorities, I am of opinion that this action is not maintainable.

Rule refused.

GRANT *v.* LYNAM

[ROLLS COURT (Sir John Leach, M.R.), February 16, March 15, 1828]

[Reported 4 Russ. 292; 6 L.J.O.S. Ch. 129; 38 E.R. 815]

Power of Appointment—Exercise—Appointment by will—Power to appoint among testator's family—Gift to relation not next of kin.

Where a testator directs that a donee at his or her death shall give the testator's personal property to such of the testator's family as the donee shall think proper, the donee has a power to select the objects of the testator's bounty from among the members of the testator's family, not being confined to those within the degree of next of kin.

Notes. The Statute of Distribution (1670) has been repealed (except as to deaths before 1926) by s. 56, Sched. 2, Pt. 1 of the Administration of Estates Act, 1925. As to the succession to real and personal estate on intestacy, see now s. 46 of the Act of 1925 (9 HALSBURY'S STATUTES (2nd Edn.) 751), as amended by s. 1 of the Intestates' Estates Act, 1952 (32 HALSBURY'S STATUTES (2nd Edn.) 116).

Considered: *Liley* v. *Hey* (1842), 1 Hare, 580; *Re Perowne*, *Perowne* v. *Moss*, [1951] 2 All E.R. 201. Referred to: *Re Deakin*, *Starkey* v. *Eyres*, [1894] 3 Ch. 565; *I.R. Comrs.* v. *Broadway Cottages Trust*, *I.R. Comrs.* v. *Sunnylands Trust*, [1954] 3 All E.R. 120.

As to powers in the nature of trusts and as to the exercise of powers with reference to property, see 30 HALSBURY'S LAWS (3rd Edn.) 210 et seq., and 256, respectively; and for cases see 37 DIGEST (Repl.) 401 et seq., 315 et seq. As to gift in a will to family or dependants, see 39 HALSBURY'S LAWS (3rd Edn.) 1068; and for cases see 44 DIGEST 887 et seq.

Cases referred to:

(1) *Harding* v. *Glyn* (1739), 1 Atk. 469; cited in 5 Ves. at p. 501; 26 E.R. 299; 37 Digest (Repl.) 408, *1373*.

(2) *Mahon* v. *Savage* (1803), 1 Sch. & Lef. 111; 44 Digest 890, *7473 iv*.

(3) *MacLeroth* v. *Bacon* (1799), 5 Ves. 159; 31 E.R. 523; 44 Digest 889, *7458*.

(4) *Wright* v. *Atkyns* (1810), 17 Ves. 255; affirmed (1814), 19 Ves. 299; Coop. G. 111; 34 E.R. 528, L.C.; on appeal (1823), see Turn. & R. at p. 145, H.L.; 44 Digest 889, *7466*.

Also referred to in argument:

Standen v. *Standen* (1795), 2 Ves. 589, L.C.; affirmed sub nom. *Standen* v. *Macnab* (1797), 6 Bro. Parl. Cas. 193; 2 E.R. 1021, H.L.; 37 Digest (Repl.) 321, *681*.

Bradly v. *Westcott* (1807), 13 Ves. 445; 33 E.R. 361; 37 Digest (Repl.) 317, *646*.

Lewis v. *Lewellyn* (1823), Turn. & R. 104; 37 E.R. 1034; 37 Digest (Repl.) 322, *684*.

Denn d. Nowell v. *Roake* (1826), 5 B. & C. 720; affirmed sub nom. *Roake* v. *Denn* (1830), 4 Bli. N.S. 1; 1 Dow. & Cl. 437; 5 E.R. 1; sub nom. *Denn d. Nowell* v. *Roake*, 6 Bing. 475, H.L.; 37 Digest (Repl.) 322, *686*.

Bennett v. *Aburrow* (1803), 8 Ves. 609; 32 E.R. 492; 37 Digest (Repl.) 317, *644*.

Andrews v. *Emmot* (1788), 2 Bro. C.C. 297.

Cruwys v. *Colman* (1804), 9 Ves. 319; 32 E.R. 626; 44 Digest 888, *7449*.

Brown v. *Higgs* (1800), 5 Ves. 495; 31 E.R. 700; on appeal (1801), 8 Ves. 561, L.C.; (1813), 18 Ves. 192, H.L.; 44 Digest 746, *6073 a*.

Forbes v. *Ball* (1817), 3 Mer. 437; 36 E.R. 168; 37 Digest (Repl.) 401, *1313*.

Jones v. *Tucker* (1817), 2 Mer. 533; 35 E.R. 1044; 37 Digest (Repl.) 318, *654*.

Jones v. *Curry* (1818), 1 Swan. 66; 1 Wils. Ch. 24; 36 E.R. 300; 37 Digest (Repl.) 323, *703*.

Nannock v. *Horton* (1802), 7 Ves. 391; 32 E.R. 158, L.C.; 37 Digest (Repl.) 317, *643*.

Bill to construe a will and to determine whether the bequest of all her household property in the will of Elizabeth Veal, the testator's widow, was an exercise of her power under the testator's will; and whether John Grant could take under the execution of the power, although not one of the next of kin of the testator.

The testator, John Veal, made his will, inter alia, in the following words:

"I give and bequeath my present dwelling-house, garden, premises, and land adjoining, now in the occupation of Mr. Charles Baker, to Elizabeth, my dearly beloved wife, for her use and benefit during her life, and with a power of giving and disposing of the said house and premises after her decease, with the limitation and condition of her bequeathing the same to any one of my own family she may think proper. Item, I give and bequeath to my said wife all my household furniture, plate, linen, books, and other utensils; and, after her decease, to any one or more of my own family she may wish or direct."

Elizabeth Veal, the testator's wife, survived him, and by her will

"gave and bequeathed all her leasehold property, her moneys and securities for money, goods, furniture, chattels, personal estate and effects whatsoever, subject to the payment of her just debts, funeral and testamentary expenses and legacies, to trustees upon trust to convert the same into money, and to stand possessed of the same, for the only use and benefit of John Grant, when he should attain twenty-one; and if he should die before twenty-one, then to the only use and benefit of the brothers and sisters of the said John Grant who should be living at the time of his decease, with benefit of survivorship between them."

It was proved that the testatrix, at the making of her will and her death, had no other leasehold property than the dwelling-house bequeathed to her by her husband. John Grant, the legatee, was nearly related to the testator John Veal, but was one degree more remote than his next of kin. It was not contended that John Grant could claim any part of the personal chattels of the testator John Veal, which might be in the possession of his widow at her death, under the general description of "her moneys, etc.;" but it was insisted, that, inasmuch as the testatrix had no other leasehold estate than the dwelling-house specifically described in the testator's will, the bequest of all her leasehold property amounted to evidence of her intention to exercise her power in that respect; and further, that John Grant, being one of the testator's family, was capable of taking, although not one of his next of kin.

Treslove and *Hayter* in support of the bill.

Skirrow against the bill.

Phillimore for a party in the same interest.

SIR JOHN LEACH, M.R.—It is well settled, that, if the donee of a power has no freehold estate, except that which is the subject of the power, the will of the donee, giving freehold estate, will be so far deemed an execution of the power; for otherwise the will, as to that property, would wholly fail. There is no distinction between freeholds and leaseholds in the nature of the subjects; the difference is only in the quantity of interest: and there does not appear to me to be any solid ground, upon which it is to be maintained that a gift of leasehold, where the donee of the power has no other leasehold than the subject of the power, is not equally to manifest an intention to execute the power, as a gift of freehold under the same circumstances. A general gift of moneys, securities for moneys, and other personal chattels, which are in their nature subject to constant change and fluctuation, stands upon very different principles; and, as to them, the will must refer to them as the subjects of the power, or they will not pass.

Upon the other point, whether the gift to John Grant is good, he not being one of the testator's next of kin, the leading case is *Harding* v. *Glyn* (1), imperfectly reported in 1 Atk. 469, but correctly referred to in other cases by LORD ELDON, L.C., LORD REDESDALE, and SIR WILLIAM GRANT, M.R. There the testator gave to his wife his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death; and also all his plate, linen, jewels, and other wearing apparel, and did desire her, at or before her death, to give the same unto and among such of his own relations, as she should think most deserving and should approve of. The widow, by her will, gave the house in Hatton Garden to Henry Swindale, and made no other disposition of the rest of the property bequeathed to her by her husband; but, after giving some legacies, she gave in general terms the residue of her personal property to certain persons, whom she made her executors. Henry Swindale, to whom the house in Hatton Garden was given, was a relation of the testator, but not his next of kin. The reported decision in that case is, that, as to the property of the husband not disposed of by the wife, the term "relations" should be construed as next of kin; and no notice is taken, in the judgment, of the house in Hatton Garden bequeathed to Henry Swindale. But, upon reference to the registrar's book, it appears that the gift to Henry Swindale was established. The principle, therefore, of that case is, that, where the author of the power uses the term relations, and the donee does not exercise the power, there the court will adopt the Statute of Distributions as a convenient rule of construction, and will give the property to the next of kin; but that the donee, who exercises the power, has a right of selection among the relations of the donor, although not within the degree of next of kin.

I cannot find that the doctrine of that case has ever been impeached; on the contrary, it has been repeatedly acted upon; and the same rule has been applied with respect to personal estate, where the word family has been used in the place of relations. In addition to the cases which have been cited in the argument, I refer to *Mahon* v. *Savage* (2). In *MacLeroth* v. *Bacon* (3) LORD ALVANLEY proceeding upon the special words of the will, considered a husband as one of the family of the wife; and, in *Wright* v. *Atkyns* (4) LORD ELDON, L.C., held, that, as to real estate, a direction to the donee to devise the property to the family of the donor, created a trust for the donor's heir as persona designata. But the cases do not break in upon the general rule, as I have stated it, with regard to personal estate: and I declare, therefore, that John Grant is entitled to the leasehold dwelling-house of the testator, according to the terms and conditions of the will of the donee of the power.

Declaration accordingly.

BREWER AND ANOTHER *v.* SPARROW

[Court of King's Bench (Bayley, Holroyd and Littledale, JJ.), Trinity Term, 1827]

[Reported 7 B. & C. 310; 1 Man. & Ry. K.B. 2; 6 L.J.O.S.K.B. 1; 108 E.R. 739]

Bankruptcy—Trustee in bankruptcy—Conversion by defendant of bankrupt's property—Ratification of wrongful acts—Action for conversion by trustee—Competency.

The assignees [now trustee in bankruptcy] of a bankrupt, having once affirmed the acts of a person who wrongfully sold the property of the bankrupt, cannot afterwards treat him as a wrongdoer and maintain trover.

Notes. Distinguished: *Burn* v. *Morris* (1834), 4 Tyr. 485. Considered: *Lindon* v. *Sharp* (1843), 6 Man. & G. 895. *Valpy* v. *Sanders*, [1843–60] All E.R. Rep. 869. Explained: *Lythgoe* v. *Vernon* (1860), 5 H. & N. 180. Referred to: *Sutherland Publishing Co.* v. *Caxton Publishing Co.*, [1936] 1 All E.R. 177; *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20.

As to the essentials of ratification, see 1 Halsbury's Laws (3rd Edn.) 178. As to waiver of tort, see 38 Halsbury's Laws (3rd Edn.) 798; and for cases see 1 Digest (Repl.) 480.

Action of trover brought by the plaintiffs as assignees of Pitter, a bankrupt, to recover certain goods of the bankrupt alleged to have been wrongfully converted by the defendant.

The commission of bankruptcy was issued on Oct. 21, 1825, upon the petition of the plaintiff Brewer. The act of bankruptcy was committed on Oct. 2, 1825. The assignment to the plaintiffs, under the commission, was executed on Dec. 3, 1825. The goods for which the action was brought consisted of the stock in trade, household furniture, and effects found upon the premises of the bankrupt, at Cheltenham, in Gloucestershire, where he had carried on business until Oct. 2, 1825, on which day he absconded and left his dwelling-house and shop. On Oct. 4 the defendant, who was a creditor of the bankrupt, after consulting with the plaintiff Brewer, went to Cheltenham, when he found the house and shop of the bankrupt shut up. Upon his arrival he took possession thereof, and also of the stock in trade, household furniture, and effects, and re-opened the shop and continued the business, assisted by his son and the apprentice of the bankrupt, by selling the stock in the same manner as had been done by the bankrupt; and he continued to do so until Nov. 13 following, when he and his son quitted the premises, leaving the apprentice in possession.

On Nov. 15 a messenger, by virtue of a warrant issued by the commissioners under the commission, at the instance of the plaintiff Brewer, arrived at Cheltenham and took possession of the premises, the household furniture, and effects, and seized the stock in trade, which consisted partly of stock which had belonged to the bankrupt, and partly of stock which the defendant had purchased during the time he continued the business, and which had been mixed up and in part sold with the bankrupt's stock for the general benefit of the trade, and to enable the defendant to sell the bankrupt's stock more beneficially than he otherwise could have done. The goods purchased by the defendant amounted to £212, which he paid out of the moneys received by him in the sale of the general stock in trade. He kept a daily account of the sale and purchase of the stock bought and sold, of all moneys received and paid, and of all incidental expenses during the time he continued in possession; and such account was a just and true account; and at the time of his quitting possession, he left with the apprentice of the bankrupt, the balance of such account, amounting to £20 6s. 3d.; which sum the apprentice duly paid to the messenger, who duly paid and accounted for the same to the plaintiffs before the commencement of the action. On Jan. 21, 1826, the defendant,

being summoned before the commissioners, delivered a copy of the account so kept by him to the plaintiffs. The action was commenced on April 4 following. The defendant did not intermeddle with, or dispose of any part of the bankrupt's goods, chattels, or effects, except his stock in trade. The defendant acted in all things touching and concerning the taking possession, and selling and disposing of the stock in trade of the bankrupt, and purchasing other stock and conducting the business, and in all other matters relating to or concerning the subject-matter of the action, bona fide, and solely for the benefit of all creditors of the bankrupt.

The action was referred to an arbitrator who, by his award, stated the facts above set out.

Hutchinson for the plaintiffs.

Brodrick for the defendant, was stopped by the court.

BAYLEY, J.—The defendant in the first instance was a wrongdoer, and the plaintiffs might have treated him as such, but it was competent to them in their character of assignees either to treat him as a wrongdoer and disaffirm his acts, or to affirm his acts and treat him as their agent, and if they have once affirmed his acts and treated him as their agent, they cannot afterwards treat him as a wrongdoer, nor can they affirm his acts in part, and avoid them as to the rest. I am of opinion that the plaintiffs, in their character of assignees in this case, have affirmed the acts done by the defendant with reference to the disposition of the goods of the bankrupt, for they have accepted from him the balance of the account. That balance consisted of a sum due to them after giving them credit for the produce of all the bankrupt's goods sold by the defendant. By accepting and retaining that balance without objection, after they had received a copy of the account kept by the defendant, they adopted his acts and recognised him as their agent, and having so done, they are not at liberty to treat him as a wrongdoer.

HOLROYD, J.—I think the plaintiffs adopted the acts of the defendant by accepting the balance of the account. By doing so, they at all events either recognised him as their agent in the sale of the bankrupt's goods, or they must have received the amount of that balance as a satisfaction for the wrongful act done by the defendant. If they have treated him as their agent, they cannot afterwards treat him as a wrongdoer, and maintain trover. If, on the other hand, they accepted the balance of the account as a satisfaction for the wrongful act, the acceptance of that sum is an answer to the action.

LITTLEDALE, J., concurred.

Judgment for defendant.

R. *v.* MOORE

[Court of King's Bench (Lord Tenterden, C.J., Littledale, Taunton and Patteson, JJ.), January 25, 1832]

[Reported 3 B. & Ad. 184; 1 L.J.M.C. 30; 110 E.R. 68]

Nuisance—Liability of person creating nuisance—Need to prove intention—Nuisance probable consequence of his acts.

The defendant kept for profit enclosed ground near a highway and inhabited houses for the purpose of other persons using it to practise rifle shooting and to shoot at pigeons That practice collected a number of vagabonds outside the ground, who met there to shoot at such birds as escaped from the ground, and they trod down the grass of the neighbouring fields, destroyed the fences, and caused alarm and disturbance. There was some evidence to show that the defendant employed people to keep the vagabonds off his own ground.

Held: although the vagabonds had collected against his will there was evidence on which to indict the defendant for a nuisance, because their collecting together was a probable consequence of his acts.

Notes. Applied: *R.* v. *Pedly* (1834), 1 Ad. & El. 822. Considered: *Rich* v. *Basterfield* (1847), 4 C.B. 783. Followed: *Walker* v. *Brewster* (1867), L.R. 5 Eq. 25. Considered: *Inchbald* v. *Robinson*, *Inchbald* v. *Barrington* (1869), 4 Ch. App. 388. Followed: *Chibnall* v. *Paul* (1881), 29 W.R. 536; *Bellamy* v. *Wells* (1890), 60 L.J.Ch. 156. Considered: *Barber* v. *Penley*, [1893] 2 Ch. 447; *Chase* v. *L.C.C. and Leslie* (1898), 62 J.P. 184. Applied: *Lyons, Sons & Co.* v. *Gulliver*, [1911–13] All E.R. Rep. 537. Distinguished: *Stearn* v. *Prentice Bros., Ltd.*, [1918–19] All E.R. Rep. 495. Referred to: *R.* v. *Warwick* (1837), 6 L.J.M.C. 96; *Simpson* v. *Savage* (1856), 1 C.B.N.S. 347; *R.* v. *Stephens* (1866), L.R. 1 Q.B. 702; *Haigh* v. *Sheffield Corpn.* (1874), L.R. 10 Q.B. 102; *A.-G.* v. *Horner* (1912), 107 L.T. 547; *Seligman* v. *Docker*, [1948] 2 All E.R. 887; *Philco Radio and Television Corpn. of Great Britain, Ltd.* v. *J. Spurling, Ltd.*, [1949] 2 All E.R. 882.

As to who is liable to be sued for nuisance, see 28 Halsbury's Laws (3rd Edn.) 155 et seq.; and for cases see 36 Digest (Repl.) 345 et seq.

Case referred to:

(1) *R.* v. *Cross* (1812), 3 Camp. 224; 170 E.R. 1362, N.P.; 36 Digest (Repl.) 321, *666*.

Motion by the defendant for a rule nisi to set aside the verdict in an action tried on indictment for nuisance.

The defendant was charged in the first two counts of the indictment with keeping certain enclosed lands, grounds and premises near to the king's highway and to private dwelling-houses for the purpose of persons frequenting such grounds and meeting therein to practise rifle-shooting, and to shoot at pigeons with guns, and that he unlawfully and injuriously caused divers persons to meet and frequent there for that purpose; and unlawfully and injuriously permitted and suffered and caused and occasioned a great number of idle and disorderly persons, armed with guns and fire-arms, to meet and assemble in the streets, highways and other places near and about the enclosed premises, discharging fire-arms and making a great noise, disturbance and riot, by means whereof the king's subjects were disturbed and put in peril. The third and fourth counts were for keeping a ground for rifle-shooting at a target, and causing persons to assemble and shoot there.

At the trial before Lord Tenterden, C.J., in 1831, it was proved that the defendant, a gun-maker, had taken some land at Bayswater, in the county of Middlesex, distant about one hundred feet from the north side of the main London and Uxbridge road, and had enclosed part of it and converted it into a shooting-ground where persons came to practise with rifles at a target on a mound and to

shoot at pigeons. It was also proved that, as the pigeons which were fired at often escaped, it was the custom for idle persons to collect outside the grounds and in the neighbouring fields to shoot at the birds as they strayed; those persons were called scouts; and there was some evidence to show that the defendant employed people to keep them off his own grounds. Some injuries were said to have been received from the bullets and shot used in those grounds; but, as the defendant contended, they arose entirely from the scouts, for whose acts he urged, he could not be responsible. LORD TENTERDEN directed the jury to find the defendant guilty on four counts, but reserved leave for him to move to enter a verdict of not guilty on the first two.

Joy for the defendant.
Sir James Scarlett for the prosecution.

LORD TENTERDEN, C.J.—The defendant asks us to allow him to make a profit to the annoyance of all his neighbours; if not, it is said that we shall strain the law against him. If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. This is an old principle. Here the defendant invites persons on his own ground to shoot pigeons. The effect of that is that idle people collect near the spot; they tread down the grass of the neighbouring fields, destroy the fences, and create alarm and disturbance. It is not found that the defendant has attempted to prevent their so collecting. He has indeed had them driven off his own ground, but that is all. I cannot say that the verdict is wrong.

LITTLEDALE, J.—It has been contended that, to render the defendant liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object, but I do not agree with the other position; because if it be the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead anyone to expect the result, he will be answerable for it.

TAUNTON, J.—In HAWKINS'S PLEAS OF THE CROWN, bk. 1, c. 75, ss. 6, 7, it is laid down that all common stages for rope-dancers, and all common gaming-houses, are nuisances in the eye of the law,

> "not only because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood. Also it hath been holden that a common playhouse may be a nuisance if it draw together such numbers of coaches, or people, etc., as prove generally inconvenient to the places adjacent."

The present is a very similar case.

PATTESON, J., concurred.

Rule refused.

HASTELOW *v.* JACKSON

[Court of King's Bench (Bayley, Holroyd and Littledale, JJ.), Easter Term, 1828]

[Reported 8 B. & C. 221; 2 Man. & Ry. K.B. 209; 6 L.J.O.S.K.B. 318; 108 E.R. 1026]

Sport—Illegal sport—Prize fighting—Stakes—Payment to stakeholder—Notice by losing party after event not to pay stakes to winner—Both stakes paid over to winner—Right of loser to recover his stake from stakeholder—Money had and received.

A. and B. deposited equal sums of money with a stakeholder to abide the event of a boxing match between them. After the match A., the loser, claimed the whole sum from the stakeholder and threatened him with an action if he paid it over to B. The stakeholder paid the sum deposited to B.

Held: where money in respect of an illegal sporting event had been paid to a stakeholder and after the event one of the payers dissented from the stakes being paid to the other, that payor was entitled to recover from the stakeholder his own stake as money had and received to his use.

Notes. The existing statute law relating to gaming and unlawful games has been repealed to the extent set out in the third column of Part 1 of Sched. 6 by s. 15 of the Betting and Gaming Act, 1960 (40 Halsbury's Statutes (2nd Edn.) 345, 383). This Act has now been replaced by the Betting, Gaming and Lotteries Act, 1963, Part 2 of which now deals with gaming (43 Halsbury's Statutes (2nd Edn.) 370, 409). Public boxing matches, as opposed to the old "prize fighting," are permitted under special regulations (37 Halsbury's Laws (3rd Edn.) 49).

Followed: *Mearing* v. *Hellings* (1845), 14 M. & W. 711. Considered: *Hampden* v. *Walsh* (1876), 1 Q.B.D. 189; *Barclay* v. *Pearson*, [1893] 2 Ch. 154. Referred to: *Hodson* v. *Terrill* (1833), 1 Cr. & M. 797; *Bone* v. *Ekless* (1860), 5 H. & N. 925; *Taylor* v. *Bowers* (1876), 1 Q.B.D. 291; *Diggle* v. *Higgs* (1877), 37 L.T. 27; *Strachan* v. *Universal Stock Exchange (No. 2)*, [1895] 2 Q.B. 697; *Burge* v. *Ashley and Smith*, [1900] 1 Q.B. 744; *Hermann* v. *Charlesworth*, [1905] 2 K.B. 123; *Harry Parker, Ltd.* v. *Mason*, [1940] 4 All E.R. 199.

As to stakeholder's position and his liability for stakes, see 18 Halsbury's Laws (3rd Edn.) 174 et seq.; and for cases see 25 Digest (Repl.) 429 et seq.

Cases referred to:

(1) *Tenant* v. *Elliott* (1797), 1 Bos. & P. 3; 126 E.R. 744; 1 Digest (Repl.) 512, *1473*.

(2) *Farmer* v. *Russell* (1798), 1 Bos. & P. 296; 126 E.R. 913; 1 Digest (Repl.) 512, *1474*.

(3) *Lubbock* v. *Potts* (1806), 7 East, 449; 3 Smith, K.B. 401; 103 E.R. 174; 29 Digest (Repl.) 353, *2734*.

(4) *Vandyck* v. *Hewitt* (1800), 1 East, 96; 102 E.R. 39; 29 Digest (Repl.) 353, *2732*.

(5) *Lowry* v. *Bourdieu* (1780), 2 Doug. K.B. 468; 99 E.R. 299; 29 Digest (Repl.) 352, *2707*.

(6) *Aubert* v. *Walsh* (1810), 3 Taunt. 277; 128 E.R. 110; 25 Digest (Repl.) 428, *96*.

(7) *Lacaussade* v. *White* (1798), 7 Term Rep. 535.

(8) *Cotton* v. *Thurland* (1793), 5 Term Rep. 405; 101 E.R. 227; 25 Digest (Repl.) 429, *104*.

(9) *Smith* v. *Bickmore* (1812), 4 Taunt. 474; 128 E.R. 413; 25 Digest (Repl.) 429, *105*.

(10) *Howson* v. *Hancock* (1800), 8 Term Rep. 575; 101 E.R. 1555; 25 Digest (Repl.) 431, *127*.

Also referred to in argument:

Bate v. *Cartwright* (1819), 7 Price, 540; 146 E.R. 1054; 25 Digest (Repl.) 429, *108*.

Andree v. *Fletcher* (1789), 3 Term Rep. 266; 100 E.R. 567; 29 Digest (Repl.) 352, *2708*.

Morck v. *Abel* (1802), 3 Bos. & P. 35; 127 E.R. 20; 29 Digest (Repl.) 353, *2733*.

Rule Nisi obtained by the defendant for a new trial in an action of assumpsit against the defendant, stakeholder for money had and received. The defendant pleaded the general issue.

At the trial before HOLROYD, J., at the Nottingham Summer Assizes, 1827, it appeared that the plaintiff and one Wilcoxon had each deposited £20 with the defendant to abide the event of a boxing match between them. The match was fought, and a dispute arose as to which was the winner; two referees and an umpire were chosen, who decided in favour of Wilcoxon. The plaintiff then claimed the £40 from the defendant, and gave him notice that if he paid it over to Wilcoxon, he should bring an action to recover it. The defendant, however, afterwards, acting upon the decision of the umpire, paid over the money to Wilcoxon. At the trial the plaintiff claimed only the £20 deposited by him; and for the defendant it was contended that the plaintiff could not recover at all, for he had never given notice of an intention to rescind the illegal wager, but had affirmed it, by claiming the whole of the stakes, and insisting that he was the winner of the boxing match. The learned judge overruled the objection, and the plaintiff had a verdict for £20. In Michaelmas Term a rule nisi for a new trial was granted to the defendant.

N. R. Clarke for the plaintiff, showed cause against the rule.

Reader and *Humphrey* for the defendant, supported the rule.

BAYLEY, J.—I am of opinion that this rule must be discharged. *Tenant* v. *Elliott* (1) and *Farmer* v. *Russell* (2) do not prove that the winner of an illegal wager can recover the whole of the stakes from the holder, but only that when the loser has paid the money into the hands of an agent for the winner the agent cannot set up the illegality against the claim of his principal. Those cases may, therefore, be laid out of consideration, and from all the others which have been cited it appears that there is a material difference between actions by one party to an illegal contract against the other and those against a stakeholder.

If money has been paid upon such a contract by one party to the other, he cannot recover it unless he rescinds the contract while it remains executory. That it may, as between the parties, be rescinded before the event happens has been established by a variety of cases: *Lubbock* v. *Potts* (3), *Vandyke* v. *Hewitt* (4), *Lowry* v. *Bourdieu* (5), and *Aubert* v. *Walsh* (6); nor am I aware of any decision to the contrary except that of *Lacaussade* v. *White* (7) which cannot, I think, be supported, and, indeed, it appears to have proceeded on the supposition that the defendant was a stakeholder, in which case it would have been right. It is too late now to consider what would have been the best rule on this subject. It might have been proper to say that the party to a wager on an illegal act, after he had done the act, should not recover his stake. But *Cotton* v. *Thurland* (8), followed by *Smith* v. *Bickmore* (9), has established that, notwithstanding the event has been decided, and the party has concurred in doing the illegal act, he shall be allowed to recover his own stake. *Smith* v. *Bickmore* (9) was decided long after the other, and at a time when the distinction had been taken between actions against the party and the stakeholder; and it is now a settled rule that where a wager has been laid on the event of a boxing match either party may recover his own stake from the holder.

It has been urged that a decision for the plaintiff in the present case would go beyond all former cases, for that the money had been paid over before the action was brought, and the plaintiff had done no act to rescind the wager, nor had ever

intimated that he claimed his own money, and that only. But if a stakeholder pays over money without authority from the party, and in opposition to his desire, he does so at his own peril. In *Houson* v. *Hancock* (10) the jury found that the money was paid with the assent and concurrence of the plaintiff; the decision, therefore, merely amounted to this, that where money has been paid over with the assent of the party, he cannot get it back. Here, it is true, the whole was demanded. The defendant said he should pay it to the other party, the plaintiff desired him not to do so, and threatened him with an action. That was a plain expression of dissent. The defendant, therefore, paid over the money at his peril, and, having paid over what could not have been recovered from him, he paid it in his own wrong. Wilcoxon could not have recovered more than his own money, without proving himself the winner, and that could only be established by evidence of his having done an illegal act. He, therefore, could not have recovered the money deposited by the plaintiff, and the defendant having paid over the whole after the plaintiff's prohibition, which was valid as to a moiety of the stakes, paid over that moiety wrongfully, and is liable to refund it to the present plaintiff. For these reasons, I think the opinion expressed by HOLROYD, J., at the trial was correct, and that this rule must be discharged.

HOLROYD, J.—It appears to me now as at the trial, that the case of payment to a stakeholder differs from that by one party to the other. The question made at the trial was whether it was necessary for the plaintiff to rescind the contract. I think it was not; and that he did sufficient by giving notice that he would sue the defendant if he paid over the money.

LITTLEDALE, J.—I am entirely of the same opinion. If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards. In the case of persons entering into such a contract and paying money to a stakeholder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the contract, and the money cannot be reclaimed. but if the event has not happened, the money may be recovered. With respect to a stakeholder there is a third case, viz., where the event has happened, but before the money has been paid over, one party expresses his dissent from the payment. Under such circumstances he may recover it; and perhaps it may then be said, that although the event has happened, yet the contract is not completely executed until the money has been paid over, and, therefore, the party may retract at any time before that has been done.

Rule discharged.

ALSOP *v.* LORD OXFORD

[ROLLS COURT (Sir John Leach, M.R.), May 25, 1833]

[Reported 1 My. & K. 564; 2 L.J.Ch. 174; 39 E.R. 794]

Costs—Taxation—Matters of fact and quantum—Master's decision final unless mistake in principle.

Costs—Taxation—Disallowance—Unnecessary proceeding.

Costs—Taxation—London agent employed by usage—Attendance of country solicitor at client's request.

Abstract of Title—Comparison with title deeds in London.

The master's decision on questions of taxation is final as to matters of fact and quantum, and is only reviewed by the court when he acts on a mistaken principle.

Where a solicitor negligently or ignorantly takes some unnecessary proceeding it is the master's duty to disallow the charge for it.

Where it is the usage of the profession that certain business should be entrusted to a London agent a country solicitor will not be allowed to charge for his attendance in London to perform that business although his client has requested his attendance, unless the solicitor has first explained to his client that by the usage of the profession such attendance is considered unnecessary.

The comparison of an abstract of title with the title deeds is business within this rule and a country solicitor will not be allowed to charge for his personal attendance in London for such business.

Notes. Order for review of taxation is now dealt with by Supreme Court Costs Rules, 1959, r. 35 (4) ANNUAL PRACTICE (1966) 1999/312. Attendance of country solicitor is now dealt with by Supreme Court Costs Rules, 1959, r. 28 and notes ANNUAL PRACTICE (1966) 1999/293 et seq.

Followed: *Re Nicholson* (1861), 30 L.J.Ch. 796. Considered: *In the Estate of Ogilvie, Ogilvie* v. *Massey*, [1910] P. 243; *Coon* v. *Diamond Tread Co. (1938), Ltd.*, [1950] 2 All E.R. 385. Referred to: *Russel* v. *Buchanan* (1838), 9 Sim. 167; *Re Congreve* (1841), 4 Beav. 87; *Macintosh* v. *Great Western Rail. Co.* (1865), 11 Jur. N.S. 681; *White* v. *Altrincham U.D.C.*, [1936] 1 All E.R. 923; *British United Shoe Manufacturing Co.* v. *Holdfast Boots, Ltd.*, [1936] 3 All E.R. 717; *Isaacs* v. *Isaacs*, [1955] 2 All E.R. 811.

As to principles followed by the court on a review of taxation of costs, see 30 HALSBURY'S LAWS (3rd Edn.) 438. As to expense of inspection of documents on sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 288. As to limits of authority of solicitor, see 36 HALSBURY'S LAWS (3rd Edn.) 74; and for cases see 43 DIGEST (Repl.) 237.

Case referred to in argument:

Fenton v. *Crickett* (1818), 3 Madd. 496; 56 E.R. 587; 43 Digest (Repl.) 238, *2482*.

Petition for a review of taxation of costs by a solicitor residing in Worcestershire.

One of the items complained of was the master's reduction of a charge of £54 for a journey made by the petitioner to London, for the purpose of comparing an abstract of a title with the title deeds. The petitioner stated, by affidavit, that he had been occupied sixty hours in this comparison; that he had been absent from his residence thirteen days; and that he had made the journey to London at the instance and request of his client. The master disallowed this item, on the ground that the comparison of abstracts with the deeds was business not requiring the personal attendance of a solicitor, and which, according to the usage of the profession, ought to have been done by an agent in London. Accordingly the

charge was reduced to £20, being at the rate of 6s. 8d. an hour, the usual charge for the attendance of a solicitor's clerk for this purpose.

Bickersteth and *Piggott* for the petitioner.
Pemberton and *Koe* for the respondent.

SIR JOHN LEACH, M.R.—This petition involves matter of very great importance. Generally speaking, the decision of the master on taxation is final: he is the sole judge of the fact whether the business has been done, and of the proper charge to be made for it; and it is further his duty to inquire whether the business was required to be done; for, if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of the master to protect the client from any charge in respect of such proceedings. The court will only interfere where the master acts upon some mistaken principle.

It is said that the master here has acted upon a mistaken principle—that the client here required the attendance of the solicitor in London, and ought, therefore, to pay for that attendance. That fact is questionable upon the affidavit. The judgment of the master assumes as a fact, that, by the usage of the profession, the comparison of the deeds with the abstract would have been properly entrusted to an agent. Even if it were clear that the client did request the solicitor to proceed to London for the purpose, it would not vary the case, unless the solicitor proved that he distinctly informed his client that it was not by the usage of the profession considered to be necessary that such expense should be incurred. It was the duty of the solicitor to give this explanation to the client; and if, after this explanation, the client had requested the attendance of the solicitor in London, he would properly be charged with the expense, and there is no master who would, under such circumstances, have refused to allow it. The client here was himself but a trustee, and had no personal interest in the subject, and the duty of the solicitor to give this explanation was specially imperative. If, therefore, in this case, the client did request the attendance of the solicitor in London, and that fact was proved before the master, yet, it not being pretended that the required explanation was given to the client, the master appears to me to have acted upon very proper principles, and, for the sake of example, I must dismiss this petition with costs.

Petition dismissed

EVANS *v.* ROBERTS

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Trinity Term, 1826]

[Reported 5 B. & C. 829; 8 Dow. & Ry. K.B. 611; 4 L.J.O.S.K.B. 313; 108 E.R. 309]

Sale of Land—Interest in land—Growing crops—Need for contract to be in writing—Crop of potatoes to be raised by vendor.

A verbal agreement made for the sale of a growing crop of potatoes to be raised by the vendor, **held** not to be a contract for sale of any lands, tenements, or hereditaments, or any interest in or concerning them within s. 4 of the Statute of Frauds, 1677, but a sale of goods, wares and merchandise within s. 17 of that Act, and in the circumstances of the case not required to be in writing.

Notes. The provisions of s. 4 of the Statute of Frauds, 1677, relating to land were repealed and replaced by the Law of Property Act, 1925, s. 40. Section 17 of the Statute of Frauds, 1677, is no longer applicable, since it was repealed and replaced by s. 4 of the Sale of Goods Act, 1893, which was itself repealed by the Law Reform (Enforcement of Contracts) Act, 1954, s. 2.

Considered: *Scorell* v. *Boxall* (1827), 1 Y. & J. 396; *Watts* v. *Friend* (1830), 8 L.J.K.B.O.S. 181. Explained: *Shelton* v. *Livius* (1832), 2 Tyr. 420. Applied: *Hallen* v. *Runder* (1834), 1 Cr. M. & R. 266. Considered: *Sainsbury* v. *Matthews* (1838), 4 M. & W. 343; *Jones* v. *Flint* (1839), 10 Ad. & El. 573; *Stephenson* v. *Thompson*, [1924] All E.R. Rep. 736. Referred to: *Graves* v. *Weld* (1833), 2 Nev. & M.K.B. 725; *Washbourn* v. *Burrows* (1847), 1 Exch. 107; *I.R. Comrs.* v. *Smyth*, [1914] 3 K.B. 406; *English Hop Growers* v. *Dering*, [1928] All E.R. Rep. 396; *Honeywill and Stein, Ltd.* v. *Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K.B. 191; *Saunders* v. *Pilcher*, *I.R. Comrs.* v. *Pilcher*, [1949] 2 All E.R. 1097; *Hood Barrs* v. *I.R. Comrs.*, [1957] 1 All E.R. 832.

As to whether a sale of a growing crop is an interest in land, see 1 HALSBURY'S LAWS (3rd Edn.) 445–447; and for cases see 2 DIGEST (Repl.) 34–40. For the Law of Property Act, 1925, s. 40, see 20 HALSBURY'S STATUTES (2nd Edn.) 500; for the Sale of Goods Act, 1893, s. 4, see HALSBURY'S STATUTES (2nd Edn.) 988; and for the Law Reform (Enforcement of Contracts) Act, 1954, s. 2, see 34 HALSBURY'S STATUTES (2nd Edn.) 757.

Cases referred to:

(1) *Crosby* v. *Wadsworth* (1805), 6 East, 602; 2 Smith, K.B. 559; 102 E.R. 1419; 2 Digest (Repl.) 34, *155*.

(2) *Parker* v. *Staniland* (1809), 11 East, 362; 103 E.R. 1043; 2 Digest (Repl.) 36, *169*.

(3) *Warwick* v. *Bruce* (1813), 2 M. & S. 205; 105 E.R. 359; 2 Digest (Repl.) 36, *170*.

(4) *Emmerson* v. *Heelis* (1809), 2 Taunt. 38; 127 E.R. 989; 2 Digest (Repl.) 35, *159*.

(5) *Waddington* v. *Bristow* (1801), 2 Bos. & P. 452; 126 E.R. 1379; 2 Digest (Repl.) 35, *162*.

(6) *Mayfield* v. *Wadsley* (1824), 3 B. & C. 357; 5 Dow. & Ry. K.B. 224; 3 L.J.O.S.K.B. 31; 107 E.R. 766; 2 Digest (Repl.) 36, *168*.

(7) *Poulter* v. *Killingbeck* (1799), 1 Bos. & P. 397; 216 E.R. 973; 2 Digest (Repl.) 35, *158*.

(8) *Poole's Case* (1703), Holt, K.B. 65; 1 Salk. 368; 90 E.R. 934, N.P.; 21 Digest (Repl.) 574, *692*.

(9) *Winn* v. *Ingilby* (1822), 5 B. & Ald. 625; 106 E.R. 1319; 21 Digest (Repl.) 573, *683*.

Rule Nisi obtained by the defendant to enter a nonsuit in an action of indebitatus

assumpsit, for crops of potatoes bargained and sold. The defendant pleaded the general issue.

At the trial before GARROW, B., at the Monmouthshire Spring Assizes, 1826, it appeared that on Sept. 25, 1825, a verbal agreement was made between the plaintiff and defendant by which the defendant agreed to purchase of the plaintiff a cover of potatoes then in the ground, to be turned up by the plaintiff, at the price of £5, and the defendant paid 1s. earnest. The defendant agreed to come and take them away before Christmas following. At the time the potatoes in question were sold, potatoes of the same quality were selling in the market at 12s. per sack, and in a month afterwards they fell to 8s. The defendant having neglected to take the potatoes pursuant to his agreement, the present action was brought. It was objected on the part of the defendant that this was a contract or sale of an interest in or concerning land, within the meaning of the Statute of Frauds, and, not being in writing, was void. The learned judge was of opinion, that as the seller was to turn up the potatoes, the contract did not give the buyer any interest in the land; and he directed a verdict to be found for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. The defendant obtained a rule nisi accordingly.

By s. 4 of the Statute of Frauds, 1677:

> ". . . no action shall be brought whereby . . . to charge any person . . . upon any contract for sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Justice for the plaintiff, showed cause against the rule.

Ludlow for the defendant, supported the rule.

BAYLEY, J.—I am of opinion, that in this case there was not a contract for the sale of any lands, tenements, or hereditaments, or any interest in or concerning them, but a contract only for the sale and delivery of things which, at the time of the delivery, should be goods and chattels. It appears that the contract was for a cover of potatoes; the vendor was to raise the potatoes from the ground at the request of the vendee. The effect of the contract, therefore, was to give to the buyer a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land; he was merely to have the potatoes delivered to him when their growth was complete.

Most of the authorities cited in the course of the argument, to show that this contract gave the vendee an interest in the land within the meaning of s. 4 of the Statute of Frauds, are distinguishable from the present case. In *Crosby* v. *Wadsworth* (1) the buyer did acquire an interest in the land; for, by the terms of the contract, he was to mow the grass, and must, therefore, have had the possession of the land for that purpose. Besides, in that case, the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. Growing grass does not come within the description of goods and chattels, and cannot be seized as such under a fi. fa.; it goes to the heir and not to the executor. Growing potatoes, however, come within the description of emblements, and are deemed chattels, by reason of their being raised by labour and manurance; they go to the executor of tenant in fee simple, although they are fixed to the freehold, and may be taken in execution under a fi. fa., by which the sheriff is commanded to levy the debt of the goods and chattels of the defendant. If a growing crop of potatoes be chattels, then they are not within the provisions of s. 4 of the Statute of Frauds, which relate to lands, tenements, or hereditaments, or any interest in or concerning them.

In *Parker* v. *Staniland* (2), the owner of a close cropped with potatoes, made a contract on Nov. 21, to sell them at so much per sack, and the purchaser was to

raise them from the ground immediately, and that was held not to be a contract for any interest in or concerning land. In that case, as well as in *Warwick* v. *Bruce* (3), the potatoes had ceased to grow; and, therefore, they are distinguishable from the present case; but the reasoning of LORD ELLENBOROUGH in the latter case may assist us in coming to a right conclusion in the present case. He there says (2 M. & S. at p. 208):

> "If this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in or concerning lands, and would then fall unquestionably within the range of *Crosby* v. *Wadsworth* (1). But here is a contract for the sale of potatoes at so much per acre: the potatoes are the subject-matter of sale; and whether at the time of sale they were covered with earth in the field, or in a box, still it was a sale of a mere chattel."

It does not appear that the other judges gave any opinion upon that point; but it is clear that LORD ELLENBOROUGH's judgment proceeded upon the ground that if the contract gave to the vendee no right to the land so as to enable him to make a profit of the growing surface, then it was not to be considered as giving him an interest in the land, but merely in a chattel.

The opinion delivered by MANSFIELD, C.J., in *Emmerson* v. *Heelis* (4) is certainly at variance with our judgment in the present case. But it is first to be observed, that it was not necessary in that case for the court to decide the question upon s. 4 of the Statute of Frauds, for the contract was signed by the auctioneer as the agent of the buyer, and was equally binding whether it was for a sale of goods and chattels or of an interest in land. The plaintiff there put up to sale on Sept. 25, by public auction, a crop of turnips then growing on his land, in separate lots, and under certain conditions of sale. The defendant, by his agent, attended at the sale, and being the highest bidder for twenty-seven different lots, was declared to be the purchaser; and the name of the defendant was written in the sale bill opposite to each particular lot for which he had been declared the highest bidder. MANSFIELD, C.J., there says (2 Taunt. at p. 47):

> "As to this being an interest in land, we do not see how it can be distinguished from the case of hops decided in this court; and if the auctioneer is an agent for the purchaser, then the Statute of Frauds is satisfied, because the memorandum in writing is signed by an agent for the party to be charged."

The ground of the Lord Chief Justice's opinion as to the contract giving the purchaser an interest in the land, was that the case could not be distinguished from that of *Waddington* v. *Bristow* (5).

It becomes necessary, therefore, to consider whether the two cases be similar. In the latter case the contract was made in November for all the hops which should be grown in the ensuing year upon a given number of acres of land. At that time the hops which were the subject of the contract were not in existence; there was nothing but the root of the plant, and the purchaser was not to have that. The question in that case was, not whether the agreement, which was in writing, was for an interest in the land, but whether it ought to have been stamped. It was contended that it was within the exception in the Stamp Act, an agreement made for and relating to the sale of goods, wares, and merchandise. All the judges concurred in the judgment that the contract in that case was not an agreement for the sale of goods, wares, and merchandise; but their opinions were founded upon different reasons. LORD ALVANLEY thought that it was an agreement for the sale of goods, wares, and merchandise, and something more, viz., for the produce of the land in a certain state at the time of delivery. The opinions of HEATH, J., and ROOKE, J., proceeded on the ground that the hops at the time of the contract did not exist as goods, wares, and merchandise. CHAMBRE, J., was the only judge who intimated an opinion that the contract gave the vendee an interest in the land. He certainly stated that the contract gave the vendee an interest in the produce

of the whole of that part of the vendor's farm which consisted of hop grounds. I concur in opinion with the three learned judges, who thought in that case that the hops were not goods, wares, and merchandise at the time of the contract: but I do not agree with MANSFIELD, C.J., that there was no distinction between the hops in that case and the growing turnips in *Emmerson* v. *Heelis* (4), because I think that in the latter case the growing turnips at the time of the contract were chattels.

It has been insisted that the right to have the potatoes remain in the ground is an interest in the land: but a party entitled to emblements has the same right, and yet he is not by virtue of that right considered to have any interest in the land. For the land goes to the heir, but the emblements go to the executor. In TIDD'S PRACTICE, 1039, it is laid down that under a fi. fa. the sheriff may sell fructus industriales, as corn growing, which goes to the executor, or fixtures which may be removed by the tenant; but not furnaces or apples upon trees, which belong to the freehold, and go to the heir. The distinction is between those things which go to the executor and those which go to the heir. The former may be seized and sold under the fi. fa., the latter cannot. The former must, therefore, in contemplation of law, be considered chattels. It appears, therefore, that when it was necessary at common law to distinguish between what was land and what was not, a growing crop produced by the labour and expense of the occupier of lands was, as the representative of that labour and expense, considered an independent chattel, not going as the land does, but in a different direction. Upon the same principle the purchaser of a growing crop, who by his contract acquires a right to have the crop continue in the land of the seller until it arrived at maturity, must, before the passing of the Statute of Frauds, have been considered to have had an interest not in the land, but in a chattel independent of the land.

That being so, I cannot suppose that by s. 4 of that statute, which enacts, that unless certain provisions be complied with, no action shall be brought upon any contract or sale of any interest in or concerning lands, tenements, or hereditaments, the legislature contemplated, as the subject-matter of such contract or sale, that interest which passes from a vendor to a vendee by a sale of a growing crop of potatoes. The Sale of Farming Stock Act, 1816, indeed, is a legislative declaration that growing crops may be seized and taken in execution under a fi. fa. It prevents their being so seized in cases where the tenant is restrained by covenant in his lease from removing them off the premises. *Mayfield* v. *Wadsley* (6) also shows, that where there is a sale of growing crops, distinct from any assignment or letting of the land, the crops do not constitute part of the inheritance, or any interest in land, but are mere chattels, and may be recovered under a count for goods bargained and sold.

Upon these grounds, I am of opinion that there was not in this case any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them within s. 4 of the Statute of Frauds; but that there was a contract for the sale of goods, wares, and merchandise within the meaning of s. 17, though not to the amount which makes a written note or memorandum of the bargain necessary. The rule for entering a nonsuit must, therefore, be discharged.

HOLROYD, J.—I also think that this rule ought to be discharged. This is to be considered a contract for the sale of goods and chattels to be delivered at a future period. Although the vendee might have an incidental right, by virtue of his contract, to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in the land within the meaning of this statute. He clearly had no interest so as to entitle him to the possession of the land for a period, however limited; for he was not to raise the potatoes. Besides, this is not a contract for the sale of the produce of any specific part of the land, but of the produce of a cover of land. The plaintiff did not acquire by the contract an interest in any specific portion of the land. The contract only

binds the vendor to sell and deliver the potatoes at a future time at the request of the buyer, and he was to take them away.

In *Parker* v. *Staniland* (2), LORD ELLENBOROUGH says (11 East, at p. 366):

> "The lessee primæ vesturæ may maintain trespass quare clausum fregit, or ejectment for injuries to his possessory right; but this defendant could not have maintained either; for he had no right to the possession of the close; he had only an easement, a right to come upon the land for the purpose of taking up and carrying away the potatoes; but that gave him no interest in the soil."

In this case the potatoes are not to be dug up by the buyer; but even if that had been part of the contract, I think he would not have had an interest in the land, but a mere easement. In *Emmerson* v. *Heelis* (4) it did not appear that the subject-matter of the contract was fit to be taken at the time of the contract. The purchaser was not to pay until January, and it may have continued to grow until that period. In *Poulter* v. *Killingbeck* (7), indebitatus assumpsit was brought for moieties of crops of wheat sold by the plaintiff to the defendant, and accordingly reaped for his the defendant's own use. It appeared that the plaintiff by a parol agreement had let land to the defendant, from which he was to take two successive crops, and to render the plaintiff a moiety of the crops in lieu of rent. While the crops of the second year were on the ground, an appraisement of them was taken by both parties, and the value ascertained. The action was brought to recover a moiety of the value. It was objected that the agreement was within the statute, because it related to land, but the court overruled the objection, EYRE, C.J., observing (1 Bos. & P. at p. 398),

> "that as the case originally stood, the plaintiff had a claim to a moiety of the produce of the land under a special agreement, but that special agreement was executed by the appraisement. The circumstance of the appraisement afforded clear proof that the plaintiff sold what the defendant had agreed was his, and the price having been ascertained, brought this to the case of an action for goods sold and delivered."

LORD ELLENBOROUGH, in observing upon that case in *Crosby* v. *Wadsworth* (1), says (6 East, at p. 612):

> "The contract, if it had originally concerned an interest in land, after the agreed substitution of pecuniary value for specific produce, no longer did so: it was originally an agreement to render what should have become a chattel, i.e., part of a severed crop in that shape, in lieu of rent, and by a subsequent agreement it was changed to money instead of remaining a specific render of produce."

So in this case the contract being for the sale of the produce of a given quantity of land, was a contract to render what afterwards would become a chattel; and although some advantage might accrue to the vendee by the potatoes remaining in the land, I think that was not an interest in or concerning land within the meaning of s. 4 of the Statute of Frauds.

LITTLEDALE, J.—I am of opinion that a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of lands, tenements, or hereditaments, or any interest in or concerning them within the meaning of s. 4 of the Statute of Frauds. The words lands, tenements, and hereditaments in that section appear to me to have been used by the legislature to denote a fee simple, and the words any interest in or concerning them were used to denote a chattel interest, or some interest less than the fee simple. In s. 5, which requires a will of lands, tenements, and hereditaments to be attested by three witnesses, the words "lands and tenements" are clearly used to denote a fee simple, and do not extend to leaseholds

The legislature contemplated an interest in land which might be made the subject of sale. I think, therefore, they must have contemplated a sale of an interest which would entitle the vendee either to the reversion or the present possession of the land.

Now this contract only gives to the vendee an interest in that growing produce of the land which constituted its annual profit. Such an interest does not constitute part of the realty. In Co. LITT. 55 b, it is laid down:

> "If tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain, and determined by the act of God."

Upon the death of the tenant for life the land belongs to the reversioner, but the growing crop goes to the executor of the tenant for life, as part of his personal estate. SIR EDWARD COKE then states:

> "If a man be seised of land in right of his wife, and soweth the ground and he dieth, his executors shall have the corn, and if his wife die before him, he shall have the corn."

Upon the death of the husband or wife, the interest of the former in the land ceases, yet the growing corn is considered as part of his personal estate, and belongs to him or his executors. SIR EDWARD COKE afterwards puts other cases, and in all of them he distinguishes between the land and the growing produce of the land; he considers the latter as a personal chattel independent on, and distinct from, the land. If, therefore, a growing crop of corn does not in any of these cases constitute any part of the land, I think that a sale of any growing produce of the earth (reared by labour and expense) in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land within the meaning of s. 4 of the Statute of Frauds; but a contract for the sale of goods, wares, and merchandise within s. 17 of that statute. Such an interest goes to the executor and not to the heir, and anything which goes to the executor and not to the heir, may be taken in execution under a fi. fa. This is the rule of law as to tenants' fixtures, which bear a very close resemblance to those growing crops which are not the spontaneous produce of the earth, but are raised by the labour and expense of the occupier of the land. It has been held, that vats, coppers, etc., set up in a house by the lessee for years in relation to his trade, may be taken in execution under a writ of fi. fa. issued against him: *Poole's Case* (8); but that fixtures of a similar description cannot be taken in execution under a fi. fa. issued against a party who was seised in fee of the house in which they were situate, upon the ground that they would go to his heir and not to his executor: *Winn* v. *Ingilby* (9). A growing crop of corn or potatoes, or of any vegetable which is produced not spontaneously by the earth, but by the labour and expense of the occupier, goes to the executor and not to the heir of tenant in fee simple. It would seem, therefore, that such a growing crop may be seised under a fi. fa., issued against the owner of the inheritance as his goods and chattels, even while they are annexed to the freehold. I cannot, therefore, consider the annual produce of land which is proceeding to a state of maturity, and which, when taken at maturity, will be severed from the ground and become movable goods and chattels, as an interest in or concerning land within the meaning of s. 4 of the Statute of Frauds, which seems to me to mean land taken as mere land, and not its annual growing productions; consequently the rule for entering a nonsuit must be discharged.

Rule discharged.

HUDSON *v.* REVETT

[COURT OF COMMON PLEAS (Best, C.J., Burrough and Gaselee, JJ.), February 7, 1829]

[Reported 5 Bing. 368; 2 Moo. & P. 663; 7 L.J.O.S.C.P. 145; 130 E.R. 1103]

Deed—Alteration—Validity—Alteration to carry out intention of parties—Presumption of re-delivery.

If an alteration is made in a material part of a deed without the consent of the person who is liable under the deed, the deed is rendered void, but where it is shown that this person meant that the deed should be acted on in its altered state and the alterations were made in his presence and with his consent his subsequent assent to the alterations is equivalent to a re-delivery of the deed and the deed is valid.

A debtor executed a deed of trust by which he conveyed all his property to a trustee in trust to sell it for the benefit of his creditors. At the time of the execution of the deed by the debtor a blank space was left in the deed for the amount of the sum due to a creditor whose debt had not then been finally ascertained. On the following day the amount of the debt was agreed by the debtor and the creditor, and the blank space was filled in with the agreed sum.

Held: either (i) the deed was not a complete deed until, with the consent and in the presence of the debtor, the amount of the debt was filled in to give effect to the prior agreement of the parties, in which case a re-delivery would be presumed, and the deed would become valid; or (ii) if it were a good deed in the first place it was delivered only to have operation from the time that the agreed amount of the debt was written in.

Notes. Considered: *Hibblewhite* v. *McMorine* (1840), 6 M. & W. 200; *West* v. *Steward* (1845), 14 M. & W. 47; *Tupper* v. *Foulkes* (1861), 9 C.B.N.S. 797; *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555; *Bishop of Crediton* v. *Bishop of Exeter*, [1904–7] All E.R. Rep. 552; *Rudd* v. *Bowles*, [1912] 2 Ch. 60. Referred to: *Cherry* v. *Heming and Needham* (1849), 19 L.J.Ex. 63; *Fazakerly* v. *McKnight* (1856), 26 L.J.Q.B. 30; *Société Générale de Paris* v. *Tramways Union* (1884), 14 Q.B.D. 424; *Re Seymour, Fielding* v. *Seymour*, [1913] 1 Ch. 475.

As to the avoidance of deeds by alteration, see 11 HALSBURY'S LAWS (3rd Edn.) 367–371; and for cases see 17 DIGEST (Repl.) 241, 242.

Case referred to:

(1) *Goodright d. Carter* v. *Straphan* (1774), 1 Cowp. 201; Lofft. 763; 98 E.R. 1043; 17 Digest (Repl.) 219, *180*.

Also referred to in argument:

Thoroughgood's Case (1612), 9 Co. Rep. 136 b; 77 E.R. 925; 17 Digest (Repl.) 217, *155*.

Pigot's Case (1614), 11 Co. Rep. 26 b; 77 E.R. 1177; sub nom. *Winchcombe* v. *Pigot*, 2 Bulst. 246; sub nom. *Winscombe* v. *Piggott*, 1 Roll. Rep. 39; sub nom. *Anon.*, Moore, K.B. 835; 12 Digest (Repl.) 405, *3134*.

Markham v. *Gonaston* (1598), Cro. Eliz. 626; 78 E.R. 866; 7 Digest (Repl.) 240, *775*.

Zouch v. *Clay* (1671), 1 Vent. 185; 2 Keb. 872, 881; 2 Lev. 35; 86 E.R. 126; 7 Digest (Repl.) 240, *779*.

Paget v. *Paget* (1688), 2 Rep. Ch. 410; 21 E.R. 701; 12 Digest (Repl.) 406, *3143*.

Hall v. *Chandless* (1827), 4 Bing. 123; 12 Moore, C.P. 316; 130 E.R. 714; 12 Digest (Repl.) 410, *3173*.

Doe d. Lewis v. *Bingham* (1821), 4 B. & Ald. 672; 106 E.R. 1082; 17 Digest (Repl.) 251, *543*.

Tevira v. *Evans* (1788–1794), cited in 1 Anst. at p. 228; 145 E.R. 854, N.P.; 7 Digest (Repl.) 241, *785*.

Matson v. *Booth* (1816), 5 M. & S. 223; 105 E.R. 1033; 7 Digest (Repl.) 240, *780*.

Coke v. *Brummell* (1818), 8 Taunt. 439; 2 Moore, C.P. 495; 129 E.R. 453; 7 Digest (Repl.) 240, *782*.

Jennings v. *Bragg* (1595), Cro. Eliz. 447; cited in 3 Co. Rep. at p. 35 b; 78 E.R. 687; 17 Digest (Repl.) 219, *179*.

Rule Nisi for a new trial obtained by the defendant after the decision of an issue directed by this court in the last Term to try whether certain deeds of lease and release, bearing date Nov. 25 and 26, 1825, and an accompanying deed of trust, dated Nov. 26, 1825, were the deeds of the defendant, and, if so, whether they had been obtained from him by fraud, covin, or misrepresentation.

At the trial, before HOLROYD, J., at Suffolk Assizes it appeared that, by the deeds in question, the defendant conveyed all his estates in the county of Suffolk to the plaintiff upon trust for the benefit of the defendant's creditors, and, among others, to secure certain debts due from him to the plaintiff and one Mills. By the deeds of lease and release (after reciting certain debts and encumbrances) the defendant's estates were conveyed to the plaintiff in trust for sale, and that he should stand possessed of all moneys arising therefrom upon certain trusts to be declared in a deed to be executed immediately after the execution of the deeds of lease and release, and by the terms of the deed of trust the plaintiff, as trustee, was, in the first place, to pay and defray the costs, charges, and expenses of all parties thereto attending the preparing, settling, completing, and executing the deed of trust and the several indentures of lease and release therein referred to; and, in the next place, to pay to one Robert Browne, a party to the deed of trust, all costs, charges, and expenses, which should be incurred or sustained in making and completing the sale of the estates, of which he, Browne, was to be the receiver and manager. There was an ultimate trust in favour of the defendant as to the surplus, if any, of the moneys arising from the sale of the estates after the payment of debts. The deeds of lease and release contained a covenant on the part of the defendant and his wife to levy a fine to the plaintiff to enure to the intents and purposes of the trust deed.

Browne was called as a witness, and, on his stating that he was the attorney who prepared the deeds and that he was a party to the deed of trust and had acted under it, his testimony was objected to on the grounds that he had an interest to support the deeds for the purpose of being paid his costs for preparing them, or that, at all events, he had an equitable claim on the moneys arising from the sale of the estates to defray the expenses attending such sale. [Interest of a witness now goes to the weight of his evidence and not to its admissibility: see 15 HALSBURY'S LAWS (3rd Edn.) 278.] The learned judge, however, was of opinion, that, as the plaintiff, as trustee, was liable to pay Browne personally, having employed him to prepare the deeds, the latter must be considered as his agent for that purpose, and that Browne's testimony was admissible, although he might have an interest in proving the due execution of the trust; that the deeds did not give Browne a higher security for his costs; and, therefore, that they could not be used in evidence in support of his claim on the plaintiff for such costs. Browne then stated, that, on Nov. 14, 1825, he was employed as an attorney on the part of the plaintiff and Mills, creditors of the defendant, to prepare certain deeds by which the estates of the defendant were to be conveyed to the plaintiff in trust to sell for the payment of the defendant's debts; that he prepared drafts of the deeds in question; that, on Nov. 24, he, accompanied by Mills, went to the King's Bench Prison, where the defendant was confined at the suit of the plaintiff and Mills; that the drafts of the deeds were read over to the defendant in the presence of Mills; that, after certain alterations had been made in the drafts, they were signed by the defendant

and Mills; that, on Nov. 28 Browne again went to the prison and took the deeds in question, which had been engrossed verbatim from the drafts, for the purpose of having them executed by the defendant; that, on his being told that they corresponded with the drafts, he said that there was no occasion to have them read over to him; that blanks were left in the deed of trust for the amount of sums due from the defendant to his creditors which were, previously to its execution, filled up, with the exception of the amount of the debt claimed by Mills, who was then present and produced an account stating that the defendant was indebted to him in a sum exceeding £16,000; that the defendant disputed this amount, produced a counter account reducing Mills's debt to £14,858 8s. 8½d., and said that he had vouchers to confirm such account which he undertook to produce on the following day; that it was then agreed that blanks should be left in the trust deed for Mills's debt, subject to the production of the vouchers, and that they should be filled up when they were produced; that Mills and the defendant then executed the deeds, leaving blanks at four places in the trust deed for the insertion of the sum due to Mills when ascertained; and that the defendant requested that it might be done. On the following day, Nov. 29, Browne and Mills again called on the defendant at the King's Bench Prison, when the latter produced the vouchers above referred to. A balance was struck; the amount of Mills's debt was agreed to both by him and the defendant; Browne then filled up the blanks in the trust deed with the above sum of £14,858 8s. 8½d., and then left the prison, taking away all the deeds with him for the purpose of having them executed by the plaintiff and the other necessary parties. The plaintiff did not execute the trust deed until the latter end of the following month of December.

Shortly after the execution of the deeds the defendant was discharged from prison, the plaintiff and Mills having executed releases of their demands on him. In December, 1825, the defendant's wife executed the deeds in his presence, and a fine was levied by them in Hilary Term, 1826, to enure to the uses of the trust deed.

No witnesses were called for the defendant, nor was any evidence offered on his behalf. But it was objected for him that, where a deed between several parties was executed by them and a blank left in a material part, although it was afterwards filled up with the concurrence of all the parties interested, it was no longer the deed of the executing parties, but was altogether a void instrument; that, as blanks were left in the trust deed for the amount of the sum due to Mills at the time of the execution by the defendant, the deed was void as against him although the amount was afterwards inserted with his consent; and that parol evidence of his assent to such alteration, after the execution, was inadmissible, for, in BULLER'S NISI PRIUS, 7th Edn., by Bridgman, 267, it was said:

> "If there be blanks left in an obligation, in places material, and filled up afterwards by the assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered: as, if a bond were made to C. with a blank left after for his christian name, and for his addition, which is afterwards filled up."

HOLROYD, J., told the jury that the only question for their consideration was whether the deeds of lease and release and the accompanying deed of trust, all of which were actually executed by the defendant on Nov. 28, were his deeds, and, if so, whether either, or which of them, had been obtained by fraud or misrepresentation; that no substantial ground of objection had been raised to the deeds of lease and release, which conveyed the estate to the plaintiff upon certain terms declared in the trust deed; that, although it had been said that that deed was void on account of the blanks left for the insertion of the sum due from the defendant to Mills on the authority of a passage in BULLER'S PRIUS, yet it did not appear there that the blanks were filled up in the presence of the party; that,

if it were done in his absence, and the instrument had not been shown him subsequently to the execution, there could have been no re-delivery; but that, if, in such a case there were circumstances to show that the party meant that the deed should be acted upon in its altered state and the alterations were made in the presence and with the assent of the party, the deed would be his, as his subsequent assent to the alterations in his presence would be equivalent to a re-delivery, for, in *Goodright d. Carter* v. *Straphan* (1), where a feme covert delivered a deed during her husband's lifetime, which was void, and re-delivered the deed after his death, it was held to be a sufficient confirmation of the deed so as to bind her without its being re-executed or re-attested, as certain circumstances might of themselves be equivalent to a re-delivery, so as to render the deed operative, in point of law. LORD MANSFIELD, after referring to PERKINS, s. 154, said:

> "The question is whether circumstances may not be equivalent to a delivery, without actual delivery. LORD COKE, in his commentary on LITTLETON, says (p. 36): 'As a deed may be delivered to the party without words, so a deed may be delivered by words, without any act of delivery.'"

So, here, the only question was whether the facts, as proved by Browne, amounted to a re-delivery. The deed of trust was a valid deed although blanks for the sum due from the defendant to Mills were left in at the time of the execution, for it was then agreed and assented to by the defendant that the blanks should be filled up when the amount of the debt was ascertained and the sum was not inserted at the time because the defendant claimed a deduction, and on the following day, he having produced certain vouchers, the deduction was allowed and the sum was inserted accordingly in his presence, and with his assent. The deeds were afterwards taken away by Browne, who acted as the attorney for all parties, for the purpose of their being executed by others, and the defendant himself afterwards saw his wife execute them and actually joined with her in levying a fine to enure to the purposes of the trust deed. The question was: Did not these facts amount to a confirmation of the deed? The learned judge intimated it as his opinion that, unless the jury disbelieved the evidence adduced for the plaintiff, there was abundant ground for them to consider that the deeds were the deeds of the defendant, and there was no evidence whatever to show that either of them had been obtained by fraud or covin.

The jury found that the deeds were the deeds of the defendant, and that the execution of them had not been obtained by any fraud, covin, or misrepresentation, and they, accordingly, gave a verdict for the plaintiff.

A rule nisi was obtained by the defendant calling on the plaintiff to show cause why this verdict should not be set aside and a new trial granted.

Serjeant Storks and *Serjeant Russell* for the plaintiff, showed cause against the rule.

Serjeant Wilde for the defendant, supported the rule.

BEST, C.J.—This was an issue directed by the court for the purpose of ascertaining whether certain deeds were the deeds of the defendant, and, if so, whether they had been properly executed and were obtained by fraud or covin. The jury have found that all the deeds were properly executed, and they have negatived fraud. An application has been since made to us to grant a new trial on several grounds—(i) that the testimony of a witness (Browne) was admitted which ought not to have been received; (ii) that the deeds of lease and release should have had an ad valorem stamp as they were in the nature of a mortgage security or a conveyance for sale (so it would be, perhaps, if we looked at those deeds only, but the object of all the deeds was to convey the defendant's property to be sold for the benefit of his creditors); (iii) that the trust deed was a completely executed deed at the time the witness attested its execution in the King's Bench Prison; (iv) that the learned judge ought not to have left it to the jury to presume another execution

or re-delivery; (v) if it were a perfectly executed deed, the filling up the blanks subsequently to its execution, though with the assent of all the parties, rendered the deed a nullity; and (vi) that, if the trust deed be void, the two previous deeds are useless, and may be considered as gone, because they refer to the latter, and cannot stand as a complete conveyance of the defendant's property, without it.

[His LORDSHIP dealt with points (i), (ii) and (vi) on grounds which do not call for report, and continued:] This brings me to the material questions in the case, which have been divided into two. It has been first insisted by the counsel for the plaintiff that there was no perfect execution of the deed of trust until the sum of £14,858 8s. 8½d. was inserted in it; and, if there was not a perfect execution of the deed up to that time, it was competent to the judge who tried the cause to leave it to the jury to consider whether they would not presume a re-delivery of the deed, after all the sums were written in, and it was rendered a perfect deed. I am of opinion, that this is a correct view of the case, and, if it be, it comes precisely within the principle of *Goodright d. Carter* v. *Straphan* (1), to which my brother HOLROYD referred at the trial. There a deed had been executed by a married woman, and, as such, was undoubtedly a void instrument, but, after the death of her husband, when she was in a state to dispose of her property, she, by various acts, confirmed the deed, and the Court of King's Bench decided that, by the confirmation of the deed, the jury were warranted in presuming a re-execution of it. Undoubtedly in that case LORD MANSFIELD (1 Cowp. at pp. 203, 204) referred to a passage in PERKINS, where he says in s. 154:

> "It is to be known that a deed cannot have and take effect at every delivery as a deed; for, if the first delivery take effect, the second delivery is void; as, in case an infant, or a man in prison, makes a deed and deliver the same as his deed, etc.; and, afterwards, the infant, when he cometh to his full age, or the man imprisoned when he is at large, deliver again the same deed as his deed, which he delivered before as his deed, this second delivery is void."

That brings me to the question, was there any perfect delivery of the deed of trust, antecedent to the time when the amount of the sum due to Mills was written in? If we look at the deed, it is quite impossible to say that it could have any operation until the whole of the sums were actually written in, for, what was the object of the deed? The object of all the deeds was to convey the defendant's estates to a trustee that they might be sold and the proceeds applied to pay the debts of certain creditors which were to be ascertained, and, when ascertained, were to be inserted in the deed of trust. In preparing the draft of that deed blanks were left for the insertion of the sums, until the debts of the respective creditors should have been ascertained. When the parties first met in the King's Bench Prison, on Nov. 28, can it be said that there was a perfect execution of the deeds when the amount of the sum due to one of the principal creditors remained unascertained? The operative part of the deed of trust refers to the payment of particular sums, which, at first, were not ascertained. It is quite clear that, if nothing had passed on the day the deeds were executed, the trust deed could not be an operative deed until all the sums were introduced because the main object of that deed was the payment of those sums.

I, therefore, think that, taking it in this point of view, this was not to be considered as an execution of the deed—that it was not a complete deed, and, therefore, the case falls within the authority of *Goodright d. Carter* v. *Straphan* (1) and not within the law which was there referred to from PERKINS. This deed of trust, as I have stated, undoubtedly was not to be considered as complete until the sum due to Mills was introduced. It has been said that it could not be delivered as an escrow unless it were so delivered in terms. Perhaps, technically speaking, this is so, because a deed delivered to the party is not an escrow. A deed delivered to a stranger is an escrow till something is done, but, though it is delivered to a party, there are cases to show that it may not be a perfect and complete deed. In COMYNS's

DIGEST, tit. Fait, A. 3, that learned writer, in treating of the delivery of deeds, says:

> "If a writing be once delivered as a deed of the obligor, it is sufficient, though he afterwards by words explains his intent otherwise; as, if an obligation be made to A. and delivered to A. himself as an escrow, to be his deed upon performance of a condition, this is an absolute delivery, and the subsequent words are void and repugnant."

When we come to look at the authorities which are referred to in the text in support of the proposition, there is some difficulty to ascertain on which side the balance lies, as several cases are referred to which are in themselves conflicting and contradictory. But, in the next division, tit. Fait, A 4, it appears to me to be clear that the formal delivery as an escrow, as applicable to this case, is merely a technical subtlety, if I may be allowed such an expression, for COMYNS, C.B., says:

> "If a writing be delivered to a stranger as an escrow, to be the deed of the party upon performance of conditions, it is not his deed till the conditions performed, though the party happens to have it before, or it be delivered to a stranger to keep till conditions be performed, or to be delivered to the party, as his deed, upon performance of a condition."

This latter proposition that learned writer gives as his own authority without referring to any case, and I think I am warranted in saying that we cannot have a better authority.

Let us now see how that doctrine applies to the present case. The parties met—something was to be done before a complete deed could be made—the sums were to be ascertained which the different creditors were to be paid. That was not done on the first day of meeting but they all were ascertained on the following day, when they were written in. Taking it, then, that the first was a delivery, was it not a delivery of the deed, in the language of LORD COKE, upon condition, viz., upon condition that something was to be done which at that time was not done, and, when that something is afterwards done, then, and not until then, it becomes a perfect deed. It seems to me, therefore, without touching any of the cases that have been decided upon the alteration of deeds, we may say that this deed was not a complete deed executed, so as to have effect in the hands of the parties, until all the sums were inserted or written in. I shall not, after what I have said, travel through the different cases that have been cited, with respect to the alteration of deeds, but I beg not to be taken as deciding that, if a deed be altered with the consent of all the parties after it is executed, it may not be considered as a good deed. I think, if we were driven to examine that question, it would be found that in these times, whatever might have been thought formerly, if all the parties assent to the alteration of a deed, it will, in its altered shape, be a good deed; but I do not decide this case on that ground. I decide it on this, that it either was no deed at all until the sum due to Mills was written in, and that then the jury were warranted in presuming a re-delivery to make it a deed, or that, if it were a deed, it was delivered, in the first instance, only to have operation from the time that that sum was written in, which was to give it its full effect. I, therefore, think we must take it, from what passed at the time of the execution, that it was not to be considered as having effect until it could have its full force by all the sums being written in which were to be written in.

On these grounds, I am of opinion that the rule should be discharged. **BURROUGH, J.,** who heard nearly the whole of the argument, but who was obliged to go to chambers before its conclusion, desires me to state that he concurs in this opinion.

PARK, J., was absent through illness.

GASELEE, J.—This case has been extremely well argued and a great number of authorities have been referred to, which it is now unnecessary to travel through

at length. That which appeared to me to be the strongest, and which at first struck me as being most against the opinion which my Lord Chief Justice has now given, was the passage from BULLER'S NISI PRIUS, that

> "if there be blanks left in an obligation, in places material, and filled up afterwards by the assent of the parties, yet is the obligation void; for it is not the same contract that was sealed and delivered."

That certainly is borne out by the authority referred to in ROLLE'S ABRIDGMENT, but BULLER, J., goes on by saying:

> "As, if a bond be made to C., with a blank left for his christian name, and for his addition, which is afterwards filled up."

I should certainly have supposed that the leaving the blank for the christian name and the addition imported of itself that it was to be afterwards filled up. But I think that that position is not warranted by the authority to which that learned writer refers, and certainly this case does not range itself within the first part of the sentence, because it appears to me that, from what was done here, the deed or contract was not materially altered. What was the meaning of the deed? Its object was the payment of all debts which the defendant owed to Mills and certain other creditors. That which was uncertain when the deed was at first executed, or rather when it was originally signed and attested, was afterwards reduced to a certainty. The way in which I consider the trust deed to be good is that it was an imperfect execution when the parties first met with an agreement that it should be afterwards perfected and take effect, when all the blanks were filled up. It appears that there was afterwards a meeting for that purpose; that the sum due to Mills was at that time agreed on; and that it was filled up in the handwriting of Browne, who acted as the agent of all parties, and, after the deed was filled up by him, he took it away for the purpose of carrying it to other creditors of the defendant by whom it was also to be executed. But it has been said, that the defendant Revett never had the possession of this deed himself. Although that may be so, yet a deed may be delivered, either by actual delivery, or by words, or acts equivalent to a delivery, and here the permitting Browne to take the deed away and carry it to other parties for the purpose of their executing it was of itself a question fit to be left to the jury whether that was not (if a re-delivery should be deemed to be necessary) a re-delivery on the completion of the deed, by the insertion of the amount of all the sums due from the defendant to his creditors. On that ground it is that I am of opinion that the trust-deed is to be considered as good.

[HIS LORDSHIP then dealt with questions of fact arising in the case which do not call for report.]

Rule discharged.

GILES *v.* GROVER AND ANOTHER

[House of Lords (Lord Tenterden, C.J., and Lord Brougham, L.C.), July, 1831, May 25, June 25, July 11, 1832]

[Reported 9 Bing. 128; 6 Bli. N.S. 277; 1 Cl. & Fin. 72; 2 Moo. & S. 197; 131 E.R. 563]

Execution—Seizure of debtor's goods—Effect of seizure—Property in goods remaining in debtor until sale.

By the seizure of a debtor's goods by the sheriff under a fi. fa. no property in the goods passes to the judgment creditor. Until the sale of the goods the general property remains in the debtor who, after their seizure, may, by payment of the judgment debt, stay the execution and have back his goods. The right of the execution creditor to the goods does not become consummate until after the sale of the goods to him.

Execution—Sheriff—Special property in goods seized—Right of action in trespass or trover—Limitation of right.

The sheriff has a special property in goods which he has seized under a fi. fa. while they are in his hands and may maintain trespass and trover for them, but that is a limited right (per Patteson and Alderson, JJ.) resulting from the sheriff being an officer of the law and the goods being in custodia legis, conferred on him to enable him to perform a public duty, or (per Tindal, C.J., and Lord Tenterden, C.J.) as being the right which belongs to any man in legal possession of goods, whether as a bailee or otherwise, to maintain an action against a person who deprives him of their possession.

Notes. Proceedings for the determination of any issue upon a writ of extent (a procedure to enable the Crown to enforce claims against the subject) were abolished by the Crown Proceedings Act, 1947: see Sched. 1. The Crown Debts Act, 1541, is published in 6 Halsbury's Statutes (2nd Edn.). Section 51, which appears at p. 16, is the equivalent in the Statutes of the Realm of s. 74 in Ruffhead's edition of the statutes, which is referred to throughout the present case.

Considered: *Godson* v. *Sanctuary* (1832), 4 B. & Ad. 255. Followed: *Grove* v. *Aldridge* (1832), 9 Bing. 428. Distinguished: *Doe d. Hughes* v. *Jones* (1842), 9 M. & W. 372. Considered: *Re Johnson, Ex parte Rayner* (1872), 41 L.J.Bcy. 26. Referred to: *Balme* v. *Hutton* (1833), 9 Bing. 471; *Garland* v. *Carlisle* (1834), 4 Cl. & Fin. 693; *R.* v. *Maberley* (1834), 4 Tyr. 345; *Grainger* v. *Hill* (1838), 5 Scott, 561; *Woodland* v. *Fuller*, [1835–42] All E.R. Rep. 343; *Doe d. Hughes* v. *Jones* (1842), 9 M. & W. 372; *Playfair* v. *Musgrove* (1845), 14 M. & W. 239; *Whitworth* v. *Gargain* (1846), 1 Ph. 728; *Bothamley* v. *Heyward* (1862), 8 Jur. N.S. 1156; *Re Clarke*, [1898] 1 Ch. 336; *Potts* v. *Hickman*, [1940] 4 All E.R. 491.

As to the effect of seizure of goods under a fi. fa., see 16 Halsbury's Laws (3rd Edn.) 55–62; and for cases see 21 Digest (Repl.) 597–599.

Cases referred to:

(1) *Philips* v. *Thompson* (1684), 3 Lev. 191; 83 E.R. 645; 21 Digest (Repl.) 618, *1048*.

(2) *Lowthal* v. *Tonkins* (1740), Barn. Ch. 39; 2 Eq. Cas. Abr. 381; 27 E.R. 546, L.C.; 21 Digest (Repl.) 618, *1051*.

(3) *Payne* v. *Drewe* (1804), 4 East, 523; 102 E.R. 931; sub nom. *Paine* v. *Drew*, 1 Smith, K.B. 170; 21 Digest (Repl.) 562, *590*.

(4) *Quick's Case* (1611), 9 Co. Rep. 128 b.

(5) *Hutchinson* v. *Johnston* (1787), 1 Term Rep. 729; 99 E.R. 1346; 21 Digest (Repl.) 561, *575*.

(6) *Jones* v. *Atherton* (1816), 7 Taunt. 56; 2 Marsh. 375; 129 E.R. 23; 21 Digest (Repl.) 597, *858*.

(7) *Smalcomb* v. *Buckingham* (1697), Carth. 419; 1 Com. 35; Holt, K.B. 362; 5 Mod. Rep. 376; 12 Mod. Rep. 146; 1 Salk. 320; 3 Salk. 159; 88 E.R. 1225; sub nom. *Smallcomb* v. *Cross and Buckingham*, 1 Ld. Raym. 251; sub nom. *Smallcorn* v. *London (Sheriff)*, Comb. 428; 21 Digest (Repl.) 560, *567*.

(8) *Wilbraham* v. *Snow* (1670), 2 Keb. 588; 1 Lev. 282; 1 Sid. 438; 2 Wms. Saund. 47; 1 Vent. 52; 86 E.R. 37; sub nom. *Willbraham* v. *Snow*, 1 Mod. Rep. 30; 21 Digest (Repl.) 598, *879*.

(9) *Clerk* v. *Withers* (1704), 2 Ld. Raym. 1072; Holt, K.B. 303, 646; 6 Mod. Rep. 290; 11 Mod. Rep. 34; 1 Salk. 322; 92 E.R. 211; 21 Digest (Repl.) 510, *66*.

(10) *R.* v. *Bird* (1679), 2 Show. 87; 89 E.R. 811; 21 Digest (Repl.) 567, *632*.

(11) *Mildmay* v. *Smith* (1671), 2 Saund. 343; 2 Keb. 821; 85 E.R. 1139; 21 Digest (Repl.) 632, *1199*.

(12) *Casberd* v. *A.-G.* (1819), 6 Price, 411; Dan. 238; 146 E.R. 850, Exch.; 35 Digest (Repl.) 523, *2077*.

(13) *R.* v. *Lee* (1819), 6 Price, 369; 146 E.R. 837; 1 Digest (Repl.) 645, *2205*.

(14) *R.* v. *Humphery* (1825), ante p. 452; M'Cle & Yo. 173; 148 E.R. 371; 32 Digest (Repl.) 280, *275*.

(15) *R.* v. *Watson* (1816), 3 Price, 6; 146 E.R. 174; 25 Digest (Repl.) 178, *50*.

(16) *Thomas* v. *Desanges* (1819), 2 B. & Ald. 586; 106 E.R. 480; 5 Digest (Repl.) 867, *7284*.

(17) *Uppom* v. *Sumner* (1779), 2 Wm. Bl. 1251, 1294; 96 E.R. 737, 758; 41 Digest (Repl.) 93, *201*.

(18) *Stringefellow* v. *Brownesoppe* (1549), 1 Dyer, 67 b.

(19) *Letchmere* v. *Thorowgood* (1688), 3 Mod. Rep. 236; 1 Show. 12; 87 E.R. 153; sub nom. *Lechmere* v. *Thorowgood*, Comb. 123; subsequent proceedings, sub nom. *Lechmore* v. *Toplady* (1690), 1 Show. 146; 2 Vent. 169; 89 E.R. 502; 21 Digest (Repl.) 617, *1041*.

(20) *A.-G.* v. *Andrew* (1655), Hard. 23; 145 E.R. 360; 11 Digest (Repl.) 665, *902*.

(21) *R.* v. *Dickenson* (1692), Park. 262; 145 E.R. 774; 23 Digest (Repl.) 351, *4190*.

(22) *Cooper* v. *Chitty* (1756), 1 Wm. Bl. 65; 1 Burr. 20; 1 Keny. 395; 96 E.R. 36; 5 Digest (Repl.) 893, *1429*.

(23) *A.-G.* v. *Fort* (1804), 8 Price, 365; 146 E.R. 1230; 21 Digest (Repl.) 603, *938*.

(24) *Swain* v. *Morland* (1819), 1 Brod. & Bing. 370; 3 Moore, C.P. 740; 129 E.R. 766; 21 Digest (Repl.) 634, *1219*.

(25) *Rorke* v. *Dayrell* (1791), 4 Term Rep. 402; 100 E.R. 1087; 5 Digest (Repl.) 867, *7282*.

(26) *Thurston* v. *Mills* (1812), 16 East, 254; 104 E.R. 1085; 21 Digest (Repl.) 634, *1218*.

(27) *R.* v. *Wells* (1807), 16 East, 278; 104 E.R. 1094; 16 Digest (Repl.) 253, *171*.

(28) *R.* v. *Sloper and Allen* (1818), 6 Price, 114; 146 E.R. 767; 16 Digest (Repl.) 258, *248*.

(29) *Curson's Case* (1590), 3 Leon. 239; 4 Leon. 10.

(30) *R.* v. *Peck* (1716), Bunb. 8; 145 E.R. 576; 16 Digest (Repl.) 253, *169*.

(31) *A.-G.* v. *Capell* (1687), 2 Show. 480; 89 E.R. 1053; 16 Digest (Repl.) 258, *250*.

(32) *R.* v. *Cotton* (1751), Park. 112; 2 Ves. Sen. 288; 145 E.R. 729; 16 Digest (Repl.) 253, *176*.

(33) *Foster* v. *Jackson* (1615), Hob. 52; 80 E.R. 201; sub nom. *Forster's Case*, Moore, K.B. 857; 21 Digest (Repl.) 524, *233*.

(34) *Milton* v. *Eldrington* (1554), 1 Dyer, 98 b; 73 E.R. 215; 21 Digest (Repl.) 598, *867*.

(35) *Perkinson* v. *Gilford* (1639), Cro. Car. 539; 79 E.R. 1061; 21 Digest (Repl.) 633, *1212*.

(36) *Higgins* v. *McAdam* (1829), 3 Y. & J. 1; 7 L.J.O.S.K.B. 97; 148 E.R. 1068; 5 Digest (Repl.) 874, *7313*.

(37) *Rybot* v. *Peckham* (1778), 1 Term Rep. 731, n.; 99 E.R. 1347; 21 Digest (Repl.) 562, *589*.

(38) *Sheffeild* v. *Ratcliffe* (1615), Hob. 334; 80 E.R. 475, Exch.; 11 Digest (Repl.) 591, *299*.

(39) *Empson* v. *Bathrust* (1622), Win. 20, 50; 124 E.R. 18, 43; sub nom. *Empson* v. *Bathurst*, Hut. 52; 21 Digest (Repl.) 708, *2106*.

(40) *Thoroughgood's Case* (1598), Noy, 73; 1 Dyer, 76 b, n.; 74 E.R. 1041; 21 Digest (Repl.) 510, *65*.

(41) *Thomson* v. *Clerk* (1596), Cro. Eliz. 504; Noy, 56; 78 E.R. 754; 21 Digest (Repl.) 603, *929*.

(42) *Meriton* v. *Stevens* (1741), Willes, 271.

(43) *Shelton's Case*, 1 Dyer, 67 b, n.

(44) *Fleetwood's Case* (1610), 8 Co. Rep. 171 a; 77 E.R. 731; 21 Digest (Repl.) 653, *1433*.

(45) *Brassey* v. *Dawson* (1733), Cunn. 65; Kel. W. 290; 7 Mod. Rep. 182; Ridg. temp. H. 12; 2 Stra. 978; 94 E.R. 1065; 5 Digest (Repl.) 898, *7461*.

(46) *R.* v. *Crump and Hanbury* (1670), cited in Park. at p. 126; 2 Show. at p. 481; 145 E.R. 733; 45 Digest (Repl.) 271, *402*.

Appeal to the House of Lords from a decision of the Court of Exchequer Chamber on an issue directed by the Court of Exchequer to be tried between the parties, and originating on a writ of extent [a writ directing the sheriff to seize the property of a debtor to the Crown] then depending in that court. The issue sought a decision on whether the appellant, Daniel Giles, the sheriff of Hertfordshire, had any goods of the debtors, Henry Fourdrinier and Thomas Nicholls, which were liable to seizure for debts in respect of taxes due to be paid by them to the respondents, Harry Grover and James Pollard, bankers appointed by the Receiver-General of Taxes for the county of Hertford.

In July, 1816, writs of fieri facias were issued against the debtors at the suit of certain creditors and were delivered to the appellant as sheriff to be executed. In due course he seized and took in execution goods of the debtors sufficient to satisfy the sums endorsed on the writs. Before he made any disposition of the goods seized by sale or otherwise the extent in question was issued at the suit of the Crown. This raised the question whether such an extent coming while the goods of the debtors remained in the hands of the sheriff was (as the respondents contended) to be preferred to the executions taken out by the subjects. The Court of Exchequer gave judgment in favour of the respondents, and that decision was affirmed by the Court of Exchequer Chamber. The sheriff appealed to the House of Lords.

By s. 51 of the Crown Debts Act, 1541 (s. 74 in Ruffhead's edition):

"Suits by the King shall have preference to private suits, and execution be first had thereon.—And . . . that if eny sute be comensed or taken, or eny proces herafter awarded for the King for the recovery of eny of the King's debts, that then the same sute and prosesse shalbe preferred before the sute of any other pson or persones; and that o' saide sovereign lorde his heires and successours shall have [the] first execution against any defendaunt or defendaunts of [and] for his said detts, before eny other perso or persones; so alwaies that the King's saide sute be taken and comenced, or proces awarded for the said dett, at the sute of o' said sovereign lord the King his heires or successours, before judgement gyven for the said other persone or persones."

J. Campbell and *Follett* for the appellant.

F. Pollock and *Sir W. Owen* for the respondents.

At the conclusion of the arguments certain questions were put to the judges who delivered their opinions as follows.

PATTESON, J.—In this case your Lordships have propounded two questions for the opinions of the judges. The first is raised when a common person brings his action against another, and obtains judgment, issues a writ of fieri facias upon that judgment, and delivers the writ to the sheriff, who, in execution thereof, seizes the goods of the defendant. While the goods remain in the sheriff's hands and before he has sold them, a writ of extent in aid is issued against the same defendant as debtor of a debtor of the Crown, tested after the seizure under the fieri facias, and is delivered to the said sheriff. Shall this writ of extent be executed by the sheriff, by extending the same goods, seizing them into the king's hands, and selling them to satisfy the Crown's debt, without regard to the writ of fieri facias under which he had first seized them?

Upon the first question much difference of opinion has long existed, and there are conflicting decisions of the courts of law. Your Lordships, therefore, will not be surprised to find that the judges have not been able to agree, and that it has become my duty to state my opinion upon it. I apprehend that the answer to this question depends upon two points: first, whether the property in the goods is so altered by the seizure of the sheriff under the fieri facias, that the extent cannot take effect; and, secondly, whether s. 74 of the Crown Debts Act, 1541, bars the right of the Crown.

As to the first point, at common law the goods of the debtor were bound from the teste of a writ of fieri facias at the suit of a common person as well as from the teste of the king's writ. This, as to common persons, is altered by s. 16 of the Statute of Frauds, 1677 [repealed by Sale of Goods Act, 1893] since which they are bound only from the delivery of the writ of fieri facias to the sheriff. The Crown, however, not being named in that statute, goods are still bound from the teste of the king's writ. But this binding, in the case both of the king and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt: *Philips* v. *Thompson* (1); per LORD HARDWICKE in *Louthal* v. *Tonkins* (2) (2 Eq. Cas. Abr. at p. 381); per LORD ELLENBOROUGH in *Payne* v. *Drewe* (3) (4 East, at p. 538); and many other cases. Even when made in market overt in the case of the king, it in no way affects the priority of conflicting writs. The rule as to priority between common persons always was that the writ which was first delivered to the sheriff should be first executed without regard to the teste, but between the king and a subject that the king's writ, though delivered last, should be preferred on the ground expressed by LORD COKE in *Quick's Case* (4) (9 Co. Rep. at p. 129 b): "Quando jus domini regis et subditi insimul concurrunt jus regis præferri debet," and this also without regard to the teste. If, therefore, a writ of fieri facias at the suit of a common person be delivered to the sheriff, and before any seizure made by him under that writ, a writ of extent at the suit of the king, tested after the delivery of the fieri facias, be delivered to him, it is not doubted but that the sheriff would be bound to execute the writ of extent in preference to the fieri facias. In the case, indeed, stated by your Lordships, the sheriff had already seized under the writ of fieri facias, before the writ of extent was delivered to him. What then is the effect of that seizure? If by it the writ of fieri facias is executed, if the rights of the king and of the subject no longer run together, if the property of the goods be taken out of the debtor, then the writ of extent is too late, it has nothing on which to operate. But if the seizure of the goods be but an inception of the execution, if rights of the king and the subject are still conflicting, if the general property in the goods still remain in the debtor, then the maxim will still apply, and the king's right must be preferred.

It is not pretended in any of the authorities, except in some supposed loose dicta, that by seizure of the goods, any property therein is acquired by the creditor. So far is this from being the case that when goods were seized by the sheriff under one writ (which had been last delivered) it was held that he might sell under the writ of another creditor which had been first delivered, but under which he

had not seized: *Hutchinson* v. *Johnston* (5); and see *Jones* v. *Atherton* (6). If the seizure under a writ of fieri facias executed the writ, if it changed the property and vested it in the creditor, how came it that the sheriff, having seized under the second writ, was not compelled to sell under that writ? It cannot be said that the reason was, because the property was bound and altered by the delivery of the first writ, and, therefore, the goods could not be taken under the last, since it was held in *Payne* v. *Drewe* (3) that, if the sheriff sell under the writ last delivered, the creditor whose writ was first delivered cannot follow the goods or their proceeds, though he has his remedy against the sheriff, and the same point had long before been determined in *Smallcombe* v. *Cross* (7), and other cases. It seems to me to be clear from these cases that the seizure of goods by the sheriff will not make any difference as to the right of creditors under conflicting writs any more than the teste of the writ does and will not vest any property whatever in the creditor under whose writ the seizure is made in the case of common persons.

Why then should it make any difference in the case of the Crown and a subject? It is true, that in one report of *Wilbraham* v. *Snow* (8), KELYNGE, C.J., is made to say (1 Lev. 282):

> "The property is altered from the owner and given to the party at whose suit."

But the reporter adds a quære, and the other reports of the same case do not mention this supposed dictum. Again, in one report of *Clerk* v. *Withers* (9) (2 Ld. Raym. at p. 1075), GOULD, J., is made to refer to this supposed dictum of KELYNGE, C.J., but, in another report of the same case (6 Mod. at p. 298), GOULD, J., is made to say only that KELYNGE, C.J., held in *Wilbraham* v. *Snow* (8) that the sheriff gained a general property by seizure, whereas the other judges held that he gained a special property only, and POWYS, J., is made to say that the general property remained perhaps in abeyance. All which shows only the inaccuracy of the reporters on the doubtful grounds of the decision, and, as a special property in the sheriff is quite sufficient ground to warrant the decision, no other ground beyond that can be reasonably taken to have been established.

That the general property in goods, even after seizure, remains in the debtor, is clear from this, that the debtor may, after seizure, by payment suspend the sale and stay the execution (*R.* v. *Bird* (10)), and have back his goods without any bill of sale or assignment from the sheriff or creditor. Again, if the sheriff, after selling a sufficient quantity of the goods seized to satisfy the debt, proceed to sell more, trover will lie against him at the suit of the debtor. But if the property by seizure is taken out of the debtor, it must be so taken as to all the goods seized, and what has operated to restore it? Still it is said that by the seizure a special property vests in the sheriff, and that this is an alteration of property sufficient to protect the rights of the execution creditor, and to prevent the Crown from taking otherwise than subject to those rights. It is undoubtedly true, that the sheriff does, by the seizure, acquire a special property in the goods. He may maintain trespass or trover for them: *Wilbraham* v. *Snow* (8), *Mildmay* v. *Smith* (11); he is answerable to the creditor if they be rescued; and he is bound to sell them: *Clerk* v. *Withers* (9). But on full consideration it seems to me that this property vested in the sheriff by seizure is merely that which results from his being the appointed officer of the law to enable him to sell the goods and raise the money, not that thereby the property is taken out of the debtor. The goods are, in substance, in custodia legis, the seizure made by the officer of the law is for the benefit of those who are by law entitled, it is made against the will of the debtor, and no property is transferred by any act of his to the sheriff. In this respect it differs from all cases of special property, and of charges on goods created by the debtor while he has the absolute dominion over the goods.

It is conceded, that the Crown cannot avoid an equitable mortgage: *Casberd* v. *A.-G.* (12); or the lien of a factor; *R.* v. *Lee* (13), or of a wharfinger: *R.* v.

Humphery (14); or a bona fide assignment in trust for creditors: *R.* v. *Watson* (15); WEST ON EXTENTS 115; or any other similar assignment or charge, because they are created when the debtor has legal power and authority to create them and attach upon the goods before the process of the Crown, and the Crown can only take the goods subject to such liabilities as the debtor has legally created. In the case, however, of a seizure by the sheriff, the debtor has created no liability, and the Crown has a right to say that the sheriff, while the goods are in his hands, holds them for the benefit of anyone who may have a legal charge against them as the property of the debtor.

One instance, apparently showing that a fieri facias is executed by seizure of the goods is that of the bankruptcy of the debtor after seizure and before sale, in which case the assignment of the commissioners does not pass the property in the goods to the assignees although it relates back to the act of bankruptcy and although the words of the Bankrupts Act, 1623, s. 9 [repealed by Bankrupts Act, 1825], respecting the distribution of bankrupts' effects compels creditors upon judgments, whereof there is no execution or extent served and executed upon the lands or goods before the bankruptcy, to come in pari passu with other creditors. Even a fraction of a day is made in favour of the fieri facias: *Thomas* v. *Desanges* (16). It is argued, therefore, that the courts of law, by holding that seizure under an execution before an act of bankruptcy prevents the execution creditor from being driven to come in with the other creditors, have, in effect, held that by such seizure the execution is served and executed. It is to be observed, that at the time of the passing the Bankrupts Act, 1623, goods were bound from the teste of a fieri facias as against the debtor's own acts, and it seems not improbable that this provision of the statute might be intended to guard against creditors who might have sued out a writ, and so bound the debtor's goods, but still abstained from putting it in force till after an act of bankruptcy which would be in conformity to the principle of the subsequent s. 11, as to goods in possession of the bankrupt by consent of the true owner. Besides, the goods when seized, are the goods of the debtor, and if the effect of the seizure were to be done away with by a subsequent act of bankruptcy it would enable the debtor, by his own act, to defeat the creditor. The courts, therefore, have construed the words in that Act as applying to a seizure and not to a sale. At all events, whether this conjecture be right or wrong, the decisions amount only to a construction of words in a particular Act of Parliament with reference to the scope and object of the Act and cannot affect the general law, and it is also to be remembered that the Crown is not mentioned in or bound by that Act.

Clerk v. *Withers* (9) is also pressed as establishing the doctrine that the property is taken out of the debtor by the sheriff's seizure, but no such doctrine is there laid down. The facts of the case were shortly these. An administrator recovered a judgment of default against Clerk, he sued out a fieri facias, and Withers, the then sheriff seized Clerk's goods. Before sale the administrator died, then Clerk sued Withers (who had gone out of office in the meantime) to have restitution of his goods, contending that, as the plaintiff was an administrator, his executor or administrator could not have the benefit of the judgment, and that any new administrator de bonis non could not because the judgment was by default. Another point was raised, which is not material here, as to Withers having quitted office. After much argument it was held that the action would not lie, because Clerk was discharged from the debt by the seizure of the sheriff ad valentiam, and that the sheriff, having seized in the lifetime of the plaintiff, must account to his representative. All this is perfectly consistent with the position that the general property in the goods, even after seizure, remained in Clerk, and establishes only that the debtor himself cannot defeat an execution once begun nor get back his goods after a seizure under a fieri facias without payment of the debt.

It is argued, also, that when goods are once seized under a fieri facias, the sheriff must go on to perfect the execution, and that even a writ of error will not operate

as a supersedeas. The cases to establish this proposition are somewhat confused, but, admitting it to be established, the doctrine of change of property does not follow, for the bringing the writ of error is here also the act of the debtor himself. For these reasons, and on the authority of the cases I have mentioned, and some others to which I must refer hereafter, I conceive that the property in the goods is not so altered by the seizure of the sheriff under the fieri facias as that the extent cannot take effect.

HIS LORDSHIP referred to s. 74 of the Crown Debts Act, 1541, and said that, in his view, it did not apply to prevent the right of the Crown being preferred where the right of the Crown and that of a subject were in conflict, and he continued: I will now proceed to consider some of the cases in which the question has arisen or been discussed. First, *Uppom* v. *Sumner* (17). In that case the sheriff, on April 18, seized one Cann's goods under a fieri facias at the suit of Uppom, the plaintiff, returnable on May 12. On April 24, before sale, an extent was sued out and delivered to the sheriff. The sheriff sold under the extent and returned nulla bona to the fieri facias, upon which Uppom brought his action for a false return. A verdict was taken for the plaintiff, subject to the opinion of the Court of Common Pleas on a Case. The plaintiff's counsel first admitted that they could not support their case and the verdict was set aside, but afterwards, on their application, the court let them in to argue it. It was argued by Serjeant Walker, for the plaintiff, who put the case on the Crown Debts Act, 1541. The judgment was given by GOULD, J., in Easter Term, 1779, delivering the opinion of DE GREY, C.J., himself, NARES, J., and BLACKSTONE, J. He grounds his judgment, first, on the statute of 1541 as to which I have already spoken, and, secondly, on authorities which I will proceed to examine. He first distinguishes *Stringefellow* v. *Brownesoppe* (18), as not having arisen on a judgment, but on a statute staple, and, therefore, not being within the provisions of the Act of 1541, and then relies on *Letchmere* v. *Thorowgood* (19), *A.-G.* v. *Andrew* (20), and a passage in COMYNS's DIGEST, tit. Debt (G 8), where, after reciting the Act of 1541, it is said:

> "Therefore, if execution be upon a judgment against the king's debtor, and before a venditioni exponas, an extent comes at the king's suit, those goods cannot be taken upon the extent."

For this proposition the two cases just mentioned are cited. GOULD, J., also mentions *R.* v. *Dickenson* (21). That was a question as to the administration of assets in which the point decided was that a judgment creditor of the deceased should be preferred to a simple contract creditor who, being a debtor to the Crown, had, after the death of the deceased, procured an extent in aid. A case wholly foreign to the question in *Uppom* v. *Sumner* (17).

The authorities, therefore, on which COMYNS, C.B., and GOULD, J., rely are reduced to the two before mentioned, *Letchmere* v. *Thorowgood* (19) and *A.-G.* v. *Andrew* (20). GOULD, J., says that the former of these cases is obscure, arising from its being reported piecemeal and in different books, and he recommends reading them in order of time as they occur, viz., the pleadings 2 Jac. 2, 2 Vent. 156; the first argument, 4 Jac. 2, 3 Mod. Rep. 236; the second argument and judgment, 1 W. & M. Comb. 123, 1 Show. 12; and a subsequent action between the same parties, in effect, in the Common Pleas in *Lechmere* v. *Toplady* (19) (2 Vent. 169). I have read them all in that order, and, although there are some loose dicta and extra-judicial matters stated, yet it is easy to find out what points were really determined, and they were simply these—first, that in an action of trespass by assignees of a bankrupt against a sheriff who had seized goods under a fieri facias after a secret act of bankruptcy, the sheriff could not be made a trespasser by relation: this was *Letchmere* v. *Thorowgood* (19); and, secondly, that in an action of trover for the same seizure against the execution creditor the judgment for the sheriff in the action of trespass was a good bar by way of estoppel:

that was *Lechmere* v. *Toplady* (19). I do not mean to say that I at all agree to the decision on the last point, but it was the point decided, and the only point.

With respect to *Letchmere* v. *Thoroughgood* (19), the facts were shortly these. The sheriff seized goods of one Toplady, on April 29, under a fieri facias, after a secret act of bankruptcy, committed on April 28, and, while the goods remained in his hands unsold, viz., on May 4, an extent at the suit of the Crown against Toplady was delivered to him. On May 5, a commission of bankruptcy issued against Toplady, under which the plaintiffs were appointed assignees and sued the sheriff in trespass. A special verdict was found, and it was held that the action would not lie. Some of the reports say that it was held that the extent came too late, but this point could not have been determined, for the Crown was no party to the suit and was not heard. Therefore no right of the Crown could be decided in it. Again, the Crown and the execution creditor were on the same side, the sheriff, the defendant, having seized for both; no point, therefore, as between them could arise in the case, especially as the defendant succeeded, because it was held that the sheriff could not be made a trespasser by relation. All the reports agree in stating that to be the point decided, even COMBERBACH so states, although he makes LORD HOLT, C.J., say (Comb. at p. 123):

> "The property in goods is vested by the delivery of the fieri facias, and the extent afterwards for the king comes too late, and this by the Statute of Frauds and Perjuries."

This must be a mistake. It is contrary to LORD HOLT'S own position in *Smallcomb* v. *Cross* (7). It is wholly beside the question before him, and makes him consider the Statute of Frauds as binding on the king, who is not named in it. LORD MANSFIELD, in *Cooper* v. *Chitty* (23), says that LORD HOLT could never say that the property in the goods vested by the delivery of the fieri facias and that the extent for the king afterwards came too late, and adds: "No inception of an execution can bar the Crown;" and LORD ELLENBOROUGH also points out the inaccuracy of COMBERBACH very forcibly in *Payne* v. *Drewe* (3).

With respect to *A.-G.* v. *Andrew* (20), it is quite apparent from a perusal of that case that the execution, which was by elegit, was perfected and completed by delivery of the lands before the king's writ issued, and then, as STEEL, C.B., says: "The subject's title is prior to the king's, and is executed." The same law and the same consequences have since been held to attach in *A.-G.* v. *Fort* (23), and *Swain* v. *Morland* (24). These two cases cited do not, therefore, bear out the proposition of COMYNS, C.B., nor the decision in *Uppom* v. *Sumner* (17), and that decision must be supported, if at all, on the Crown Debts Act, 1541, on which I have already remarked.

The next case is *Rorke* v. *Dayrell* (25). That case was decided principally on the authority of *Uppom* v. *Sumner* (17), and the authorities there cited, and, if they are shown to be wrong, the decision in *Rorke* v. *Dayrell* (25) is wrong also. LORD KENYON puts the case on the ground of change of property, for, he says (4 Term Rep. at p. 411):

> "As long as the property of the debtor remains unaltered, and an execution at the suit of a subject, and an extent at the king's suit issue against the debtor, the title of the latter must prevail, for the point to be considered in these cases is, in whom is the property?"

He adds:

> "I have always understood it to be clear and settled (and this question has very frequently occurred in the Exchequer), that if an extent at the suit of the Crown be tested prior to the time when the subject's execution is delivered to the sheriff, the former shall have the preference. But as, by the common law, abridged as it is by the Statute of Frauds, the property of the debtor's goods is bound by delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the Crown can attach."

With all possible respect for everything which fell from LORD KENYON, I humbly conceive that he has here confounded the binding the property in goods, and the alteration of the property, and that he is mistaken in supposing that the property in goods is or ever was at all bound or altered either by the teste or delivery of the writ, as regards conflicting writs, and that the binding is only as regards the debtor himself, as I have before shown. If so, the very foundation of his judgment fails. The other judges put the case on the Crown Debts Act, 1541.

These are the only decisions in favour of the subject's execution, for *Thurston* v. *Mills* (26) went off on another point. Against them are the uniform decisions of the Court of Exchequer, one of which is reported at length, viz., *R.* v. *Wells* (27), in the note to *Thurston* v. *Mills* (26). This is subsequent to both *Uppom* v. *Sumner* (17) and *Rorke* v. *Dayrell* (25), which are cited and relied on in argument. Without fully agreeing to every word that is said by MACDONALD, C.B., in giving the judgment of the court (some of whose propositions according to the letter, I confess, appear to me untenable), I, for one, am perfectly satisfied with the general reasons given in that judgment. The same point was again discussed and decided in *R.* v. *Sloper and Allen* (28), which is still later.

There are other prior cases to which I would briefly refer, and, first, *Stringefellow* v. *Brownesoppe* (18), which was decided in 1549, eight years after the Crown Debts Act, 1541. In that case the sheriff seized Brownesoppe's goods under an extendi facias upon a statute staple at the suit of Stringefellow, and before any writ of liberate the king's writ of extent came into his hands. The court held that the king's writ should be preferred, because the property in the goods was not in Stringefellow before they were delivered to him by writ of liberate. It is said that this is no authority to the present point, for that the extendi facias is in nature of a judgment, and the liberate is the execution. Therefore, as a judgment operates no change of property, so neither does seizure into the king's hands under an extendi facias, but that, as delivery under a liberate operates a change of property, so does seizure under a fieri facias. I cannot understand this reasoning at all. I can see that the award of an extendi facias may be and is analogous to a judgment, but how a seizure under it can be so I am at a loss to comprehend. Again, I can see how delivery under a liberate of the specific goods to the creditor, as is always done, may be and is analogous to sale under a fieri facias, which directs the sheriff to make money of the goods, but how the mere seizure into the sheriff's hands under a fieri facias should be analogous to delivery over to the creditor under a liberate I am at a loss to comprehend. I apprehend that seizure under an extendi facias is the inception of the execution and so is seizure under a fieri facias; delivery under a liberate is the completion, and so is sale under a fieri facias. The only difference is that a liberate must issue to enable the sheriff to deliver in the one case, whereas in the other he may and ought to sell without a venditioni exponas; but this difference cannot vary the effect of the seizure. The principle established in *Stringefellow's Case* (18), is, in the words of LORD MANSFIELD, that no inception of an execution can bar the Crown. *Stringefellow's Case* (18) was against the opinion of some of the professon at the time, but it has been recognised as good law many times since, and seems to me to be directly in point. Next comes *Curson's Case* (29), which only shows that after delivery under a liberate the king's writ is too late. In *R.* v. *Peck* (30), it was taken for granted that, if an extent comes after seizure under a fieri facias and before the sale, it shall be preferred.

In *A.-G.* v. *Capell* (31), the point decided arose out of a bankruptcy, the king's writ being preferred after an act of bankruptcy and before assignment by the commissioners. It is not in point to the present question, but at the end of the judgment are these words (2 Show. at pp. 481, 482):

"Extents have been held good that have been made upon goods actually levied

by virtue of a fieri facias, and in the sheriff's custody; the extent coming before a bill of sale made, so as the property was not altered."

Also in *Smalcomb* v. *Buckingham* (7) (5 Mod. Rep. 376), which is the same case as is elsewhere called *Smallcomb* v. *Cross* (7), there is a dictum to the same effect, and many others in other places, all which dicta I merely notice to put them in opposition to other dicta as to the vesting and alteration of property by seizure. Lastly comes *R.* v. *Cotton* (32). That was the case of goods seized under a distress for rent, and it was held that they were still liable to be taken under an extent at the suit of the king, though in the custody of the law and, therefore, privileged from being taken in execution by a subject. It is said that this case is not in point because no property at all in the goods is gained by the distrainor who can neither maintain trespass nor trover for them, and that such is the ground of the decision, inasmuch as it lay on the claimant in the Exchequer to prove property in himself against the Crown. On looking at the whole of the elaborate judgment of PARKER, C.B., in that case, I do not find that he puts the case on the form of the pleading, but on the general principle that the property is not altered, and, therefore, the king has preference, and throughout his judgment he cites cases as to the effect of seizure under a fieri facias, proceeding upon that principle. I consider, therefore, that this case is a strong authority upon principle unless it can be shown that seizure by the sheriff alters the property, and I submit that the contrary has been shown. It is true that neither *Stringefellow's Case* (18) nor *R.* v. *Cotton* (32) are direct authorities with regard to the statute of 1541, because in neither of them had the subject obtained judgment. Upon the whole, then, whether with reference to the statute of 1541 or independent of it, the main points appear to me to be: Was the property changed by the seizure? and Were the king's writ and the subject's concurring? I say, that the property was not changed, and that the writs were concurring.

My answer, therefore, to the first of your Lordship's questions is that, in my opinion, the writ of extent shall be executed by the sheriff by extending the same goods, seizing them into the king's hands, and selling them to satisfy the Crown debt without regard to the writ of fieri facias under which he had first seized them.

ALDERSON, J.—The first question proposed by your Lordships for our consideration is in substance whether, when goods seized by a sheriff, under a writ of fieri facias remain in his hands unsold, a writ of immediate extent tested after such seizure does, upon its delivery to such sheriff, entitle the Crown to a priority of execution. After fully considering that question, I have arrived at the conclusion that it must be answered in the affirmative. The subject has been for a long period vexata questio in our courts.

HIS LORDSHIP referred to the prerogative of the Crown with regard to recovering its debts, said that it was clear that, if the right of the Crown came into conflict with that of the subject, the right of the Crown was to be preferred, and continued: If, however, the right of the subject be complete and perfect before that of the king commences, it is manifest that the rule does not apply, for there is no point of time at which the two rights are in conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. But if while the right of the subject is still in progress towards completion, the right of the Crown arises, it seems to me that the two rights do come into conflict together at one and the same time, and that the consequence in that case is that the right of the Crown ought to prevail. LORD MANSFIELD in *Cooper* v. *Chitty* (22) expresses this proposition in shorter language when he says (1 Burr. at p. 36): "No inception of an execution can bar the Crown."

If we proceed to apply these principles to the determination of the present case, it will appear that the material facts are these. J.S. has obtained judgment against a Crown debtor, has issued a fieri facias upon that judgment, and has delivered the writ to the sheriff, and the sheriff, in execution thereof, has seized the

goods of the Crown debtor. The question then is this: Is the right of the subject perfect at the time when the goods are seized by the sheriff, or is there any further act to be done in order to make that right consummate?

The most simple criterion of this seems to be whether, without anything further being done, the execution creditor is entitled to call upon the sheriff for the possession of the goods or to pay him the debt. I do not believe that it was ever contended that the execution creditor is entitled to the possession of the goods themselves unless under some contract made between the sheriff and him which would be equivalent to a sale under the writ. Nor can he call upon the sheriff, even after a return of goods seized ad valentiam, to pay to him the debt for which the levy is made. If he could, it would be utterly useless to empower him to require the sheriff afterwards to proceed to a sale by the writ of venditioni exponas. In fact, it is clear, that all he can do, even after such return, is to compel the sheriff to proceed to sale by ulterior process from the courts. There are many authorities founded on this principle, which show that a seizure of goods ad valentiam is only a temporary bar to the execution creditor, so long as the goods remain unsold in the sheriff's hands. Again, if the goods after seizure are destroyed by unavoidable accident the loss falls upon the debtor. The principle is that the sheriff is excused where the execution fails altogether without his fault. In that case, according to the doctrine laid down in *Foster* v. *Jackson* (33) by LORD HOBART, the creditor may have a fresh writ of fieri facias, and the loss falls on the debtor. There is a third criterion, which is this, that the debtor on tendering the amount for which the levy is made and the sheriff's charges thereon, is entitled to have a return of the goods seized by the sheriff.

From these premises, two propositions seem to me to follow—first, that at no period of time at all does the execution creditor obtain any property whatsoever in the goods themselves, and, secondly, that the general property in the goods seized remains, until the sale, in the debtor, and is not changed by the seizure: *Milton* v. *Eldrington* (34). After the sale the case is very different, for, by the sale, the property is wholly changed from the debtor to the vendee of the sheriff, and the money, the produce of the goods, then becomes the property of the creditor, for which he may maintain an action for money had and received and for which the sheriff is responsible to him, the original debtor being then wholly and finally discharged: *Perkinson* v. *Gilford* (35). The rule is thus expressly laid down by GARROW, B., in delivering the opinion of the court after full consideration in *Higgins* v. *M'Adam* (36) (3 Y. & J. at p. 13):

> "The rule is, that when execution is executed, the property is changed; and execution is said to be executed when a sale has taken place."

It is not, therefore, till after the sale, that the right of the execution creditor becomes consummate, and it would follow thence that it is not till after the sale that the right of the creditor ceases to concur with the right of the Crown. If, therefore, the right of the Crown arises at any period prior to the sale, it seems to me that on the principles above laid down, it ought to have the preference.

A preference depending on similar grounds and terminating at the same period seems to me to be fully recognised by the Court of King's Bench in *Hutchinson* v. *Johnston* (5). That was the case of two conflicting executions. The sheriff had seized under the writ last delivered to him, but, before sale, having discovered that another writ which was entitled to priority had been first delivered to him, he made sale under it and paid the surplus only to the creditor under the second writ under which he had seized. The court expressly decided, that until sale he had a right so to do, but after sale not, *Rybot* v. *Peckham* (37) being an express authority to that effect. It is observable that many of the authorities which are relied on in the present case were then cited. In particular, *Clerk* v. *Withers* (9). And the very proposition now before your Lordships for decision, it is to be observed, was urged as clear law by the very eminent persons who argued that

case, viz., that, till sale, the extent prevails over the prior execution. I apprehend that, prior to the Statute of Frauds, if a subject's writ of execution had come to the sheriff after seizure, but before sale, under a writ of a subsequent teste, the sheriff would have been in like manner justified in executing it before the other writ under which he had seized, and would have been liable to an action on the case if he had omitted to do so. These authorities seem to me to show clearly, first, that no property passes by the seizure from the original debtor to the creditor, and, secondly, that, even in the case of conflicting rights as between subject and subject, the point of time which the courts uniformly look at, the period when the execution is consummate, is not the seizure, but the sale under the writ.

There is one case, however, which requires some observation as it would seem to trench upon this proposition. I allude to the construction put by the courts upon s. 9 of the Bankrupts Act, 1623. There is no doubt that the courts have held that the seizure under a writ of fieri facias was sufficient to satisfy the words "execution, or extent served and executed," contained in this statute, and that, for the purpose of protecting the execution creditor from the effect of a prior act of bankruptcy. But this was a decision upon the construction of a particular statute, and must have reference, reasonably considered, to the peculiar objects of the legislature. It is to be observed, first, that it was prior to the Statute of Frauds. The law, therefore, then was that writs of fieri facias bound the debtor's property (as to all persons claiming under him) from the teste of the writ and not from its delivery to the sheriff, so that it was then possible for a party to sue out his writ of fieri facias, and to omit to execute it and so give to the bankrupt the same species of delusive credit as was provided against by s. 11 in cases where the bankrupt was then reputed owner of another's goods. It was probably, therefore, with that view that this clause was introduced providing that such writs should not bind as against those who claimed under the bankrupt from their teste, but only from the date of the public act done by the sheriff in seizing the goods under the writ. For this purpose, that of giving notice to the other creditors, the seizure, and not the sale, was the important period. The present case, however, depends on the question whether the property is changed, and until sale this is not the case. The execution is not complete so as to transfer the property until that period.

But it is urged, and a great portion of the argument at the Bar turned upon it, that, although it may be that the execution creditor has no consummate right till after sale, and although the general property in the goods remains until the sale with the debtor, yet, that the sheriff has a special property in it from the time of the seizure, and that the Crown, in the event of the teste of the extent being subsequent to the seizure, must take the goods subject to that special property.

There is no doubt that a variety of authorities may be cited, establishing as clear law that the Crown must take subject to a special property created by the act of the party. In the case of the factor, *R.* v. *Lee* (13), it was held that goods in his hands on which he had a lien for his advances made before the teste of the extent, could only be taken by the Crown subject to that lien. So again, in the case of goods pawned or pledged before the teste of the extent: *R.* v. *Cotton* (32); and in *R.* v. *Humphery* (14) the same law prevailed. In *Casberd* v. *A.-G.* (12) an equitable mortgage created before the party creating it became a debtor to the Crown on record was in like manner held to be valid against a subsequent extent. But I can find no instance whatever, nor do I believe that any such exists, where a special property, not created by contract between the Crown debtor and the person setting it up as between the Crown debtor and someone under whom such person claims, has been ever allowed to prevail. I think good reasons may be assigned for the difference. In the case of land, if the subject sell it before he became Crown debtor, it is clear that the sale is good. On principle, he who can make a valid sale ought to be allowed to make any contract short of that which shall also be valid. He may, therefore, make a valid pledge. The right of the

other party is consummate by the act of pledging or of sale. But the cases of a distress for rent before sale, a seizure by the messenger under a commission of bankrupt, and the case now in judgment are very different. There the goods are all taken by an adverse proceeding from the Crown debtor, and are all under the custody of the law at the time the extent is put in. The creditor's right is but in progress, and the sheriff, the commissioners of bankrupt, and the distrainer, are all officers of the law, holding the property and having rights given to them for the purpose of protecting them in their possession, not for the purpose of protecting them in their possession, not for their own benefit, but for the purpose of disposing of it for the benefit of those who may ultimately be entitled to the proceeds of that property. The true description of the state of such property is that it is in the custody of the law, whereas in the case of the factor, wharfinger, pawnee, or equitable mortgagee, it is in the custody of the party himself, having a beneficial interest under a valid contract.

I am aware of the various cases and authorities which exist in which it has been determined that trover will lie by a sheriff after seizure of goods under a fieri facias, and I do not dispute the proposition that this shows that a sheriff has, for some purposes, a special property in the goods so seized. But it seems to me that this point is not really material. The special property which the sheriff or any other public officer has, is not a property beneficial to himself; it is a property conferred on him to enable him to discharge his public duty. The goods are in custodia legis, and the special property of the sheriff is given to him that this custodia legis may be rendered safe. If, then, it be true, as many cases have determined, and, in particular, *R.* v. *Cotton* (32), that goods in custodia legis are in a situation in which the Crown's right and that of the subject may come in conflict, I do not think that it really makes any difference whether the officer having the custody has greater or less powers to defend it conferred on him by the law. The real question seems to me to be whether the property has wholly or in part gone from the debtor to some person claiming adversely to the Crown, or whether it is only a progress to that result. The sheriff or other public officer holds it with more or less of powers given for its protection, but really for the person ultimately entitled to receive the proceeds. If that person be a subject having a prior writ delivered to the sheriff, the sheriff holds for him the proceeds of the goods seized under a subsequent writ, as in *Hutchinson* v. *Johnston* (5), or if, as in the present case, the Crown's extent come in before sale, he holds for the Crown.

I have hitherto considered this as if it were res integra. But I shall now proceed to consider it upon authority merely. The leading case upon this subject is *Stringefellow's Case* (18), and the authority of that case, though doubted for a time, cannot now, I think, be disputed. It was recognised as good law by LORD HOBART in *Sheffeild* v. *Ratcliffe* (38), by LORD ROLLE in his ABRIDGMENT; by LORD HARDWICKE, and RYDER, C.J., and WILLES, C.J., in *R.* v. *Cotton* (32), and by the Courts of Common Pleas and King's Bench, in *Uppom* v. *Sumner* (17), and *Rorke* v. *Dayrell* (25). I do not think it necessary to add the various cases in the Exchequer on this point. It is however contended, that *Stringefellow's Case* (18) is distinguishable, and undoubtedly it is so in its facts, from the present. The main ground of distinction is that there remained in that case a further act to be done by the court, viz., the award of the liberate. It is said by WOOD, B. (8 Price, at p. 318), that the liberate and the fieri facias are equivalent to each other, but I think that proceeds on a misstatement of the true point in the case. The right vested by the liberate in the creditor is to have the identical lands and the identical goods delivered to him. The creditor's right is, therefore, consummate by the liberate, but the fieri facias does not command the sheriff to seize and deliver the goods to the creditor (in which case the fieri facias and seizure would be equivalent to the liberate after the previous seizure), but in substance it commands him to seize and sell, and to pay the money produced by the sale to the creditor. The act of sale, therefore, and not the act of seizure, puts the sheriff

in the same situation with respect to the creditor, as the liberate under an extent, for by the act of the sale the creditor has vested in him a consummate right to the produce of the sale. *Stringefellow's Case* (18) clearly decides that, until the liberate, the lands and goods seized, and in the hands of the sheriff remain liable to the Crown process. That case, therefore, appears to me in principle to have decided, that until the creditor obtains a consummate right, the Crown's rights are not ousted.

R. v. *Cotton* (32) is a much stronger authority. It seems to me to be decisive of this question. Its authority, looking at the persons by whom it was decided and those by whom that decision was affirmed, must be admitted to be of great weight. It is not a little singular to find that, although the point now before your Lordships was there treated as the proposition and that case as the corollary, it should now be contended that, although *R.* v. *Cotton* (32) is good law, still the proposition from which that case was in truth only a corollary cannot be supported. The principle there laid down clearly was that goods in custodia legis continued liable to an extent until the period arrived at which some person other than the original debtor had acquired a consummate right to them, and the court clearly held that goods seized by a sheriff, but before sale, were so liable. The fanciful doctrine of a special property in an acknowledged public officer being at all material, seems never to have occurred to the great men who decided that case. The reason why the expressions as to special property are there introduced, are, as it seems to me, obvious enough. The distress is in the custody of the creditor himself, and, therefore, it might have been plausibly enough contended that he having the possession, his special property (if he had any) was to be protected for his own benefit. But the court, looking to the substance and not the form, decide that in seizing he acted as an officer of the law, that he held as such, and that the goods were not really in his possession, but in the custody of the law, they having come to him by an especial authority given by the law, and not by the act of the party as in the case of a pledge or a like, and the consequence being, that no property, nor even any "possession in jure," passed to him. This case seems to me to be a fortiori to the present case.

I proceed to enumerate shortly the other cases in which the law has been laid down in the same way. In *R.* v. *Peck* (30) the reporter says it was taken for granted that the law was so. In *A.-G.* v. *Andrew* (20) it is not, indeed, distinctly stated whether the party had obtained possession under the subject's prior extent before the right of the Crown commenced, but I think it can hardly be doubted that he had. For there STEEL, C.B., observes "that the subject's title is prior to the Crown, and is executed: 9 Co. REP. 129." It appears from *Empson* v. *Bathurst* (39), that until the liberate, no fee is due to the sheriff because the execution is not executed, and I think this explains the language of STEEL, C.B., and makes it consistent with what he adds that "*Stringefellow's Case* (18) is unanswerable."

In *A.-G.* v. *Capell* (31), it is stated (2 Show. at pp. 481, 482):

> "Although the goods were actually in custodia legis, yet because the extent came before the property was vested by an assignment, it was held a good extent. Extents have been held good that have been made of goods actually levied by virtue of a fieri facias and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered."

This latter passage WOOD, B. (who omits the former part of the report), calls "a note of the reporter unwarranted by the case." To me it appears as a reason assigned by the court for their previous judgment.

Letchmere v. *Thorowgood* (19) has been much relied on by the other side. But I cannot think it to be an authority of any weight. It is observable that the decision in that case is clearly right, and it is difficult to perceive how this point could ever have arisen. There the extent at the suit of the Crown was executed before any assignment under the bankruptcy had been made. So, according to all the

authorities, the plaintiffs had no ground of action, and the execution and the extent being set up by the same parties no question of priority inter se could well have arisen. Again, the writ of fieri facias was issued before the sheriff had notice of the bankruptcy, and, as the action was trespass, the court on that ground might well decide in his favour. The dictum attributed to LORD HOLT, that "the king's prerogative had been taken away by the Statute of Frauds," cannot be supposed to have really fallen from that learned judge. Yet this case, although thus questionable in its application to the present subject, has been one of the main grounds on which the two principal authorities on the other side, *Uppom* v. *Sumner* (17) and *Rorke* v. *Dayrell* (25), have been decided.

Clerk v. *Withers* (9) seems also to me to be wholly inapplicable to the present question. Indeed, like *Letchmere* v. *Thorowgood* (19), it is only to be cited for certain dicta of the court as to the execution being complete by the seizure, for the decision itself is clear enough. It was there argued that the death of the creditor after seizure under the fieri facias, did not give to the debtor the right of recovering back his goods from the sheriff. The court held that it did not, for on the one hand there was no act to be done in court necessary to give the sheriff authority to act, his authority being complete by the fieri facias, and, therefore, the death was immaterial to that purpose. Secondly, the levy under the writ was pleadable in bar to another action for the same debt, so that the debtor sustained no injury by the execution proceeding. But, indeed, this case would prove too much, for it is also true that after the award of the fieri facias and before seizure the same result would follow: *Thoroughgood's Case* (40), cited by GOULD, J., in giving his judgment. It is not pretended that an award of fieri facias would bar the Crown before seizure. The principles, therefore, of that decision are wholly inapplicable to this question. There are some dicta in that case certainly which may be relied on, but I think that if they are read, as all such dicta ought to be, with reference to the case then before the court, they also will be found not applicable to the present subject. For some purposes, no doubt, the execution may be called complete by the seizure. It undoubtedly was so at that time as regarded priority between an execution-creditor and the assignees of a bankrupt. It was not so in all cases, however, even between subject and subject, as appears from *Hutchinson* v. *Johnston* (5), and I think it is not so a multo fortiori in a case between the subject and the Crown which has a prerogative peculiar to itself in interposing in medio.

Curson's Case (29) is still less applicable. It depends on a totally different principle. There, Curson acknowledged a statute to Starkey, and afterwards another to P. S., who assigned to the Crown. The liability, therefore, on which the Crown proceeded was created subsequently to that of Starkey. After this Starkey obtained possession under his execution, and it was held that the debt to the Crown did not bind the lands from its assignment, so as to avoid the subsequent but consummate execution. It may be observed, also, that this case is within the Crown Debts Act, 1541, for the judgment was prior to the king's debt, and the execution was consummate before the king's extent. GILBERT, C.B. (TREATISE ON THE COURT OF EXCHEQUER, p. 94) gives this reason for it, for he says:

> "The creditor, Starkey, did not, by the liberate, take the land sub onere of the king's debt, because his lien was antecedent to it; and it were repugnant to construe him to take the land sub onere of the king's debt, when he took it in satisfaction of a debt precedent."

So, again, on the same principle it has been held that if A. infeoffs B. of his lands after a judgment confessed by him to C., the Crown, as assignee of C., cannot take more than C. could, viz., a moiety of the land, although, no doubt, if the judgment had been confessed to the Crown originally, the Crown could have taken the whole. In fact, it depends on the principle that where the law allows a party to contract it will not permit that contract, by any matter arising ex post facto,

to be made of no value, a principle to which I have before referred in distinguishing goods on which there is a lien by contract from goods in the custody of the law.

Uppom v. *Sumner* (17), which is the leading authority on the other side, would, I think, be entitled to much greater weight if it had not proceeded a good deal on *Letchmere* v. *Thorowgood* (19). Even taking the different reports of that case in the way suggested by GOULD, J., no great advantage as to clearness can be derived, and I cannot help thinking that the better course would have been to have placed no great reliance on a case in which a part was to be picked up from one reporter and a part from another in order to make something like a connected account instead of attributing the confusion to the most obvious and natural cause, viz., the inaccuracy of the reporter. The same observation applies to *Rorke* v. *Dayrell* (25). The court there also relied a good deal on *Letchmere* v. *Thorowgood* (19).

Subsequently to both these, the cases of *R.* v. *Wells* (27) *and R.* v. *Sloper and Allen* (28) arose in the Court of Exchequer in which the present question was decided, after reviewing all the authorities, in the affirmative. Upon the whole I have arrived at the conclusion that the preponderance of authority also, as well as the principle on which such authorities ought to proceed, establishes the proposition, that where an extent of the Crown comes after seizure and before sale, it ought to be preferred, unless, by the Crown Debts Act, 1541, s. 74, there has been an alteration made in the ancient prerogative by which the priority has been taken away. [HIS LORDSHIP considered the statute, and added:] Upon the words, therefore, as well as on the intention of s. 74 of the statute, as collected from the Act itself, compared with the statutes which preceded it, I have come to the conclusion that, on the true construction of s. 74, it has no reference whatever to the question now before your Lordships. I am aware that this is contrary to the construction put on the statute in *Rorke* v. *Dayrell* (25) and *Uppom* v. *Sumner* (17). But after fully considering those authorities, and the reasons assigned there, which do not satisfy my judgment, and finding them in opposition, as it seems to me, to *R.* v. *Cotton* (32), *A.-G.* v. *Capell* (31), *R.* v. *Peck* (30), *R.* v. *Wells* (27), *R.* v. *Sloper and Allen* (28), and, I would also say, *A.-G.* v. *Andrew* (20), and the uniform course of the Court of Exchequer, I think that the two cases I have mentioned are not well decided and that, both on the ground that they are contrary to the true construction of the Act if the question were res integra, and also on the ground that they are opposed to cases of greater weight and authority to which I have already referred.

TAUNTON, J., VAUGHAN, J., and **BAYLEY, J.,** concurred.

GASELEE, J., and **LITTLEDALE J.,** dissented.

TINDAL, C.J.—The questions proposed by your Lordships have been so often adverted to by the learned judges who have preceded me in delivering their opinions, that it is altogether unnecessary to refer to them. I shall content myself, therefore, with saying, that upon the first question proposed by your Lordships, I agree in opinion with the majority of the judges, that the extent in aid, tested and delivered to the sheriff after the seizure by the sheriff under the fieri facias, but before the sale under that writ, is by law to be first executed by the sheriff without regard to the writ of fieri facias.

It appears to me, my Lords, that the whole question depends upon the determination of two points, and two points only—(i) whether the property of the Crown debtor is altered by the seizure of the sheriff under the fieri facias, and (ii) supposing such property to remain unaltered, whether the Crown Debts Act, 1541, applies to the present case by restraining that which before the statute was the undisputed prerogative of the Crown, namely, the preference of the Crown, where the execution of the Crown comes in competition with that of the subject, for, if the property in the goods seized under the fieri facias remains still in the debtor unaltered by such seizure, then the execution of the subject's writ is begun only, not completed,

A at the time of the issuing of the Crown process, and both the writs are then in conflict and competition together and the goods of the subject are then within the exigency of the writ of extent, which calls upon the sheriff

> "to take and seize into the king's hands all the goods and chattels which the defendant then has (that is, at the time of the teste and issuing of the extent) to satisfy the king's debt,"

B unless, indeed, the Crown Debts Act, 1541, has interposed a restriction applicable to the present case.

That the determination of these two points does in fact involve the whole of the present inquiry appears from this, that the only two direct authorities for the preference of the subject's execution are grounded on those two points alone: *Uppom* v. C *Sumner* (17), resting on the application of the Crown Debts Act, 1541, and *Rorke* v. *Dayrell* being decided by LORD KENYON on the alteration of the property in the goods, and by the other three judges on the authority of the above-mentioned statute. On the first of these points it appears to me that the property in the goods seized under the fieri facias is not in any manner altered by the seizure, but that it still continues in the debtor, until the actual transfer thereof by the sheriff's sale under D the writ to a stranger. If the property is changed by the seizure, it must be transferred either to the judgment creditor or to the sheriff, but there are no words in the writ to give it to either. The sheriff is directed by the writ of fieri facias

> "to cause to be made of the goods and chattels of the defendant the debt or damages recovered by the plaintiff."

E In this respect the language of the fieri facias differing from that of the elegit, by which he is directed

> "to deliver to the plaintiff all the chattels of the debtor, and a moiety of the land, until the debt be levied."

So far, indeed, is the property in the goods from being transferred to the plaintiff F in the suit that the sheriff cannot deliver the goods to the plaintiff in satisfaction of the debt: *Thomson* v. *Clerk* (41).

Again, if the defendant in the action after seizure of his goods under the fieri facias pay the debt to the sheriff, he retains his goods and is discharged from the execution, and any further remedy of the plaintiff is against the sheriff only: CRO. ELIZ. 209. But if the property in the goods had been altered, if it had vested either G in the plaintiff himself or the sheriff or had become an actual pledge or security for the payment of the debt, it is difficult to see upon what principle the defendant should hold his goods again, discharged of the debt, before actual payment thereof has been made to the plaintiff. Again, if the goods, after seizure under the writ, but before sale, are destroyed by any unavoidable means without the sheriff's default, the loss does not fall either upon the plaintiff or upon the sheriff, but upon the debtor, H on whose goods a second levy may be made: HOB. REP. 60. If the property in the goods had been altered by the seizure, why is not the loss to fall upon that party whose property they have become, as, undoubtedly, after the sale the loss would be that of the purchaser? Again, if the sheriff, having received two writs of fieri facias, sell under that which is last delivered to him, although he make himself liable to the plaintiff who delivered the first writ, the property of the goods is bound by the I sale under the second writ, and the party cannot sell them by virtue of his execution first delivered: *Smallcombe* v. *Cross* (7). If the property was altered by the delivery of the first writ to the sheriff, upon what principle can the sale under the second convey the property to a stranger? *Hutchinson* v. *Johnston* (5) decides the converse of this last proposition, viz., that, if the sheriff seizes under the writ last delivered to him, but before sale discovers that another writ has been delivered to him at an earlier time, sells under the writ first delivered, and satisfies the debt of the plaintiff in the earlier writ, he is justified in so doing, though, if he had sold under the second writ, he could not have done so.

These two authorities seem decisive, that it is the sale, not the seizure, which alters the property. It has, however, been argued that the rule of the common law by which the property in the goods is bound by the award of the writ of execution, altered, as it has since been, by the Statute of Frauds, so as to become bound only by the delivery of the writ to the sheriff, implies that the property is divested out of the debtor by such delivery of the writ. But the meaning of those words has been explained and defined by various decisions. It will be sufficient to cite *Pugne* v. *Drewe* (3), in which all the former cases are considered, and LORD ELLENBOROUGH, C.J., lays down the rule to be (4 East, at p. 538), that

> "the goods are bound by the delivery of the writ to the sheriff as against the party himself, and all claiming by assignment from, or representation through or under him."

In this sense, and to this extent, therefore, may the goods of the defendant be bound by the delivery of the writ to the sheriff without the consequence contended for, that the property in the goods is in any manner altered thereby.

It has further been contended that, as the sheriff may maintain an action of trespass or trover against any wrongdoer for taking goods which he has seized, it, therefore, follows that he and not the debtor, has the property in the goods so seized. But to this argument it appears sufficient to answer that any person who has the legal possession of goods, though not the property, may maintain this action against a wrongdoer, for a mere wrongdoer cannot dispute the title of the party who is in the possession of the goods with any colour of legal title. The sheriff, no doubt, has the legal custody and possession of the goods; after seizure he has a special property in him for that purpose, for the law has directed him to seize and make sale thereof. But this affords no argument that the absolute property in the goods is altered and divested from the defendant, for the very same action is maintainable by the finder of goods against the person who wrongfully takes them from him, or by the carrier of goods for hire or the bailee of goods against a trespasser, and yet in the three cases last put the absolute property is not divested from, but still remains in, the true owner.

It is argued at the Bar, and that appears to be the main ground of argument, that, the sheriff having such special property, the extent can only take the goods of the debtor subject to such special property, just as goods in pawn can only be taken subject to the pledge and lands mortgaged can only be taken subject to the claims, both legal and equitable, of the mortgagee. In those cases, however, the property has actually been altered by the act of the debtor himself under an express contract made between himself and the other party for the benefit of such other contracting party. It is a contract complete and consummate before the seizure under the extent. It is alienation of the property which amounts pro tanto to a sale. As, therefore, the Crown process could not seize upon property actually parted with and sold, so neither can it seize property so partially sold except subject to the rights of the partial purchaser. But in the case under consideration, no property has been parted with by the Crown debtor under any contract previously made. The goods are not sold, they are only in the way to be sold. It would be a better definition of the sheriff's relation to these goods to say that he has them in his custody under a power to sell them, than any actual interest or property in them. His situation, indeed, cannot be better defined than by saying the goods are in custodia legis, a phrase which plainly distinguishes a mere custody and guardianship of the goods from a change in the property. So far, therefore, as a special property in the goods is necessary for their safe custody against wrongdoers and to render the execution of his public duty useful to the judgment creditor, so far he may be said to have the property, but beyond this and as against the rights of adverse claimants, there is no authority that he has any property at all. The only question can be: Has the property passed from the debtor to any other person?

It has been further contended that the decisions which have taken place under the

Bankrupts Act, 1623, are authority to show that the execution is executed upon the mere act of seizure by the sheriff and that the subsequent sale is no more than a formal completion of the execution. By that statute it is enacted:

> "the creditors who have security for their debts, whether by judgment, statute, . . . whereof there is no execution or extent served and executed upon the lands and tenements, goods and chattels of the bankrupt, shall come in rateably with the other creditors."

And it must be admitted, that under that statute, various decisions have determined that, if the sheriff has once entered and seized, a subsequent act of bankruptcy before sale comes too late to vest the property in the assignees. It is contended, therefore, that by the seizure of the sheriff, the execution is executed. Undoubtedly, for the objects and purposes of that statute, the seizure must be taken to be a complete execution of that writ. That statute was passed before the Statute of Frauds at a time when the property in the goods was bound, as against the bankrupt himself and all claiming under him, by the mere suing out and teste of execution. In order, therefore, to obviate the manifest inconvenience which would result if plaintiffs were to lie by and conceal their writs, and afterwards bring them forward when the effects of the bankrupt had been disposed of by the assignees under the commission, by which means, they would give a false credit to the trader which it is the direct object s. 11 [repealed by Administration of Estates Act, 1925] of that statute to prevent, that statute did, for that purpose, compel the plaintiff to put his writ into immediate operation by making the seizure under the writ the utmost limit of any preference which he could give. But this affords no argument for the general position that the seizure of the goods, and not the sale, does generally, and in all cases, and for all purposes, alter the property. It was a particular provision made to obviate a particular inconvenience.

It has further been contended that the seizure under the writ is the completion of the execution because it has been held that an execution is an entire thing and cannot be superseded after it is once begun, and, therefore, if a writ of error is allowed after seizure, but before sale, it is no supersedeas of the execution, but the sheriff must notwithstanding sell the goods levied under the execution and return the money into court to abide the event of the writ of error: *Meriton* v. *Stevens* (42). It seems, however, to me that this rule of practice in the courts affords no grounds for such conclusion. In some of the old cases the judges appear to have doubted whether the defendant should not have his goods again when the writ of error was allowed after seizure, but before sale, and the reason assigned for the affirmative of that proposition was "for that, before sale, the property remains in the defendant.": *Shelton's Case* (43). But in later cases the courts have thought it a better exercise of discretion to allow the money to be made under the writ and brought into court to abide the event of the writ of error. In this case, it is to be observed, the suing of the writ of error is the act of the defendant himself and the object is to deprive the plaintiff of the fruits of his execution, and it is the laches of the defendant himself that he did not bring his writ of error before the seizure, circumstances which make a manifest distinction between this case, and that of persons who claim under any conflicting rights.

That the actual sale of property seized under the writ issued at the suit of the subject forms the dividing line, so that where the sale is complete before the awarding of the Crown process the property is protected therefrom, but where it is not completed the property may be seized thereunder, appears from *Fleetwood's Case* (44) where the sale of a lease belonging to the Crown debtor bona fide and without covin before the award of execution for the king's debt, which is analogous to the teste of the writ of extent was held to be good against the Crown, and that the Crown could not take it in execution. In this case no argument is offered that the seizure alters the property, the whole argument and the judgment of the court rests on the fact of the actual sale.

Independently of any argument upon principle, a very long series of cases from the earliest time down to the present with the exception of the two cases only which have been so often referred to, viz., *Uppom* v. *Sumner* (17) and *Rorke* v. *Dagrell* (25), establish the proposition that, if the subject seizes his debtor's property, either under a writ of execution, a distress, or any other mode which the law allows for the satisfaction of a debt or demand, and an extent issues at the suit of the Crown while the goods remain in specie and before anything is done to change the ownership, it is part of the prerogative of the Crown to treat this seizure as a nullity, and to proceed to the satisfaction of the Crown debt out of the goods so seized.

The first authority is *Stringefellow's Case* (18), the more valuable because it took place little more than six years after the passing of the Crown Debts Act, 1541, at a time consequently when the object and intention of that statute and the meaning of its provisions must have been familiar to all the judges who were present at its decision. In that case, the four barons of the Exchequer and two of the judges, namely, BROMLEY, J., one of the justices of the King's Bench, and HALES, J., one of the justices of the Common Pleas, were of opinion, that the actual taking of the goods of Brownesoppe, the debtor, by the sheriff, under an extendi facias out of Chancery upon a statute staple and the seizing them into the hands of the king, but without delivering them to the plaintiff, was no answer to a prerogative writ at the suit of the Crown out of the Exchequer, but that the sheriff was bound out of such goods to satisfy the king's debt. The reason assigned by the reporter for the opinion of the judges is,

> "because the property in the goods and lands was not in Stringefellow before they were delivered to him by the liberate."

It has been said, however, that this case is to be considered as subject to doubt, on account of the "quære" subjoined to it by the reporter. But it is to be observed, on the other hand, that ROLLE inserts the case in his ABRIDGMENT (2 ROLL. ABR. 158) without the quære, expressly stating, that:

> "The sheriff ought to execute the extent for the king's debt, because the property of the goods and lands were not in Stringefellow before they were delivered to him by a writ of liberate, and, therefore, liable to the king's extent,"

and that LORD HOBART, in *Sheffeild* v. *Radcliffe* (38), affirms the case to be law. Again, TREBY, C.J., in a marginal note to the report, states that the barons of the Exchequer agreed that this case was law; and the case itself is cited and relied upon as law in *R.* v. *Cotton* (32), where the Chief Baron, in a very elaborate and able judgment, states, "that he will show *Stringefellow's* case (18) to be undoubtedly law." Among other instances in which he states it to be recognised, he mentions that LORD HARDWICKE, C.J., in delivering the resolution of the Court of King's Bench in *Brassey* v. *Dawson* (45), cited, and relied upon *Stringefellow's* case (18) as clear law, and said it was grounded on the general rule of preference allowed by law to the king's debts.

The case last referred to, *R.* v. *Cotton* (32), which was decided in 1751, was determined on the very same principle as that which applies to the present case. In that case the goods of Chapman, the king's debtor, were seized under a distress for rent on October 12. On October 14, after the seizure, but before the sale, the extent issued. The Court of Exchequer held that the property in the goods was not altered by the distress, but until the time of actual sale remained in the king's debtor and was liable to the operation of the writ of extent. How can any real distinction be made between the landlord seizing the goods for the purpose of making his rent by a subsequent sale and a sheriff seizing under a fieri facias for the purpose of making the plaintiff's debt by a subsequent sale? Or, if there is any distinction, is it not stronger in favour of the landlord who might reasonably be supposed to have acquired a special property when he seized for his own benefit? Indeed, both the argument and the judgment in that case proceed on the assumption that the present case is in favour of the Crown, and that it could not be disputed but that the extent

would operate upon goods seized by the sheriff, but not yet sold. Again, in *A.-G.* v. *Cayell* (31), determined in the Exchequer in 1687, where the extent was tested Dec. 24, 1686, after a commission of bankrupt had issued against the debtor, but before the assignment made by the commissioners, it was held by the court that, if the extent came before the assignment, it must be preferred. *R.* v. *Crump and Hanbury* (46) is relied upon as an authority in point to which the reporter adds this observation (2 Show. at pp. 481, 482):

> "Extents have been held good, that have been made upon goods actually levied by virtue of a fieri facias, and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered."

These two cases, therefore, are direct authorities—the one that in the case of a distress where goods are in custodia legis after the seizure but before the sale, and, again, in the case of a bankrupt where goods are also in custodia legis between the seizure by the messenger and the actual assignment by the commissioners; still the goods of the king's debtor are subject to an extent at the suit of the Crown tested before the actual sale under the distress or before the actual assignment to the assignees, and the just inference would seem to be that in the case of a seizure by the sheriff under a fieri facias, where the goods are also in custodia legis an extent tested before the sale ought to be entitled to the same operation. *Stringefellow's* case (18), acknowledged as it has been in various and repeated instances and by the most eminent judges, is a direct authority on the very point now under discussion, and since that decision various other cases have been decided in the same way, and after great argument, by the Court of Exchequer. I refer particularly to *R.* v. *Wells* (27) in 1807, and to *R.* v. *Sloper and Allen* (28), where the Exchequer acted on the authority of the case just mentioned.

The only two cases which have received a contrary decision are those before referred to, viz., *Uppom* v. *Sumner* (17), in 1779 by the Court of Common Pleas, and *Rorke* v. *Dayrell* (25), in 1791 by the Court of King's Bench—cases undoubtedly entitled to great respect when the authority of the eminent persons by whom they were adjudged is taken into consideration. I say that these two cases only have received a contrary decision, for I cannot consider *Letchmere* v. *Thorowgood* (19), which is sometimes cited, to be an authority upon the present question between the Crown and the subject. That was an action of trover by the assignees of a bankrupt against the sheriff who had entered under a fieri facias, and upon a special verdict one of the questions was whether the fieri facias was well executed, the sheriff having seized, though not sold under the writ before the commission of bankrupt had issued, and upon that question it was held that the fieri facias was well executed so that the assignees of the bankrupt's estate could not have a title to those goods which were before taken in execution, and, therefore, in custodia legis. So far, undoubtedly, the case is an authority. But it was further stated in the special verdict, that after seizure under the fieri facias and before any venditioni exponas, an extent in aid issued, whereupon parcel of the goods mentioned in the declaration was seized by the sheriffs upon the same extent and sold and the money paid to the creditor. One question stated by the reporter is whether the extent did not come too late, and he says it was held that it did. On this point the case cannot be an authority, for the priority between the extent and the fieri facias was perfectly immaterial to the plaintiffs; in that action they were out of court upon the title of the judgment creditor. All further discussion was res inter alios acta. No one appeared for the Crown. No argument took place before the court on behalf of the Crown. The only inference, therefore, to be drawn from that case is that the plaintiffs, the assignees, had no right against the judgment creditor, but whether the Crown, who had received payment out of part of the goods seized, had such right or not, is left undetermined, and, indeed, untouched.

The question, therefore, is, whether the two cases to which I have referred are of such authority as to overturn the decisions which, both before and since, have

been given by the Court of Exchequer. These two cases, as I have already observed, are decided partly upon the ground that the property in the goods is altered by the seizure under the fieri facias, and partly upon the ground, that by the Crown Debts Act, 1541, such a restriction was put upon the king's prerogative that the preference now contended for ceased to exist. These are the only grounds upon which these cases are rested. As I have already stated the reasons for the opinion which I have formed, that no alteration takes place until the actual sale under the fieri facias, I shall confine my remaining observations to the consideration of the second point, viz., the Crown Debts Act, 1541. [HIS LORDSHIP considered the statute and said that it did not abrogate the priority of the Crown regarding recovery of debts where the Crown and a subject were in competition, and he concluded:] For these reasons, the opinion which I have formed upon the first question proposed to us is, that the actual sale under the fieri facias forms the dividing line between the right of the Crown and the right of the subject; and, consequently, that the extent is in the present case to be preferred to the writ of fieri facias issued at the suit of the subject. I have the authority of **PARK, J.,** who is unavoidably absent on this occasion, to express his entire concurrence with the opinion formed by the majority of His Majesty's judges.

July 11, 1832. **LORD TENTERDEN, C.J.**—By their answers a very great majority of the judges coincided in the opinion upon which I propose to submit to your Lordships that the judgment of the Court of Exchequer should be affirmed, two only being of a different opinion. [HIS LORDSHIP stated the facts.]

The question raised by this case has arisen more than once in courts of law and there are two recorded decisions, in two cases so often alluded to, upon the subject —one, *Uppom* v. *Sumner* (17), decided in the Common Pleas and the other *Rorke* v. *Dayrell* (25), decided in the Court of King's Bench after the decision of the other case. Not to notice the prior decisions in the Court of Exchequer, it may be sufficient for the present to say that there have, since *Rorke* v. *Dayrell* (25), been two or three decisions in the Court of Exchequer to the contrary of those two prior decisions. Your Lordships well know that the barons of the Court of Exchequer are very peculiarly conversant with the revenue of the Crown. It is their peculiar duty to attend to and enforce the rights of the Crown against the subject as connected with that revenue. The two cases which are against the rights of the Crown appear to have proceeded upon two grounds—(i) that by the seizure of the sheriff the property of the goods was divested out of the debtor; (ii) that, according to the true interpretation of the Crown Debts Act, 1541, the execution of the Crown was not to be preferred.

With regard to the first point, namely, the supposition that the property was divested out of the debtor by the act of the sheriff in seizing the goods, it appears to me upon due consideration, and so the majority of the judges have thought, that the proposition could not be maintained. Property cannot be divested out of one person without being vested in another, and it is impossible to say in whom the property does become vested if the investment be taken out of the debtor. It has been argued that the property is vested in the sheriff, because there are authorities to show that the sheriff, if the property be taken out of his hands, may maintain an action of trover against the wrongdoer. These actions are maintainable upon a ground perfectly distinct from the right of property. They are maintainable upon the ground of possession. Any man in possession of goods, whether as the bailee or otherwise, may in his own name maintain an action against any party who shall deprive him of the possession. The power, therefore, of bringing an action of this kind does by no means prove that the property is in the sheriff. It has been supposed by some that the property is in the judgment creditor, but it is perfectly clear upon consideration of the subject that the judgment creditor has no property in the goods while they remain in the hands of the sheriff. If the sheriff executes the process of the court and makes a bill of sale to the plaintiff in the action, then the judgment

creditor obtains the property; until that is done, while the goods are in the possession of the sheriff they are in the custody of the law, but still remain the property of the debtor to whom they originally belonged. If the property were divested, some ceremony would be necessary to re-vest it, but there is no such ceremony. If the debtor pays the money to the sheriff, the sheriff withdraws; he executes no conveyance; he does not even go through any ceremony; all he does is to withdraw and leave the goods where they were. It appears to me, therefore, that putting the case shortly upon that ground of a supposed divesting of the property, it can by no means sustain the two cases I have referred to which were decided against the right of the Crown.

His Lordship referred to the Crown Debts Act, 1541, and said: I am, therefore, of opinion that the true effect of this statute is to allow the subject to obtain judgment, and even to sue out execution, without first making satisfaction to the king, but, nevertheless, to leave the law in all other respects as it stood before, namely, if the king's execution comes while the goods remain the property of the debtor—and, as I have already stated, my opinion is that they do remain the property of the debtor although they be taken possession of by the sheriff—the king's execution shall prevail. The contrary of that has been decided in *Uppom* v. *Sumner* (17) and *Rorke* v. *Dayrell* (25), but there are two or three decisions of the Court of Exchequer in accordance with my view of the subject. I do not know that it is necessary to trouble your Lordships with referring to those cases. They were very much considered in the Court of Exchequer, and the decision in one of them afterwards became the subject of inquiry in the Court of King's Bench. The case is *Thurston* v. *Mills* (26) in which the point of law which is the question in the present case was twice argued before the King's Bench, and a third time upon a question preliminary to the question argued on the two first occasions. Upon that preliminary question, which regarded only the form of the action, the Court of King's Bench decided against the plaintiff. The main question was there left untouched, but I think it may be collected, though not very clearly, that the opinion at least of some of the judges who sat in the court at that time, Lord Ellenborough being at the head of them, and Le Blanc, J., being one of them, was in favour of the Crown. I cannot assert positively that it was so, but, in reading the report of the case, and from my own recollection of the questions introduced into the argument of it, I am strongly inclined to think that it was so, and I formed that opinion at the time.

The ground upon which *Uppom* v. *Sumner* (17) and *Rorke* v. *Dayrell* (25) have proceeded as to the divesting of the property out of the debtor and vesting it in another failing, in my opinion, and the argument also that was founded upon the construction of the Crown Debts Act, 1541, failing on a due consideration of that statute with regard to the law as it existed before, my opinion is that the Crown has a right of priority in this case before the subject, and, consequently, that the judgment of the Court of Exchequer must be affirmed.

LORD BROUGHAM, L.C., after reviewing the cases, said: I certainly entertain a strong opinion that the judgment of the Court of Exchequer in this case is right, and ought, by your Lordships, to be affirmed. I entirely go along with the opinions pronounced by the majority of the learned judges in answer to the questions put to them. It is of much more importance that this question should be settled, than it is in which way it shall be settled.

Appeal dismissed.

AMICABLE SOCIETY *v.* BOLLAND AND OTHERS

[House of Lords (Lord Lyndhurst, L.C., and Lord Radnor), June 23, 25, July 9, 1830]

[Reported 4 Bli. N.S. 194; 2 Dow. & Cl. 1; 5 E.R. 70]

Insurance—Life assurance—Avoidance of policy—Execution of assured for felony.

The assignees in bankruptcy of a person who has been convicted of a capital felony and executed cannot recover any moneys under a life insurance policy effected by the bankrupt prior to the commission of the felony. The policy must be construed as if a clause had been inserted in terms insuring against the event of the commission of such an offence by the party insured, and is thus contrary to public policy.

Notes. Extended: *Horn* v. *Anglo-Australian and Universal Family Life Assurance* (1861), 30 L.J.Ch. 51. Explained: *Cleaver* v. *Mutual Reserve Fund Life Association*, [1891-4] All E.R. Rep. 335. Considered: *Beresford* v. *Royal Insurance Co.*, [1938] 2 All E.R. 602. Referred to: *Davis* v. *Eglon* (1830), 7 Bing. 154; *Borradaile* v. *Hunter* (1843), 5 Man. & G. 639; *Moore* v. *Woolsey* (1854), 3 C.L.R. 207; *Dufaur* v. *Professional Life Insurance* (1858), 4 Jur. N.S. 841; *Jackson* v. *Foster* (1859), 5 Jur. N.S. 1247; *Dudley and West Bromwich Banking Co.* v. *Spittle* (1860), 2 L.T. 47; *Yates* v. *Kyffin-Taylor and Wark*, [1899] W.N. 141; *In the Estate of Hall, Hall* v. *Knight and Baxter*, [1911-13] All E.R. Rep. 381; *Hardy* v. *Motor Insurers Bureau*, [1964] 2 All E.R. 742.

As to life insurance, and event insured against, see 22 Halsbury's Laws (3rd Edn.) 274, 275; and for cases see 29 Digest (Repl.) 369 et seq.

Appeal by the defendants from a decree of Sir John Leach, M.R., on a bill filed by the plaintiffs, the assignees in bankruptcy of Henry Fauntleroy, deceased, against the Amicable Society for a Perpetual Assurance Office and others, as defendants, claiming the benefit of an insurance policy.

In January, 1815, Henry Fauntleroy effected an insurance on his life, with the appellants, the Amicable Society for a Perpetual Assurance Office. By the policy which was dated Jan. 11, 1815, after reciting that Fauntleroy had paid to the society the sum of £25, by way of premium on his admission and the further sum of £128 15s. as the first yearly payment, which he had agreed to pay yearly to the society, according to the provisions of the society's byelaws, it was witnessed that, in consideration of the premises, Henry Fauntleroy was thereby admitted a member of the society and the society thereby bound themselves and their successors to pay to the executors, administrators or assigns of Fauntleroy, such a proportion or share of the joint-stock and fund of the society as should become due on the death of Fauntleroy, according to the charters and byelaws of the society. The policy was signed by the directors and sealed with the society's seal, and Fauntleroy, from the time of the making of such policy until the time of his death, regularly paid the premiums as they became due on the policy: which was, at the time of his death, a valid and subsisting policy of assurance, and there was then due and payable a sum of money, amounting to some £6,000.

Fauntleroy in January, 1820, executed an indenture dated Sept. 10, 1819, and made between Fauntleroy on the one part, and Sir Everard Home and Joseph Birch, of the other part, whereby, in consideration of 5s. paid by Home and Birch to Fauntleroy, Fauntleroy assigned the policy and all sums of money secured thereby, or to become due thereon, to Home and Birch. Home and Birch executed a declaration of trust, dated Sept. 19, 1819, whereby they declared that the assignment dated Sept. 10, 1819, was made to them in trust for the benefit of Ann Nelson Macnamara, otherwise Cathrow, and that they would stand possessed of the policy and all benefit and advantage to arise therefrom, in trust, for her sole and separate use and benefit; and Fauntleroy thereby covenanted with Home

and Birch to pay the annual sum of £128 15s., according to the terms of the policy. Fauntleroy at the same time signed a memorandum as follows:

"This assignment was given to Sir Everard Home and Joseph Birch, in trust, to pay Ann Nelson Cathrow the proceeds upon my decease. (Signed) H. Fauntleroy, Berners Street, Sept. 10, 1819."

The person described as Ann Nelson Macnamara, was, at the time of the execution of the instrument, the wife of the defendant James Cathrow Disney. Fauntleroy never received any valuable consideration for the assignment of the policy of assurance, which was purely voluntary.

On Sept. 16, 1824, a commission of bankruptcy was issued against William Marsh, Josias Henry Stracey, and George Edward Graham, under which they were found and declared to be bankrupts, and the respondents were chosen assignees of their estates and effects, and the usual bargain, sale, and assignment thereof were made to them accordingly. On Oct. 29, 1824, Fauntleroy was declared to be bankrupt, and all his estate and effects became vested in the respondents as his assignees in bankruptcy.

Fauntleroy died on Nov. 30, 1824, and the moneys secured by the policy of assurance thereby became payable.

On this statement of facts it was the bill prayed that the assignment of the policy might be declared void or set aside, and that the respondents might be declared to be entitled to the policy and the money payable thereon; further, that the society might be decreed to pay what was so due to the respondents, and that the other appellants, Disney and Ann Nelson his wife, Home and Birch, might be decreed, if necessary, to assign the policy to the respondents.

The appellants by their answer, said that on Oct. 23, 1824, Henry Fauntleroy was convicted of felony, and afterwards executed for the same. They submitted that on his attainder for felony, he ceased to be a member of the society, and because of his death occasioned by the felony no claim could be made on the society by virtue of the policy.

The Master of the Rolls, by his decree dated May 21, 1827, declared that the respondents as assignees of Henry Fauntleroy, were entitled to the policy of assurance, and the money then payable thereon; and the appellants having admitted that £6,084 7s. 6d. was payable on the policy, should pay the respondents that sum. The appellants now appealed to the House of Lords against that decree.

Sir Charles Wetherell and *Rose* for the appellants.
Sir Edward Sugden and *Koe* for the respondents.

LORD LYNDHURST, L.C. The circumstances of the case are shortly these. In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In May of the same year he committed a forgery on the Bank of England. He continued to pay the premiums on this insurance for a considerable time. In 1824 he was apprehended and, on Oct. 29, he was declared a bankrupt and an assignment of his effects was made to the respondents. On the following day, Oct. 30, he was tried for this forgery; he was found guilty, sentenced to death and in the following November was executed.

The question in these circumstances is whether the assignees in bankruptcy can recover against the insurance company the amount of this insurance, that is to say, whether a party effecting an insurance on his life with an insurance company and afterwards committing a capital felony, being tried, convicted and finally executed, whether, in such circumstances, the parties representing and claiming under him, can recover the sum assured in the policy so effected. LORD RADNOR and I have both come to the conclusion that the respondents, the assignees, cannot maintain this suit.

It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against—

that is, that the party insuring had agreed to pay a sum of money year by year on condition that, in the event of his committing a capital felony and being tried, convicted and executed for that felony, his assignees would receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void on the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections. If a policy of that description containing such a condition in express terms, cannot on grounds of public policy be sustained, how can it be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion which, if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void?

On this short and plain ground, therefore, I think that this policy cannot be sustained and that the respondents are not entitled to recover. I submit, therefore, that the judgment of the court below ought to be reversed.

Appeal allowed.

RICHARDSON *v.* WATSON

[Court of King's Bench (Denman, C.J., Littledale and Parke, JJ.), May 3, 1833]

[Reported 4 B. & Ad. 787; 1 Nev. & M.K.B. 567; 2 L.J.K.B. 134; 110 E.R. 652]

Will—Avoidance—Uncertainty—Gift of estate—Two estates answering description in will—Uncertainty as to which estate intended.

If a will shows that a testator intends to give a particular property to a devisee, and, owing to his having more than one property answering the description given in the will, the court is unable to say, either from the will or from admissible extrinsic evidence, which of the properties the testator intended to give, the gift must fail for uncertainty.

Will—Evidence—Identification of subject-matter of gift—Instructions for preparation of revoked will.

Observations on the admissibility of a testator's instructions for the preparation of a revoked will as evidence to identify the subject-matter of a gift but not as evidence of his intention.

Notes. Applied: *Shore* v. *Wilson* (1842), 9 Cl. & Fin. 355. Distinguished: *Duckmanton* v. *Duckmanton* (1860), 5 H. & N. 219. Considered: *Asten* v. *Asten*, [1894] 3 Ch. 260. Applied: *Re Rayner*, *Rayner* v. *Rayner*, [1900–3] All E.R. Rep. 107. Referred to: *Grant* v. *Grant* (1870), L.R. 5 C.P. 380; *Tapley* v. *Eagleton* (1879), 12 Ch.D. 683; *Re Knapton*, *Knapton* v. *Hindle*, [1941] 2 All E.R. 573.

As to admissibility of evidence in construction of will, see 39 Halsbury's Laws (3rd Edn.) 955 et seq.; and for cases see 44 Digest 612 et seq.

Cases referred to:

(1) *Goodtitle d. Radford* v. *Southern* (1813), 1 M. & S. 299; 105 E.R. 112; 44 Digest 628, *4589*.

(2) *Lord Cheyney's Case* (1591), 5 Co. Rep. 68 a.; 77 E.R. 158; 44 Digest 632, *4640*.

(3) *Doe d. Hayter* v. *Joinville* (1802), 3 East, 172; 102 E.R. 563; 44 Digest 612, *4394*.

(4) *Mohun* v. *Mohun* (1818), 1 Swan. 201; 1 Wils. Ch. 151; 36 E.R. 357; 44 Digest 611, *4378*.

(5) *Miller* v. *Travers* (1832), 8 Bing. 244; 1 Moo. & S. 342; 1 L.J.Ch. 157; 131 E.R. 395; 44 Digest 625, *4559*.

Also referred to in argument:

Druce v. *Denison* (1801), 6 Ves. 385; 31 E.R. 1106, L.C.; 44 Digest 643, *4824*.

Thomas d. Evans v. *Thomas* (1796), 6 Term Rep. 671; 101 E.R. 764; 44 Digest 613, *4403*.

Press v. *Parker* (1825), 2 Bing. 456; 10 Moore, C.P. 158; 3 L.J.O.S.C.P. 96; 130 E.R. 382; 44 Digest 607, *4347*.

Lane v. *Earl of Stanhope* (1795), 6 Term Rep. 345; 101 E.R. 587; 44 Digest (Repl.) 737; *5917*.

Doe d. Humphreys v. *Roberts* (1822), 5 B. & Ad. 407; 106 E.R. 1240; 44 Digest 673, *5135*.

Action for use and occupation by the defendant of two closes of land situate in the parish of Kirton, Lincolnshire.

The plaintiff was entitled as heir-at-law of the testator, William Richardson (who had previously demised the closes by parol from year to year to John Watson), to recover £12 11s. 7d. for the half year's rent of the two closes provided they did not pass by the will of William Richardson, to his great nephew, John Richardson.

By his will dated April 17, 1827, the testator, after giving and devising certain estates to his wife and to his great nephew William, gave and devised all his real estate at Hibaldstow, Lincolnshire, then in the occupation of John Watson, to his great nephew Percival, his heirs, and assigns, for ever. He then devised as follows:

"I give and devise all that my messuage, or tenement, closes, lands, hereditaments, and real estates situate at Kirton in the said county of Lincoln, which are now in the occupation of Joseph Atkinson, and also the close in Kirton aforesaid, now in the occupation of the said John Watson, unto and to the use of my said great nephew John Richardson, his heirs and assigns for ever. I give and devise all that my messuage or tenement, closes, lands, hereditaments, and real estates situate at Kirton aforesaid, which are now in the occupation of Thomas Curtis, unto and to the use of my said great nephew Thomas Richardson, his heirs and assigns for ever. I give and devise all that my messuage or tenement, closes, lands, hereditaments, and real estate situate at Kirton aforesaid, which are now in the occupation of Joseph Wharton, unto and to the use of my said great nephew Richard Richardson, his heirs and assigns for ever."

There was no residuary devise.

For two or three years prior to, and in 1825, and from then until the death of the testator John Watson occupied two closes in the parish of Kirton, as tenant of the testator, being the same two closes for the use and occupation of which the present action was brought. One close contained some ten acres and had always been called Low Firwells; the other contained some eleven acres and had always been called Low Sweet Hills. They were separated from each other by several intervening properties.

Evidence was received on the part of the defendant, of a will made in 1825 in which the devise, corresponding to that on which the present question arose was as follows:

"And I give all those messuages, cottages, farms, closes, lands, tenements, and hereditaments whatsoever, situate and being in Hibaldstow and Kirton in the said county of Lincoln, as well freehold as copyhold according to the customary nature and quality of the same estates . . . [to certain trustees] and their heirs upon the trusts and to and for the said intents and purposes hereinafter declared of and concerning the same, that is to say: As to a farm and lands in Hibaldstow in the occupation of John Watson, [to certain

uses therein mentioned]. And as to, for, and concerning all that messuage or tenement, with the closes, lands, and hereditaments situate and being in Kirton aforesaid, now in the occupation of Joseph Atkinson, together with the close in Kirton aforesaid, occupied by the said John Watson, upon trust for my said great nephew John Richardson, when he shall attain the age of twenty-three years, and for the heirs of his body lawfully issuing."

The testator then proceeded in the will of 1825 to carve out by name the other estates so devised to the trustees.

The attorney who made the will of 1825, but who did not make the will of 1827, stated that he received instructions in writing from the testator for the will of 1825, which he produced and which, among other instructions, contained the following:

"I also wish the farm in Joseph Atkinson's occupation to be the property of John Richardson, my great nephew, taking also the land in Kirton, occupied at this moment by Mr. Watson (all) only to be entered on at twenty-three."

The witness stated in explanation of his having mentioned in the will only one close in the occupation of Watson, that the testator gave him certain verbal instructions for the will and in those verbal instructions (which the witness took down in writing and afterwards destroyed) described the land in the occupation of Watson as a "close," but added that he hardly knew what Watson occupied. That the will was made from the written and verbal instructions. That he (the witness) from what passed, understood it to be the testator's intention to give all the land in the occupation of Watson to his great nephew John Richardson. That in consequence of the testator not being certain what land Watson occupied, one Neale, who was supposed to know the testator's land, was called in, and asked by the witness in the testator's presence, whether the land in the occupation of Watson was in one close or two, and that Neale said it was all in one close, and that he, the witness, in consequence of this information described it in the will as above mentioned. The closes in question had formed a part of Atkinson's farm twenty-four years before and until they came into the possession of Watson.

At the trial before BAYLEY, B., at the Lincolnshire Spring Assizes, 1832, the judge thought this evidence as to the former will could not be submitted to the jury and directed them to find for the plaintiff. The jury accordingly found a verdict for the plaintiff for £12 11s. 7d., subject to the opinion of the court on a Case which stated the facts set out above.

Amos for the plaintiff.
N. R. Clarke for the defendant.

DENMAN, C.J.—There was in this will a latent ambiguity which might be explained by parol evidence, but the evidence which has been given leaves it in doubt what the testator meant to pass by the words "the close in the occupation of Watson." If it had been shown that there was only one close in his occupation, the supplementary evidence would have made it clear that that close was intended. It appears, however, that there were two closes in his occupation and, therefore, the evidence leaves it doubtful which was meant to pass. Therefore, as it is not ascertained either by the words of the will or by the evidence given to explain them, what the testator intended, the devise is void for uncertainty and the heir-at-law [the plaintiff] is entitled to recover. This is not a case of election, for an election can take place only where the intention of the devisor or grantor is clear that, out of a mass, a certain portion should be selected.

Assuming that the evidence of the former will and what took place preparatory to it, was admissible (which is very doubtful), it appears that the testator, on that occasion, gave instructions in writing to his attorney desiring that all the land in Kirton occupied by Watson should go to his great nephew, that the testator

afterwards gave the attorney verbal instructions and described the land in the occupation of Watson as a close, and that, being uncertain what land Watson occupied, he made inquiry of one Neale who in the testator's presence stated that the land in the occupation of Watson was in one close, and that, in consequence of that information, the attorney so described it in the will. If Neale had said it was in two closes, it is possible that the testator might not have left both closes. We cannot, from that evidence, say that the testator meant to give either one or the other close.

LITTLEDALE, J.—I am of opinion that the parol evidence does not show which of the two closes the testator intended to devise and, consequently, it does not explain the ambiguity of the will. The evidence as to the former will only shows that the testator intended to devise some close in the occupation of Watson. In *Goodtitle d. Radford* v. *Southern* (1), the devise was of "all that my farm, called Trogues Farm, now in the occupation of A." There the first part of the description was certain and it was held that the subsequent defective description of the occupation would not vitiate the previous correct one. The word close in this will is not synonymous with the word land, for the word closes occurs frequently in it. Independently of that, the word close is not so comprehensive a term as land.

This is not a case of election because it does not appear from the context of the will that the testator intended that the devisee should have an election. In the case put in Co. LITT. 145, a, where a gift is made of one of the donor's horses in his stable, it is manifest that the donor intends that the donee should select. So in the case put in BACON'S MAXIMS, of the grant of ten acres of wood in a place where the grantor has 100. Here, then, the devisee having no election and it being impossible to discover by the words of the will or by the parol evidence what was intended to be given, the devise is void for uncertainty.

In *Lord Cheney's Case* (2), it was resolved

> "that if a man has two sons, both baptized by the name of John, and, conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son John generally, and in truth, the elder is living; in this case the younger son may in pleading, or in evidence, allege the devise to him; and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead [and it is afterwards said] if no direct proof can be made of his intent, the devise is void for the uncertainty."

So in *Doe d. Hayter* v. *Joinville* (3), where, by the dubious use of the word family (viz., brother and sister's family) in a will, the testator having had two sisters, one of whom was dead leaving children, it could not certainly be collected to what person he meant to apply it, the heir-at-law was held entitled to take. Again in *Mohun* v. *Mohun* (4), where the whole will consisted of these words: "I leave and bequeath to all my grandchildren, and share and share alike," and by a codicil the testator appointed certain persons to be trustees for all his grandchildren and nieces. SIR THOMAS PLUMER held that the devise was void, "there being uncertainty both in the subject and objects of the bequest." In the present case, therefore, I think that the devise is void and the heir-at-law is entitled.

PARKE, J.—I am of the same opinion, and I have formed that opinion with some regret because I am satisfied that the testator intended to do something which he has not done. I should, however, be much more sorry to break in on the established rule of law that the heir-at-law is entitled to the estate of his ancestor unless there be a good devise by the latter.

Parol evidence was undoubtedly admissible to show that Watson occupied two closes in Kirton at a distance from each other. Generally speaking, evidence might be given to show that the testator used the word close in the sense which it bore in the county where the property was situate, as denoting a farm, but here such

evidence was not admissible because it is manifest that in this will, the testator used the word close in its ordinary sense as denoting an inclosure, for the word closes occurs in other parts of the will. If the parol evidence had been confined to the fact of there being two closes in Kirton in Watson's occupation, and to their situation, it would not have removed the uncertainty which of the two closes the testator meant to pass; but still the case would have fallen within the first class of those mentioned by TINDAL, C.J., in *Miller* v. *Travers* (5) (8 Bing. at p. 248):

> "As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name."

In each of those cases parol evidence is admissible to show which manor was intended to pass and which son was intended to take. Such evidence is admissible to show (as counsel for the plaintiff pointed out) not what the testator intended but what he understood to be signified by the words he used in the will.

Then as to the evidence of what passed at the time of preparing the first will, that does not show which of the two closes the testator meant to devise. It appears he was mistaken in supposing that he had only one close in Kirton in Watson's possession; but that does not remove the doubt as to which close he intended to devise, and it being impossible to say which of the two closes he intended to give, the devise is void for uncertainty.

The devisee clearly had no election here. That exists only where on the natural construction of the instrument, there is a clear intent in the testator or grantor that there shall be an election in the devisee or grantee, as in the instances put in BACON'S MAXIMS, the reason of which is there given. Here it cannot be collected, on the face of the will, that the testator intended that the devisee should have a right to elect, for he devises the close (not one of two closes) in the occupation of Watson. The judgment must, therefore, be for the plaintiff.

Judgment for plaintiff.

HALL *v.* HOLLANDER

[Court of King's Bench (Abbott, C.J., Bayley and Holroyd, JJ.), November 14, 1825]

[Reported 4 B. & C. 660; 7 Dow. & Ry. K.B. 133; 4 L.J.O.S.K.B. 39; 107 E.R. 1206]

Master and Servant —Loss of service—Child too young to perform any services.

The principle that a master may maintain an action for the loss of services sustained by the tortious act of a third person where the servant is a child does not apply where the child is too young to perform any services.

Notes. Referred to: *Harris* v. *Butler* (1837), Murp. & H. 117; *Grinnell* v. *Wells* (1844), 7 Man. & G. 1033; *Alton* v. *Midland Rail. Co.* (1865), 19 C.B.N.S. 213; *Evans* v. *Walton* (1867), L.R. 2 C.P. 615; *Admiralty Comrs.* v. *Steamship Amerika (Owners)*, *The Amerika*, [1916-17] All E.R. Rep. 177; *A.-G.* v. *Valle-Jones*, [1935] All E.R. Rep. 175; *Metropolitan Police District Receiver* v. *Tatum*, [1948] 1 All E.R. 612.

As to the right of a master to be compensated for the loss of services of his servant through the wrongful act of a third person, see 25 Halsbury's Laws (3rd Edn.) 558–560; and for cases see 34 Digest (Repl.) 226, 227.

Cases referred to:

(1) *Weedon* v. *Timbrell* (1793), 5 Term Rep. 357; 1 Esp. 15; 101 E.R. 199; 27 Digest (Repl.) 331, *2747*.

(2) *Satterthwaite* v. *Dewhurst* (1785), 4 Doug. K.B. 315; 99 E.R. 899; sub nom. *Saterthwaite* v. *Duest*, 5 East, 47, n.; 34 Digest (Repl.) 215, *1515*.

(3) *Gray* v. *Jefferies* (1587), Cro. Eliz. 55.

(4) *Barham* v. *Dennis* (1600), Cro. Eliz. 770.

Also referred to in argument:

Jones v. *Brown* (1794), 1 Esp. 216; Peake, 306, N.P.; 35 Digest (Repl.) 227, *1652*.

Fores v. *Wilson* (1791), Peake, 77, N.P.; 34 Digest (Repl.) 217, *1541*.

Motion by the plaintiff for a rule nisi to set aside a nonsuit and for a new trial of an action of trespass for driving a carriage against the plaintiff's son and servant whereby the plaintiff was deprived of his service and incurred expenses in his cure.

At the trial before Abbott, C.J., the plaintiff proved that the defendant drove his carriage against the plaintiff's son, then an infant two years and a half old. The child was much injured, and at first was taken to the Middlesex hospital, where he might have remained without expense to his father, but he was afterwards taken home by his father who thought he would be better there, and was taken daily to the hospital for advice for some months, at the expiration of which time he was dismissed as cured. The plaintiff also hired a servant to attend the child during his illness. Upon this evidence it was objected for the defendant that the child was not competent to perform any service by reason of his tender age, and that, as loss of service was the gist of the action, the plaintiff must be nonsuited. Abbott, C.J., was of that opinion, but offered to leave it to the jury to say whether the child was capable of performing services to which any value could be attached. Counsel for the plaintiff did not desire the question to be so left, and thereupon the plaintiff was nonsuited.

Lawes for the plaintiff, moved for a new trial.

BAYLEY, J.—I am of opinion that the nonsuit in this case was right. It has been contended that the action is maintainable on two grounds, first, for the loss of the services of the child and, secondly, for the expenses incurred by the plaintiff in consequence of the injury sustained by the child. With respect to the first ground, I apprehend that the gist of the action depends on the capacity of the

child to perform acts of service. Here it is manifest that the child was incapable of performing any service. The authorities on this point are all one way. In the cases which have been cited, the child being capable of performing acts of service and living with the parent would naturally be called upon to perform some acts of service; and it was, therefore, held that service might be presumed and that evidence of it need not be given. In *Weedon* v. *Timbrell* (1), both LORD KENYON and ASHURST, J., say that the loss of service is the gist of such an action as the present, and that the plaintiff must give some proof of acts of service in order to support the allegation in the declaration, although very slight evidence is sufficient; and in *Saterthwaite* v. *Duest* (2), it was held that an action for debauching a daughter could not be maintained by a father unless she was his servant, and that the action could not be maintained on the ground of expense having been incurred in providing for her during her confinement. In this case, too, it was proved that the plaintiff did not necessarily incur any expense; if he had done so, I am not prepared to say that he could not have recovered on a declaration describing, as the cause of action, the obligation of the plaintiff to incur that expense.

HOLROYD, J.—It was not established by evidence at the trial that the plaintiff was necessarily put to any expense; the court are, therefore, not called on to give any opinion on his right to recover such expenses. It is clear that, in cases of taking away a son or daughter, except for taking a son and heir, no action lies unless a loss of service is sustained: *Gray* v. *Jefferies* (3), *Barham* v. *Dennis* (4). The mere relationship of the parties is not sufficient to constitute a loss of service. The reasoning in all the modern cases shows that some evidence of service is necessary; none could be given in the present case and the nonsuit was, therefore, right.

ABBOTT, C.J.—It is a principle of the common law that a master may maintain an action for a loss of service, sustained by the tortious act of another, whether the servant be a child or not; and, when that foundation of the action has existed, courts of justice have allowed all the circumstances of the case to be taken into consideration with a view to the calculation of the damages. Here, we are required to go further, and to hold that the action is maintainable although no service was or could be performed by the child, and that, too, on a declaration alleging the existence of the relation of master and servant and the loss of the services of such servant. Such a decision would not be warranted by any former case and the nonsuit, therefore, ought not to be disturbed.

Rule refused.

R. *v.* PEASE AND OTHERS

[Court of King's Bench (Littledale, Parke and Taunton, JJ.), June 9, November 26, 1832]

[Reported 4 B. & Ad. 30; 1 Nev. & M.K.B. 690; 1 Nev. & M.M.C. 535; 2 L.J.M.C. 26; 110 E.R. 366]

Nuisance—Statutory powers—Exercise—Company empowered to build railway adjacent to highway and to use locomotives—Nuisance to users of highway—Liability of company.

Statute—Construction—Words to be given ordinary meaning—Exception to rule—Unreasonable result—Inconsistency with intention of legislature.

By an Act of Parliament a railway company was given power to build a railway according to a map from which they were not to deviate more than one hundred yards. By a subsequent Act they were empowered to use locomotive engines on the railway. The railway was built parallel and adjacent to an ancient highway and in some places came within five yards of it. On an indictment against the company for nuisance,

Held: the legislature must be presumed to have known that the railway would run adjacent to the highway, and, consequently, that the public using the highway might be incommoded by the locomotive engines on the railway: accordingly, there being no conditions imposed on the company, they had unqualified authority to use the locomotive engines on the railway.

Per Curiam: We are to construe provisions in Acts of Parliament according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be extended or modified.

Notes. Considered: *Pilgrim* v. *Southampton and Dorchester Rail. Co.* (1849), 7 C.B. 205. Distinguished: *Lawrence* v. *Great Northern Rail. Co.* (1851), 16 Q.B. 643. Considered: *Ricketts* v. *East and West India Docks, etc., Railway* (1852), 12 C.B. 160. Distinguished: *Manley* v. *St. Helens Canal and Rail. Co.* (1858), 2 H. & N. 679. Considered: *Vaughan* v. *Taff Vale Rail. Co.*, [1843–60] All E.R. Rep. 474. Distinguished: *R.* v. *Bradford Navigation Co.* (1865), 6 B. & S. 631. Considered: *Jones* v. *Festiniog Rail. Co.* (1868), L.R. 3 Q.B. 733. Applied: *Dungey* v. *London Corpn.* (1869), 38 L.J.C.P. 298. Approved: *Hammersmith and City Rail. Co.* v. *Brand*, [1861–73] All E.R. Rep. 60. Considered: *Buccleuch* v. *Metropolitan Board of Works* (1870), L.R. 5 Exch. 221; *Matson* v. *Baird* (1878), 3 App. Cas. 1082. Approved: *London, Brighton and South Coast Rail. Co.* v. *Truman*, [1881–5] All E.R. Rep. 134. Explained: *Evans* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1887), 36 Ch.D. 626. Considered: *Cowper Essex* v. *Acton Local Board*, [1886–90] All E.R. Rep. 901. Distinguished: *Long Eaton Recreation Grounds Co.* v. *Midland Rail. Co.* (1901), 71 L.J.K.B. 74; *Rattee* v. *Norwich Electric Tram Co.* (1902), 18 T.L.R. 562. Considered: *Great Central Rail. Co.* v. *Hewlett*, [1916–17] All E.R. Rep. 1027. Referred to: *R.* v. *Scott* (1842), 3 Q.B. 543; *Re Penny* (1857), 7 E. & B. 660; *Kearns* v. *Cordwainers Co.*, *Cordwainers Co.* v. *Kearns* (1859), 5 Jur. N.S. 1216; *Caledonian Rail. Co.* v. *Lockhart*, [1843–60] All E.R. Rep. 900; *Croft* v. *London and North Western Rail. Co.* (1863), 3 B. & S. 436; *Mersey Docks and Harbour Board Trustees* v. *Gibbs*, *Mersey Docks and Harbour Board Trustees* v. *Penhallow*, [1861–73] All E.R. Rep. 397; *A.-G.* v. *Leeds Corpn.* (1870), 5 Ch. App. 583; *A.-G.* v. *Gas Light and Coke Co.* (1877), 37 L.T. 746; *Smith* v. *Midland Rail. Co. and Lancashire and Yorkshire Rail. Co.* (1877), 37 L.T. 224; *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Docks Co.* (1878), 9 Ch.D. 503; *Metropolitan Asylum District Managers* v. *Hill*, [1881–5] All E.R. Rep. 536; *R.* v. *Sheward* (1882), 9 Q.B.D. 741; *Gas Light and*

Coke Co. v. *St. Mary Abbots, Kensington, Vestry* (1884), Cab. & El. 368; *Lowther* v. *Curwen* (1887), 58 L.T. 168; *City and South London Rail. Co.* v. *L.C.C.* (1891), 65 L.T. 362; *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409; *Holliday* v. *Wakefield Corpn.*, [1891] A.C. 81; *A.-G.* v. *Metropolitan Rail. Co.*, [1894] 1 Q.B. 384; *Shelfer* v. *City of London Electric Lighting Co., Meux's Brewery Co.* v. *City of London Electric Lighting Co.* (1894), 64 L.J.Ch. 216; *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; *Canadian Pacific Rail. Co.* v. *Roy*, [1902] A.C. 220; *West* v. *Bristol Tramways and Carriage Co.* (1908), 72 J.P. 145; *Manchester Corpn.* v. *Farnworth*, [1929] All E.R. Rep. 90; *Dormer* v. *Newcastle-on-Tyne Corpn.*, [1940] 1 All E.R. 219; ***Fox* v. *Newcastle-upon-Tyne City Council*, [1941] 2 All E.R. 563.**

As to liability of a railway in consequence of the exercise of statutory powers, see 31 HALSBURY'S LAWS (3rd Edn.) 472 et seq.; and for cases see 38 DIGEST (Repl.) 395 et seq. As to construction of Acts of Parliament, see 36 HALSBURY'S LAWS (3rd Edn.) 391 et seq.; and for cases see 44 DIGEST (Repl.) 203 et seq.

Cases referred to:

(1) *Eyston* v. *Studd* (1574), 2 Plowd. 459, 463; 75 E.R. 692; 44 Digest (Repl.) 223, *390.*

(2) *R.* v. *Russell* (1827), 6 B. & C. 566; 9 Dow. & Ry. K.B. 566; 4 Dow. & Ry. M.C. 403; 5 L.J.O.S. M.C. 80; 108 E.R. 560; 36 Digest (Repl.) 346, *865.*

Also referred to in argument:

Bonham's Case (1610), 8 Co. Rep. 114a, at p. 118b.

Emanuel v. *Constable* (1827), 3 Russ. 436; 5 L.J.O.S.Ch. 191; 38 E.R. 639; 44 Digest (Repl.) 238, *601.*

Brett v. *Brett* (1826), post p. 776; 3 Add. 210; 162 E.R. 456; affirmed (1827), 3 Russ. 437, n.; 44 Digest (Repl.) 234, *544.*

Hornby v. *Houlditch* (1736), 1 Term Rep. 93, n.

R. v. *Morris* (1830), 1 B. & Ad. 441; 9 L.J.O.S.K.B. 55; 109 E.R. 851; 26 Digest (Repl.) 475, *1624.*

Indictment against the defendants, members and servants of the Stockton and Darlington Railway Co., for a nuisance caused to members of the public using a highway which ran parallel to the defendants' railway by smoke and noise.

At the trial before PARKE, J., and a jury a special verdict was found which stated the following facts. The railway, which was adjacent and parallel to the highway for more than a mile between Stockton and Yarm, was separated from it only by a low hedge, except in some places where there were small plantations; and in many places the two roads were not more than five yards apart. The defendants (under the authority of the Stockton and Darlington Railway Co.) put on the railway, so being parallel, six locomotive engines worked by steam for the purpose of drawing coal-wagons thereon, which engines (under the direction of the defendants) travelled on the railway drawing coal-wagons by night and day and, when so travelling, emitted great quantities of smoke and steam and made a great noise, and by their appearance and noise alarmed the horses of many of the King's subjects when travelling along the highway, and thereby occasioned many accidents, and impeded and annoyed His Majesty's subjects in passing and re-passing along the highway with their horses and carriages. The locomotive engines were of the best construction known at the time when they were constructed, and the defendants used due care and diligence in the management of them, and from time to time adopted such improvements as had been discovered in the erection and management of locomotive engines worked by steam. The defendants used the engines for the purpose of facilitating the transport and carriage of coals and other goods on the railway and tramroad, and the public obtained coals cheaper and much better by the use of the locomotive engines, but many coal-wagons were drawn on the railroad by horses. By the statute 1 & 2 Geo. 4, c. xliv, certain persons were united into a company and

created a corporation under the name of The Stockton and Darlington Railway Co. for the purpose of making and maintaining a railway or tramroad from the river Tees at Stockton to Witton Park colliery, with several branches therefrom, all in the county of Durham. By another statute, 4 Geo. 4, c. xxxiii (which was stated in the title to be made for the purpose of enabling the company to vary the line of their railway and of some of its branches and to make an additional branch, and of altering and enlarging the powers of the former Act) it was enacted in s. 8:

> "That it shall and may be lawful for the said company, or any person or persons authorised or permitted by them, from and after the passing of this Act, to make and erect such and so many locomotive or movable engines as the said company shall from time to time think proper and expedient, and to use and employ the same in or upon the said railways or tramroads, or any of them, by the said recited Act and this Act directed or authorised to be made, for the purpose of facilitating the transport, conveyance, and carriage of goods, merchandise, and other articles and things upon and along the same roads; and also of passengers."*

The verdict found that some of the defendants were members, and the rest servants, of the company.

Cresswell for the Crown.

F. Pollock for the defendants.

Nov. 26, 1832. **PARKE, J.,** delivered the following judgment of the court, in which he stated the special verdict, and continued: The case turns on the meaning of s. 8 of the statute 4 Geo. 4, c. xxxiii, and the question is whether that section gives an authority to the company to use locomotive engines on the railway absolutely, or only with some implied condition or qualification that they should employ all practicable means to protect the public against any injury from them? Those means were, on the argument, suggested to be the altering the course of the railroad or the erection of fences or screens of sufficient height to exclude the view of the engines from the passengers on the common highway. The words of s. 8 clearly give to the company the unqualified authority to use the engines; and we are to construe provisions in Acts of Parliament according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be extended or modified; instances of which are to be found in *Eyston* v. *Studd* (1), and BACON'S ABRIDGMENT, Statute letter I, referred to during the course of the argument.

Let us, then, consider whether there is anything unreasonable or contrary to the express or implied intention of the legislature in construing these words in their ordinary sense, and without any such condition or qualification as before mentioned. It is clear that the makers of this, and the prior Act, had in view the construction of a railroad (with its branches) in a certain defined line which (1 & 2 Geo. 4, c. xliv, s. 6 and 4 Geo. 4, c. xxxiii, s. 3) had been delineated on a map, deposited with the clerk of the peace, and from which line the road was not to deviate more than 100 yards, and not into the grounds of persons not mentioned in the book of reference. The legislature, therefore, must be presumed to have known that the railroad would be adjacent for a mile to the public highway and, consequently, that travellers on the highway would be in all probability incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other

* Locomotive engines were not mentioned in the former Act.

parts of the public in the more speedy travelling and convenience of merchandise along the new railroad. Can anyone say that the public interests are unjustly dealt with when the injury to one line of communication is compensated by the increased benefit of another? So far is such a proceeding from being unreasonable, that it was held by the majority of the judges in *R.* v. *Russell* (2) that a nuisance was excusable on that principle at common law; and whether that be the law or not, at least it is clear that an express provision of the legislature having that effect cannot be unreasonable.

It is true that the same object, that of giving one part of the public the benefit of the use of these engines, might have been effected without the same injury to the other part using the road if the Act had imposed on the company the obligation of erecting a sufficient fence or screen at their own cost; or had provided that the line of road should be different at that place. But it is by no means necessary to imply such an obligation in order to make the section reasonable and consistent, for it has been shown to be so without it; and it is natural to suppose that, if such a condition had been intended, it would have been particularly expressed.

For these reasons, we think that the defendants were justified under s. 3 of 4 Geo. 4, c. xxxiii, and, therefore, that the judgment of the court should be in their favour.

Judgment for defendants.

M'CARTHY *v.* DECAIX

[Lord Chancellor's Court (Lord Brougham, L.C.), April 18, May 9, 1831]

[Reported 2 Russ. & M. 614; 9 L.J.O.S.Ch. 180; 2 Cl. & Fin. 568, n.; 39 E.R. 528]

Misrepresentation—Innocent misrepresentation—Release—Release of right to property induced by misrepresentation as to value.

Mistake—Mistake of fact and law—Release—Release of right to property induced partly by misrepresentation as to its value and partly through misapprehension of law.

Where a person agrees to give up his claim to property in favour of another, his renunciation will not be supported if, at the time of making it, he was ignorant of his legal rights and of the value of the property renounced, especially if the party with whom he dealt possessed and kept back from him better information on the subject.

Notes. In so far as this case deals with the validity of a foreign court to dissolve a marriage contracted in England, it cannot any longer be regarded as good law: see 7 Halsbury's Laws (3rd Edn.) 112–117.

Referred to: *Watkin and Bligh* v. *Brent* (1836), 1 Curt. 264; *Daniell* v. *Sinclair* (1881), 6 App. Cas. 181.

As to release or waiver of rights, see 14 Halsbury's Laws (3rd Edn.) 636-638; as to rescission on the ground of mistake, see 26 Halsbury's Laws (3rd Edn.) 910-912; as to alteration of position induced by misrepresentation, see ibid. 855, 856; and for cases see 35 Digest (Repl.) 133–135.

Cases referred to:

(1) *R.* v. *Lolley* (1812), Russ. & Ry. 237; sub nom. *Sugden* v. *Lolley*, 2 Cl. & Fin. 567, n., C.C.R.; 11 Digest (Repl.) 486, *1108*.

(2) *Tovey* v. *Lindsay* (1813), 1 Dow, 117, 131; 3 E.R. 643, H.L.; 11 Digest (Repl.) 467, *1005*.

(3) *Cocking* v. *Pratt* (1750), 1 Ves. Sen. 400; 27 E.R. 1105; 35 Digest (Repl.) 93. *1*.

(4) *Willan* v. *Willan* (1810), 16 Ves. 72; 33 E.R. 911, L.C.; 44 Digest (Repl.) 49, *355*.

Appeal by the plaintiff against a decree of SIR JOHN LEACH, V.-C., directing the Master to make certain inquiries, as hereinafter set out.

This suit was instituted by the personal representative of Robert Tuite, deceased, against the personal representative of his wife, also deceased, for the purpose of recovering the arrears of an annuity, to which, upon the death of the wife, and in default of her appointment, Mr. Tuite, as administrator of his wife, had become entitled, by virtue of a settlement executed on their marriage. Mrs. Tuite died in February, 1807: her husband took out administration to her estate and effects; and in December, 1811, he died. The defence set up was that Mr. Tuite, soon after the death of his wife, had agreed to give up, and had actually renounced, all claims that might accrue to him under the settlement, or in his marital character, for the benefit of the family of his wife, from whom the settled property had been derived.

At the hearing of the cause, two questions were principally argued: first, whether the dealings and correspondence between Mr. Tuite and his wife's relations, in the years 1807 and 1808, were of such a nature as to amount to an absolute renunciation of all his interest in their favour; and, secondly, if they were, whether that renunciation was made at a time when Mr. Tuite was fully apprised of the extent of his legal rights, as the surviving husband and the administrator of his wife, and of the amount and value of her property. At the hearing of the cause on Dec. 12, 1821, before SIR JOHN LEACH, V.-C., his Honour referred it to the Master to inquire and state to the court, whether Robert Tuite died in the intention of renouncing all interest in his wife's property in favour of her family, and whether before his death he was apprised of the circumstances which belonged to that property, and of the amount of the claim made in respect of the annuity.

The plaintiff appealed against that decree. The petition of appeal was originally argued before LORD ELDON; but his Lordship having resigned the Great Seal before disposing of the case, it now came on to be re-heard.

Sir E. Sugden and *R. P. Roupell* for the plaintiff.

Treslove and *Stuart* for the defendant.

LORD BROUGHAM, L.C.—This was a case of considerable difficulty, long pending in this court, and much considered by LORD ELDON, who went out of office before he finally decided it on the appeal. The observations and notes of that learned judge upon the case, with which notes I have been furnished, show the great attention he gave to it, and the difficulty under which he laboured with respect to the facts; and in consequence of those difficulties, it has received the greatest attention from me, and I have delayed pronouncing an opinion until I could look fully into the matter.

The case was this. A person of the name of Tuite contracted a marriage in this country with an English woman; the marriage being solemnised in England, but he being himself a Dane by birth, fortune, and domicil. He afterwards removed his wife from this country, the locus contractus (with which he appears to have had no further connection), to the dominions of the King of Denmark, where his subsequent domicil continued to be; and in that kingdom the marriage was dissolved by a valid Danish divorce, as far as such a divorce could dissolve it; but which, I may observe in passing, by the law of this land could have no operation, as was fully established by the opinion of the twelve judges, who solemnly decided, after argument, that no proceedings in a foreign court could operate to dissolve or affect a marriage celebrated in England. During the lifetime of Mrs. Tuite, and subsequently to the divorce, certain arrears of an annuity which she enjoyed under the marriage settlement, accrued, or were said to have accrued, amounting at her death to the sum of £7,000. Prior to that event, a litigation in this court had

been commenced, to which the claim to these arrears was incident. After the decease of both husband and wife, the result of the suit was, to put the party representing her in possession of those arrears, and two sums were actually recovered and paid to them, amounting in the whole to £3,631; and the whole of the question in this cause arises, with respect to those sums, it being a conflict between the respective personal representatives of Mr. and Mrs. Tuite, upon the effect of a correspondence between Mr. Tuite and Mrs. Delattre, the sister of Mrs. Tuite, and her legal adviser Mr. Pinegar.

Upon that correspondence the whole question in dispute appears to turn. On the death of Mrs. Tuite, letters are written by Mrs. Delattre representing her to have died in very poor circumstances; so much so that her debts were said to amount to more than all the little property she left could satisfy, even including her wearing apparel. Mr. Tuite, in reply, writes two letters to Mrs. Delattre, and in answer to her application to that effect, he at first refuses to execute a power of attorney to receive any funds that may become due, denying his right, because he insists it was a good divorce (nor indeed had it been decided until *R.* v. *Lolley* (1) in 1812-13, that a foreign divorce was of no effect as regards an English marriage); and he afterwards says: "If such a power is required, I would not have anything; her family is most heartily welcome;" and his language in another letter is: "I claim nothing, I would accept of nothing; nevertheless, in case it may by the form of your law be requisite, I give Messrs. S. and L. a power to act for me." How entirely he relied upon the marriage as being in other respects at an end, is manifest from the fact, that besides giving up the claim to the property of the deceased lady, he calls her by the name of Mrs. Trefusis which was the name she bore before she became his wife.

It must, therefore, at least be admitted, that in giving this, which is called his renunciation, the husband laboured under two capital errors, one of law, the other of fact; the one not superinduced by any suppression of circumstances on the part of Mrs. Delattre and her agent; whereas the other may be said to have arisen from their not disclosing facts, which there is every reason to believe they must have known; the latter an error which if they did not create, they had at least, to a certain degree, a share in maintaining.

When I state that the first of these was a great error in point of law, it is of the highest moment that no doubt should exist on a matter of such paramount importance. I find from the note of what fell from LORD ELDON on the present appeal, that his Lordship laboured under considerable misapprehension as to the facts in *R.* v. *Lolley* (1); he is represented as saying he will not admit that it is the settled law, and that, therefore, he will not decide whether the marriage was or not prematurely determined by the Danish divorce. His words are: "I will not without other assistance take upon myself to do so."

If it has not validly and by the highest authorities in Westminster Hall been held that a foreign divorce cannot dissolve an English marriage, then nothing whatever has been established. For what was *R.* v. *Lolley* (1)? It was a case the strongest possible in favour of the doctrine contended for. It was not a question of civil right, but of felony. Lolley had bona fide, and in a confident belief, founded on the authority of the Scottish lawyers, that the Scottish divorce had effectually dissolved his prior English marriage, married in England, his first wife living. He was tried at Lancaster for bigamy, and found guilty; but the point was reserved, and was afterwards argued before all the most learned judges of the day, who after hearing the case fully and thoroughly discussed, first at Westminster Hall, and then at Serjeant's Inn, gave a clear and unanimous opinion that no divorce or proceeding in the nature of divorce in any foreign country, Scotland included, could dissolve a marriage contracted in England; and they sentenced Lolley to seven years' transportation. He was accordingly sent to the hulks for one or two years; though in mercy, the residue of his sentence was ultimately remitted. I take leave to say, he ought not to have gone to the hulks at all,

A because he had acted bona fide, though this did not prevent his conviction from being legal. But he was sent notwithstanding, as if to show clearly that the judges were confident of the law they had laid down; so that, never was there a greater mistake than to suppose that the remission argued the least doubt on the part of the judges. Even if the punishment had been entirely remitted, the remission would have been on the ground that there had been no criminal intent, though that B had been done which the law declares to be felony.

I hold it to be perfectly clear, therefore, that *R.* v. *Lolley* (1) stands as the settled law of Westminster Hall at this day. It has been uniformly recognised since; and in particular it was repeatedly made the subject of discussion, before LORD ELDON himself, in the two appeals of *Tovey* v. *Lindsay* (2) in the House of Lords, when I furnished his Lordship with a note of *R.* v. *Lolley* (1), which he followed in dis- C posing of both those appeals, so far as it affected them. That case then settled two points: first, that no foreign proceeding in the nature of a divorce in an ecclesiastical court could effectually dissolve an English marriage, and, secondly, that a Scottish divorce is not such a proceeding in an ecclesiastical court, as to bring the case within the exception in the Bigamy Act (1 Jac. 1, c. 11, s. 2), for which nothing less than the sentence of an English ecclesiastical court is sufficient. D

This, then, is a very important error which may have influenced Mr. Tuite in making this renunciation. Can I hold a party to be bound by an act or declaration made in ignorance of so material a fact? Was it not a most material ingredient in forming his judgment and influencing his inclination? He might very well say: "I am no longer her husband; I give up all claim to her property," when E he supposed the connection of husband no longer to subsist. Yet if he had been told that he was still her husband; that no power could dissolve the marriage; that he was liable, in his person and property, for her debts; that the tribunals of his own country would acknowledge this to be the law; that as he undertook the relation cum onere, so also he was beneficially entitled to whatever was the property of his wife, be it small or great; it is impossible to say that this F knowledge might not have altered his intention; for if a man does an act under ignorance, the removal of which might have made him come to a different determination, there is an end of the matter. What he has done was done in ignorance of law, possibly of fact; but in a case of this kind that would be one and the same thing.

These considerations do not appear to have been sufficiently adverted to in G the court below. I cannot help thinking, besides, that taking the case at the lowest, Mr. Tuite and Mrs. Delattre were, at the time of the supposed renunciation, in a state of ignorance as to some other most material facts; and it is impossible to say that a person shall be held to what he has done under circumstances which have been so erroneously represented to him, however innocently the representation may have been made. Who can venture to predict what H might have been Mr. Tuite's course had he known how the facts really stood? If a man, separated and living at a distance from his wife, receives a letter telling him that she is on her death-bed, and that she leaves no assets—not enough to pay the costs of her funeral; and he writes in reply: "I shall not interfere: she is no wife of mine:" it is impossible to say that he shall be bound by that disclaimer, made under the influence of a common error. Doubtless, if with a I full knowledge that the wife's property might be large or might be small, he distinctly gave up all title to it, whatever might turn out to be its value, his disclaimer would be good. But if he entertained a bona fide belief that she died insolvent, it would be going far to say that his renunciation should bind him, or that the other party should have a right to hold him to it. In *Cocking* v. *Pratt* (3), where SIR JOHN STRANGE had to deal with the case of a mother contracting with her daughter as to her share of the father's personal estate, he held the transaction to be void, on the ground that the mother plainly had better information than the daughter. But even if it be assumed that Mrs. Delattre

knew no more of the real facts than Mr. Tuite, *Willan* v. *Willan* (4) is an authority to show that where both parties were in a state of equal ignorance as to the facts respecting which they were dealing, the transaction will not be supported.

It is unnecessary for me, however, to decide as to the law on this point, because when the evidence is narrowly scrutinised, the circumstances of the transaction relieve the case from all difficulty, showing that there is every reason to believe that the wife's relations, living in England, must have known, and did, in point of fact, know a great deal more than Mr. Tuite, the foreigner, living in Santa Cruz; and bringing the case, therefore, directly within the principle laid down by SIR JOHN STRANGE in *Cocking* v. *Pratt* (3).

[THE LORD CHANCELLOR then entered into a detailed examination of the language and effect of the correspondence between the parties, and expressed his opinion that the conduct and letters of Mrs. Delattre and her agent clearly indicated that they were better informed as to the state of Mr. Tuite's property than her husband, and were well aware it was not of that insolvent description which had been represented. HIS LORDSHIP then continued:] On the whole, it is sufficiently established that when Mr. Tuite agreed to give up any claim to his wife's fortune, he was acting under a misapprehension in two most material particulars: in the first place, he believed that Mrs. Tuite, at the time of her death, had by law ceased to be his wife, an impression which seems to have been the mainspring of his liberality; and, secondly, he was wholly ignorant, or rather he was positively misinformed, with respect to the amount and value of her property, and his ignorance certainly was not shared, at least in an equal degree, by the parties with whom he was dealing. Upon these two grounds I am clearly of opinion that the agreement cannot be supported as a valid renunciation by Mr. Tuite, and that the judgment of the court below must be reversed.

Appeal allowed.

COLLING *v.* TREWEEK

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Hilary Term, 1827]

[Reported 6 B. & C. 394; 9 Dow. & Ry. K.B. 456; 5 L.J.O.S.K.B. 132; 108 E.R. 497]

Evidence—Document—Secondary evidence as to effect—Notice to produce——Circumstances in which notice unnecessary—Attorney's bill of costs delivered to client.

There are three descriptions of cases where notice to produce an instrument is unnecessary: first, where the instrument to be produced and that to be proved are duplicate originals; secondly, where the instrument to be proved is a notice, as a notice to quit or a notice of the dishonour of a bill of exchange; and, thirdly, where from the nature of the suit the opposite party must have known that he is charged with possession of the instrument.

Accordingly, in an action by an attorney to recover the amount of his bill where the bill had previously been delivered to the defendant, **held**, that notice to produce the bill was unnecessary, since it was substantially in the nature of a notice, and, besides, the case might fairly be considered as being one where from the nature of the suit the opposite party must have known that he was charged with possession of the instrument.

Notes. Considered: *R.* v. *Whitley* (1908), 72 J.P. 272.

As to when notice to produce is unnecessary, see 15 HALSBURY'S LAWS (3rd Edn.) 362; and for cases see 22 DIGEST (Repl.) 241, 242.

Cases referred to:

(1) *Kine* v. *Beaumont* (1822), 3 Brod. & Bing. 288; 7 Moore, C.P. 112; 129 E.R. 1295; 22 Digest (Repl.) 241, *2367*.

A (2) *Anderson* v. *May* (1800), 2 Bos. & P. 237; 126 E.R. 1256; previous proceedings, 3 Esp. 167, N.P.; 22 Digest (Repl.) 241, *2372*.

(3) *Philipson* v. *Chase* (1809), 2 Camp. 110, N.P.; 22 Digest (Repl.) 241, *2373*.

Also referred to in argument:

Ex parte Weston (1815), 1 Madd. 75.

B **Rule Nisi** obtained by the plaintiff, who had been nonsuited at the trial, to move to enter a verdict in his favour, in an undefended action brought to recover the amount of an attorney's bill.

At the trial before LITTLEDALE, J., at the Devon Summer Assizes, 1826, it appeared that the plaintiff had not given the defendant notice to produce the bill delivered to him, but a witness proved that the bill so delivered was signed by the C plaintiff; and then produced a paper, which he swore to be a copy of the bill delivered; and the plaintiff himself offered, at the trial, to sign the copy then produced. The paper, however, was not signed by the plaintiff himself, but there was a copy of the plaintiff's signature made by the witness. The evidence was rejected on the ground that the copy was not admissible in evidence, notice not having been given to the defendant to produce the original; and that, at all events, D it was no evidence of a bill signed by the plaintiff having been delivered. The plaintiff gave evidence that the charges were reasonable, and that the business charged for had been done at the request and on account of the defendant. The learned judge nonsuited the plaintiff, but reserved liberty to the plaintiff to move to enter a verdict for the amount proved. A rule nisi was obtained for that purpose on two grounds: first, that the bill delivered to the defendant was a notice to him E of the amount of the plaintiff's demand, and of his intention to enforce payment by action, unless the defendant had the bill taxed; and, secondly, assuming it not to be a notice, it was competent to the plaintiff at the trial to sign the copy produced in evidence, and thereby to make it a duplicate original.

Carter and *Tucker* for the defendant, showed cause against the rule.

F *Wright* for the plaintiff, supported the rule.

Cur. adv. vult.

BAYLEY, J., delivered the following judgment of the court.—This was an action brought to recover the amount of an attorney's bill. There was a nonsuit on the ground that a copy of the bill could not be received in evidence because the plaintiff G had not given the defendant notice to produce the original bill delivered to him. A rule was obtained for entering a verdict for the plaintiff on two grounds: first, that it was not necessary to give any notice to produce the bill delivered to the plaintiff, because that bill itself was a notice, and that it was not necessary in any case to give notice to produce a notice; secondly, that the witness who proved the delivery of the bill to the defendant, having proved also that he made this copy of the bill H and of the plaintiff's signature to it, which copy, if it had been signed by the plaintiff, would have been a duplicate original, and the plaintiff at the trial having offered to sign the copy, it was insisted that he ought to have been permitted to do so, and that if he had it would then have been admissible evidence.

Our opinion is not founded upon the latter ground, but we think that notice to produce the bill delivered to the defendant was not necessary in this case, because I the bill delivered to him was in the nature of a notice. There are three descriptions of cases where notice to produce an instrument is unnecessary: first, where the instrument produced and that to be proved are duplicate originals; secondly, where the instrument to be proved is a notice; as a notice to quit, or a notice of the dishonour of a bill of exchange. In *Kine* v. *Beaumont* (1), the Court of Common Pleas, after consulting the judges of the other courts, held that the copy of an original letter giving notice of the dishonour of a bill was admissible without notice to produce the original letter, and DALLAS, C.J., there said, that he could not see any great difference between a duplicate original and a copy made at the time. The

third case is where, from the nature of the suit, the opposite party must know that he is charged with possession of the instrument. Thus, in an action of trover for a bond or note, parol evidence of the instrument may be given although no previous notice be proved. Our opinion in this case is founded upon this, that the bill delivered one month before action brought is substantially in the nature of a notice to the defendant of the amount of the plaintiff's demand, and that he will enforce that demand by action unless the defendant proceeds to tax his bill under the statute. The statute 2 Geo. 2, c. 23 [see now ss. 68 and 69 of Solicitors Act, 1957: 37 HALSBURY'S STATUTES (2nd Edn.) 1109 et seq.], says, that no attorney shall commence any action for the recovery of fees, etc., until the expiration of one month or more after such attorney shall have delivered to the parties, to be charged therewith, a bill of such fees, etc., which bill shall be subscribed with the proper hand of such attorney; and it then enacts,

> "that the bill may be taxed upon application of the party chargeable by such bill, and upon his submission to pay the whole sum that upon taxation shall appear to be due."

As no action, therefore, can be brought by an attorney to recover the amount of his bill until the expiration of one month after he shall have delivered to the party to be charged, a bill of his fees, etc.; the delivery of such a bill must, in effect, be a notice to the party sought to be charged, that unless he pays the amount or proceeds to tax the bill pursuant to the provisions of the statute, the attorney will bring an action to recover the amount, and when such a bill has been delivered and an action is afterwards brought by the attorney, it is brought in pursuance of the notice. Besides, this case may, perhaps, fairly be considered as falling within that class of cases where notice to produce has been held to be unnecessary, viz., on the ground, that from the nature of the suit the opposite party must know that he is charged with possession of the instrument. For here, from the very nature of the suit, the defendant must have known that the plaintiff sought to recover the amount of that bill which had been delivered to him, and which, in the ordinary course of things, must be in his possession.

We do not proceed altogether without authority on this point. In *Anderson* v. *May* (1) a copy of an attorney's bill, the original of which had been delivered to the defendant, was held to be admissible in evidence without proof of notice to produce the original. From the report of that case in 3 Esp. 167, it may be collected that the bill delivered was not made at the same time with the copy, for SERJEANT SHEPHERD states that the one produced was not a copy of the other, but a duplicate original, the two having been copied from the books of the plaintiff. In *Philipson* v. *Chase* (3) LORD ELLENBOROUGH seems to have thought that the decision in *Anderson* v. *May* (2) proceeded on the ground that they were contemporary writings. But having ascertained, as we think, satisfactorily, that the instrument given in evidence in that case was not made contemporaneously with that which was delivered to the defendant, we think the decision in that case in point, and sustainable on the ground that the bill delivered was a notice. That being so, we are of opinion that the copy of the bill delivered was admissible in evidence, without giving any notice to produce the bill delivered, and consequently the rule for entering a verdict for the plaintiff must be made absolute.

Rule absolute.

WARBURTON *v.* LOVELAND d. IVIE AND OTHERS

[House of Lords (Lord Tenterden), March 14, 1831, February 23, 1832]

[Reported 6 Bli. N.S. 1; 2 Dow. & Cl. 480; 5 E.R. 499]

Statute—Construction—Ambiguous words—Consideration of object of statute—Meaning best leading to suppression of mischief and advancement of remedy—Preamble—Reference to preamble to ascertain object of provisions of Act—Interpretation of provision by reference to other provisions of Act—Interpretation to avoid inconvenience—Fraud—Provision for suppression—Large and liberal interpretation.

Where the language of a statute is clear and explicit the court must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. If in any case a doubt arises on the words themselves, the court must endeavour to solve that doubt by discovering the object which the legislature intended to accomplish by passing the Act, and giving the statute the meaning which best leads to the suppression of the mischief and the advancement of the remedy which the legislature had in view. To ascertain, in such a case, the object of the legislature in passing the Act it is advisable to look generally at the preamble of the statute and the provisions of the Act other than that which it is sought to construe.

Where giving the words their ordinary and natural meaning would lead to an inconvenience it must be submitted to through necessity, but if the words are capable of such an interpretation as would prevent the inconvenience they should be given such an effect.

Any provision in a statute for the suppression of fraud must be given a large and liberal interpretation.

Notes. Applied: *Smeeton* v. *Collier* (1847), 1 Exch. 457. Approved: *Edwards* v. *Hodges* (1885), 15 C.B. 477; *Grey* v. *Pearson*, [1843-60] All E.R. 21. Applied: *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354; *Re Prince Blücher, Ex parte Debtor*, [1930] All E.R. Rep. 562. Referred to: *Tolderuy* v. *Colt* (1836), 1 M. & W. 250; *Ricketts* v. *Carpenter*, [1843-60] All E.R. Rep. 482; *R.* v. *Bird* (1851), 5 Cox, C.C. 20; *Gundry* v. *Pinniger*, [1843-60] All E.R. Rep. 403; *Miller* v. *Salomons* (1852), 7 Exch. 475; *A.-G.* v. *Hallett* (1857), 2 H. & N. 368; *Thellusson* v. *Rendlesham* (1859), 7 H.L. Cas. 429; *Christopherson* v. *Lotinga* (1864), 15 C.B.N.S. 809; *Reed* v. *Braithwaite* (1871), L.R. 11 Eq. 514; *Rhodes* v. *Rhodes* (1882), 7 App. Cas. 192; *R.* v. *Yates* (1883), 48 J.P. 102; *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448; *Bodega Co.* v. *Martin*, [1915] 2 Ch. 385.

As to the construction of statutes, see 36 Halsbury's Laws (3rd Edn.) 387-419; and for cases see 44 Digest Repl. 203 et seq.

Cases referred to:

(1) *Heydon's Case* (1584), 3 Co. Rep. 7a; 76 E.R. 637; 44 Digest (Repl.) 203, *149*.

(2) *Burrel's Case* (1607), 6 Co. Rep. 72a; 77 E.R. 364; 25 Digest (Repl.) 246, *548*.

Appeal from an order of the Court of Exchequer Chamber in Ireland, reported 1 Hud. & B. 623.

On the marriage of Elizabeth Batt, the appellant, with Bartholomew Boyd Warburton, by indenture of settlement dated July 24, 1779, and made between Benjamin Batt and Elizabeth Batt, his eldest daughter, of the first part, Bartholomew Boyd Elliott, and the Reverend Robert Alexander, of the second part, and Bartholomew Boyd Warburton of the third part, Benjamin Batt and Elizabeth Batt, in consideration of the intended marriage, assigned the lands of Shanbough in Ireland, which Benjamin Batt held under a long lease and became vested in Elizabeth Batt on his death, to Bartholomew Boyd Elliott and Robert Alexander for the residue of the demised term therein, in trust, to permit Benjamin Batt to receive the rents and profits of the lands during the term of his life, and after his decease to permit

Bartholomew Boyd Warburton to receive the rents and profits of the lands during his life, and in case Elizabeth, his intended wife, should survive Bartholomew Boyd Warburton, then, after his decease, to permit the said Elizabeth to receive the rents and profits thereof during the term of her life, and after the decease of Bartholomew Boyd Warburton and Elizabeth his wife in trust to permit the first son of the marriage to receive the rents and profits until he should arrive at the age of twenty-one years, and then to convey the lands to such first son absolutely. If there should be no issue of the marriage, then the lands and the interest therein were to become the sole property of the survivor of Bartholomew Boyd Warburton and Elizabeth. This deed of settlement was not registered under the Registration of Deeds (Ireland) Act, 1706–7.

After the execution of the settlement the marriage took place, and Benjamin Batt, during his life, received the rents and profits of the lands of Shanbough under the deed of settlement. After the death of Benjamin Batt, Bartholomew Boyd Warburton entered into possession of the lands and received the rents and profits. Bartholomew Boyd Warburton, by indenture dated May 26, 1800, demised to George Kough and Thomas Kough the lands of Shanbough for the term of 345 years at the yearly rent of £345 19s., being at the rate of 16s. per acre. The indenture of lease was, on June 10, 1800, duly registered under the Act of 6 Anne in the proper registry-office in Ireland. George Kough and Thomas Kough entered into possession of the lands, and, by indenture of assignment, bearing date April 9, 1813, in consideration of the sum of £3,000, conveyed their interest under the lease to George Ivie and Henry Ivie, two of the lessors of the respondent, who thereupon entered the lands. There was no proof that this deed of assignment was not registered. George and Henry Ivie continued in the possession of the lands under the deed of assignment till the time of the death of Bartholomew Boyd Warburton which happened in 1823.

Upon the death of Bartholomew Boyd Warburton, Elizabeth, his widow, claiming to be entitled to the lands under the deed of settlement of July 24, 1779, brought an ejectment in the Court of King's Bench in Ireland, for recovery of the possession of the lands, and laid demises therein in her own name and in the names of the trustees of the settlement of 1779, and in the names of the several other persons in whom the legal estate in the premises might be considered to be outstanding. The cause was tried in 1823 when a verdict was given for her. In Michaelmas Term, 1823, the respondents having obtained a conditional order to set aside the verdict, the matter was argued before the Court of King's Bench in Ireland, and that court, on Nov. 26, 1824, allowed the cause shown against the conditional order, and judgment was thereupon entered for the appellant, who took possession of the lands under a writ of habere facias possessionem.

The respondents being dissatisfied with the judgment of the Court of King's Bench brought ejectment in the Court of Exchequer in Ireland to recover the possession of the lands, which ejectment was tried in 1825 when it was agreed that a special verdict should be entered, which was accordingly done. The special verdict set forth the facts as stated, and the matter having been argued upon the special verdict before the Court of Exchequer in Ireland, that court gave judgment for the respondents, who thereupon entered again into possession of the lands under a writ of habere facias possessionem. The appellant being dissatisfied with this decision appealed to the Court of Exchequer Chamber in Ireland which affirmed the judgment of the Court of Exchequer. The appellant appealed to the House of Lords.

Sir Edward Sugden and *J. P. Abbot* for the appellant.
Knight and *Swann* for the respondents.

At the conclusion of the argument Lord Texterden put the following statement and questions to the judges:

An unmarried woman being possessed of land in Ireland for a long term of years

and about to marry, assigned the term by a deed, executed also by the intended husband, to trustees upon trust, to permit the husband after marriage to receive the rents for life, then to the wife for life, then to the first son of the marriage, if any, with remainder over. The marriage took effect; the husband entered into possession, and received the rents and profits, and then made a lease for years for part of the term, rendering rent; the lessees entered and received the rents and profits, and then assigned the lease for a valuable consideration. The marriage settlement was not registered. The lease by the husband was registered. The assignment of the lease is supposed not to have been registered. The wife, surviving her husband, obtained possession of the land. The assignees of the lease brought an ejectment against her to recover the possession.

Upon this statement two questions were put, regard being had to the true construction of the Registration of Deeds (Ireland) Act, 1706–7: (i) Which title is to be preferred, that of the assignees of the lease, or of the widow or the trustees under the settlement? (ii) Supposing the assignment of the lease to have been registered, will the construction be the same?

The judges having requested time to deliberate upon the case, the following statement was, on Feb. 23, 1832, delivered as their unanimous opinion by

TINDAL, C.J.—Upon the first of these questions the judges who have heard the argument at your Lordships' Bar are of opinion that, regard being had to the true construction of the Irish Registration Act, the title of the assignees of the lease is to be preferred to that of the widow and also to that of the trustees under the settlement. Upon the second question, they are of opinion that supposing the assignment of the lease to have been registered, the construction of the statute remains the same.

Upon the facts of this case, Mr. Warburton, who granted the lease of 1800, was at the time of granting it in possession of the premises, and, as the marriage settlement of 1779 was never put upon the register, he must have appeared to the public, and among the rest to the lessees, taking under the lease of 1800, to be in possession of the premises either in his own right or in right of his wife, in either of which cases he would have had the undoubted right to grant a valid term by the lease of 1800, unless the unregistered settlement of 1779 stands in the way. It is not disputed on the part of the appellant that, if Mr. Warburton had been the party who conveyed the term by the unregistered settlement of 1779 and had afterwards made the lease which was registered, such lessees being purchasers for a valuable consideration, might have availed themselves of s. 5 of the Registration Act, and that the prior settlement would have been held fraudulent and void as against the lease. Such a case is admitted to fall within the letter as well as the spirit of the Act, but it is contended by the appellant that the operation of the Irish Registration Act extends no further, but is confined to cases in which both the earlier and the subsequent conveyances are the deeds of the same grantor, and whether such is the case, or on the contrary the Act extends to give a preference to the subsequent deed, when registered, against the prior unregistered deed, notwithstanding the same was executed by a former owner of the estate, is, in substance, the question now proposed for our consideration. No case can be found either upon the English Registration Acts, or upon the Irish Act now under consideration in which this precise question has been decided by a court of law. It must, therefore, be determined upon principle, not upon authority, and the only principle of decision that is applicable to it is the just construction of the statute itself, to be made out by a careful examination of the terms in which it is framed, and by a reference, in all cases where a doubt arises, to the object which the legislature had in view when the statute was passed. Where the language of the Act is clear and explicit, we must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. If in any case a doubt arises upon the words themselves, we must endeavour to solve that doubt by discovering the

object which the legislature intended to accomplish by passing the Act.

Although it would be impossible to consider a question to be free from difficulty where opinions have been formed upon it in direct contradiction to each other, and each opinion has been supported with such acuteness and ability by the very learned judges of the courts below, before which it has been agitated, yet we have, upon consideration, come to the conclusion, that both the closer interpretation of the words of the statute and the construction which, at the same time, most suppresses the mischief the legislature had in view, and most advances the remedy which is held forth, warrant us in the opinion that the registered lease of 1800 is to be preferred to the unregistered marriage settlement of 1779, and that the latter, in so far as its provisions are inconsistent with the validity of the lease, is to be held altogether void.

The question appears to turn almost entirely on the construction of s. 5 of the statute, which declares in what cases, and under what circumstances, an unregistered deed shall be void. For as to s. 4, to which considerable importance has been attached in the course of the argument, it appears to us to be confined to the case of priority of registered deeds as between themselves, and to have very little, if any, bearing upon the question immediately under discussion. Before, however, we come to the more particular consideration of s. 5 it will be advisable to look generally at the preamble of the statute and the other clauses which precede s. 5, in order that we may ascertain from the Act itself the object and general intention of the legislature in passing it, for such intention is to be the guide of our course in case any difficulty should arise in the construction of a particular clause.

This statute, which was passed by the Irish Parliament, in the sixth year of Queen Anne, is intitled

> "An act for the public registering of all deeds, conveyances, and wills, that shall be made of any lands, tenements, or hereditaments."

It begins by stating its object to be

> "for securing purchasers, preventing forgeries and fraudulent gifts and conveyances of lands, tenements, and hereditaments, which have been frequently practised in this kingdom, especially by Papists, to the great prejudice of the Protestant interests thereof; and for settling and establishing a certain method, with proper rules and directions, for registering a memorial of all deeds and conveyances, which from and after Mar. 25, 1708, shall be made and executed for or concerning any honours, etc., in this kingdom, and of all wills and devises in writing . . ."

It then proceeds, in s. 1, to enact that a public office for registering memorials of deeds and conveyances, wills and devises, shall be established and kept in the city of Dublin.

Section 1, therefore, of the Act is framed in the most general and comprehensive terms, comprising "all deeds and conveyances for or concerning any lands," without restriction or qualification as to the parties by whom such deeds or conveyances were executed or otherwise, showing the intention of the legislature to have been to provide, in the place and stead of the ancient and more public and notorious mode of transferring landed property, the means of discovering all transfers with equal or greater certainty by referring to a public register, upon the face of which it was intended, they should all be found.

Section 3 directs that a memorial of all deeds and conveyances, which from and after Mar. 25, 1708, shall be made, for or concerning, or whereby any honours, etc., within this kingdom may be anywise affected, may, at the election of the party or parties concerned, be registered in such manner as is hereinafter directed. There is nothing, therefore, in the language of s. 3 which restrains the generality of s. 1. It is still a memorial of all deeds and conveyances which the legislature contemplates, although it is left open to the discretion of the parties to whom the conveyances are made whether they will avail themselves of the protection of the

Act, or incur the consequences to which they become liable, by neglecting its provisions.

What those consequences are ss. 4 and 5 proceed to declare. By s. 4 it is enacted:

> "That every such deed or conveyance, a memorial whereof shall be duly registered, shall be deemed and taken as good and effectual both in law and equity, according to the priority of time of registering such memorial, according to the right, title, and interest of the person or persons so conveying such honours . . . against all and every other deed, conveyance, or disposition of the honours . . . comprised or contained in any such memorial as aforesaid."

This clause is framed for the purpose of regulating the priorities of registered deeds and conveyances as between themselves, and is expressed in the same general terms as the preceding. It begins by enacting: "That every such deed or conveyance," that is, every deed or conveyance executed after Mar. 25, 1708, affecting lands, etc., in Ireland—an expression unlimited and unqualified by any reference to the persons executing such deeds, neither requiring nor appearing to require that the party who executes must claim under a registered conveyance, or importing any other restriction. The statute then enacts:

> "that it shall be good and sufficient according to the priority of time of registering such memorial, against all and every deed, conveyance, or disposition of the honours . . ."

Words equally unlimited and unqualified by any consideration, whether the person executing such prior deed was or was not the same person who executed the second, whether the person executing the scond deed claims under a registered conveyance, whether he is seised or possessed proprio jure, or is in under a title which is come to him by act or operation of law.

We do not see how we can give full force to the expression used by the legislature in this section, unless we adopt a construction as large as the language itself. If it had been the intention of the legislature that the priority between deeds should take place according to the time of their registration, only where both the first and the second deed were executed by the same person, it surely would have been easy to have expressed this by words to that effect, but there is no expression in s. 4, which imports such a restriction, and we think we should be legislating, not interpreting, if we were to imply such words of our own authority.

Section 5, the section upon which the present questions turn, states the effect of registration as between unregistered and registered deeds, in the following terms:

> "Every deed or conveyance not registered, of all or any of the honours . . . comprised or contained in such a deed or conveyance, a memorial whereof shall be registered in pursuance of this Act, shall be deemed and adjudged as fraudulent and void, not only against such a deed or conveyance registered as aforesaid, but likewise against all and every creditor and creditors, by judgment, recognizance, statute merchant, or of the staple, confessed, acknowledged, or entered into, as for or concerning all or any of the honours . . . contained or expressed in such memorial, registered as aforesaid."

In this clause also, as in the former, the expression is general, "every deed," and is altogether unqualified by any reference to the description of the party by whom the unregistered deed is executed, whether he be the same who executed the registered deed or another and a different person. The same observation, therefore, occurs upon s. 5 as that which has already been made upon s. 4, viz., if the legislature intended the unregistered deed to be void against a registered deed in such case only where both were executed by the same party, so important a qualification would scarcely have been omitted in the Act itself, or left to be supplied by interpretation in a court of law.

From this general view, therefore, both of the preamble and the five first clauses

of the statute, we think it cannot be doubted but that the statute meant to afford an effectual remedy against the mischief arising to purchasers for a valuable consideration from the subsequent discovery of secret or concealed conveyances, or secret or concealed charges upon the estate. It is obvious that no more effectual remedy can be devised than by requiring that every deed by which any interest in lands or tenements is transferred or any charge created thereon shall be put upon the register, under the peril that, if it is not found thereon, the subsequent purchaser for a valuable consideration and without notice shall gain the priority over the former conveyance by the earlier registration of the subsequent deed.

If the words of s. 5 will bear this construction, it is to be preferred to that which limits the operation of the clause to those cases only where both the conveyances are the deeds of the same man. For in the latter case, the remedy is obviously incomplete. The mischief to the purchaser is the same whether the secret conveyance or charge arises from the deed of his immediate grantor or that of a former owner of the estate. If the words of the statute will comprehend both, why is he to be protected against the secret deed in the one case, and not in the other? What just ground of complaint can be urged against such a construction by the grantee under the unregistered deed, executed by a former owner of the estate? The deed, if it was a real and a bona fide transaction, must have been, or ought to have been, in his custody or power from the time of its delivery; what cause can be assigned for its non-appearance upon the register, except either collusion with the grantor, or carelessness and neglect in himself, or mere accident? In neither case can he complain of the construction of a statute by which his own fraud, or his own want of due caution, or any accident which befell himself, is not allowed to operate to the prejudice of the rights of the more diligent purchaser.

Suppose a man to settle his property, upon his youngest son's marriage, on himself for life, remainder to his eldest son for life, remainder to the youngest son, his wife and children, in strict settlement, remainder over in fee; the settlement is not registered, and the settler dies. His eldest son enters, and, supposing himself to have the fee, conveys to a purchaser for a valuable consideration. Shall it be allowed, that the younger son, his widow, or his children, shall enter, and evict the purchaser? Or, suppose a like settlement and a like concealment, and the father devises all his lands in trust to sell and to apply the money to debts and portions or other purposes. After the estate is sold and the money distributed, can the construction of this Act be such that the purchaser shall be turned out by the claimants under the settlement? Or, in the particular case now before us, where Mrs. Warburton, before her marriage, might have registered the deed, and the trustees, after the marriage, were bound in duty to do so if the settlement came to their knowledge, can the proper construction of this Act allow Mrs. Warburton to avail herself of her own carelessness, of the breach of duty of her trustees, by establishing her unregistered deed against the registered lease made by her husband, upon no other ground than that the settlement and the lease were not conveyances by the same person? If there was no provision in the Act to prevent this inconvenience, it must be submitted to through necessity, but, if there are words in the Act capable of such an interpretation as would prevent the inconvenience, we think ourselves bound upon every consideration to give them such an effect. How much more, then, where the words themselves, and their strict grammatical construction, appear to require such a sense?

That in all the cases above supposed, a great injustice would be worked, if the Act supplied no remedy, no one can deny. It appears to us that to allow the Act to authorise such mischiefs, would not only be injustice, but would be against law. The language of the Act throughout, and more particularly in s. 5, seems to establish this to have been its leading object—that, so far as deeds were concerned, the registry should give complete information, and that any necessity of looking further for deeds than into the register itself, should be superseded. It

A is manifest that no construction of the Act is so well calculated to carry into effect this, its avowed object, as that which forces all transfers and dispositions of every kind and by whomsoever made to appear upon the face of the register so as to be open to the inspection of all parties who may at any time claim an interest therein.

The general rules of construction, which have been established from the earliest B times, require a large and liberal interpretation, of any provision made for the suppression of fraud. In *Heydon's Case* (1), the barons of the Exchequer resolve that the construction of the statute then under consideration before them must be made

> "by inquiring what was the mischief and defect against which the common C law did not provide; what remedy the Parliament had appointed to cure the disease of the commonwealth; and what was the true reason of the remedy."

The observation which follows in the report is one that ought never to be lost sight of in any case, and is peculiarly applicable to the present, namely,

> "that the office of all the judges is always to make such construction as shall D suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo; and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

This principle of construction has always been adopted by courts of justice. Thus, the Statute of Marlbridge, c. 6, which provides that a feoffment to the E heir to defraud the lord of ward, etc., shall be void, is held not to be confined to the case of a feoffment, but to extend to a grant, fine, recovery, lease, and release, confirmation, or other conveyance. Thus again, where the statute relating to fraudulent conveyances, 27 Eliz., c. 4, enacts

> "that every conveyance of any lands, etc., for the intent and purpose to F defeat and deceive such persons as have purchased or shall purchase the same lands, shall be deemed, only against such purchaser, to be void, frustrate, and of none effect"

it was resolved in *Burrel's Case* (2) that the remedy was not confined to cases where the first and second conveyances were made by the same person, but that, if the

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> "father makes a lease by fraud and covin of his land to defraud others to whom he shall demise or sell it (as all fraudulent leases should be so intended); and before the father sells, or demises it, he dies; and the son knowing, or not knowing of the said lease, sells the land on good consideration; in that case the vendee shall avoid that lease by the said Act."

H It is afterwards observed:

> "It is not necessary that he who sells the land should make the former fraudulent estate or encumbrance; but be the estate, etc., fraudulent, whosoever makes it, the purchaser shall avoid such fraudulent estate."

LORD COKE adds to his report of the case

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> "that when he acquainted POPHAM, C.J., with that resolution, he allowed well of it, and said it was well done to construe the said Act in suppression of fraud."

The decision in *Burrel's Case* (2) appears highly important in a double point of view, in the first place, as confirming and fortifying the general rule of construction above laid down, and, in the next place, as having a direct bearing upon and application to the proper construction of s. 5 of the Irish Registration Act. For the Act against fraudulent conveyances and the Irish Registration Act, have

the same object in view; the mischiefs to be remedied in both are to a great degree the same, namely, the frauds practised by grantors against purchasers for value. The remedy applied by both is the same also, namely, the making the former deed void against the latter, and between the terms of the clause in each by which the former deed is avoided there is almost an exact and complete agreement in the terms used by the legislature. When, therefore, we find the judges deciding in the case under the statute of Elizabeth that the statute shall apply, although the fraudulent estate and the bona fide lease are not made by the same person, it affords the strongest authority that can be furnished by analogy that the same ought to be the construction of the clause now under discussion.

It has been urged in answer to this construction of s. 5 that it is not to be taken by itself alone, but in conjunction with s. 4 of which, it is contended, one object was to control and qualify the operation of the next following clause. It is further urged that as s. 4, in declaring the effect and operation of registered conveyances inter se, gives efficacy to the first registered deed in preference to the second, not absolutely, but only "according to the right, title, and interest of the person conveying," a similar restriction must be understood to be imported into s. 5 also, and that the enactment, which avoids altogether the prior unregistered deed as against the subsequent deed which is put upon the register, must be understood with this tacit restriction, "according to the right, title, and interest of the grantor in the second deed." The meaning of those restrictive words in s. 4 appears to be,

> "according to what would have been the right, title, and interest of the person making the second conveyance, had there been no deed but what appears upon the register."

For, unless this be the meaning of those words in s. 4, that clause of the statute affords no protection at all. The clause, therefore, so understood, enacts in effect that every man who first registers his conveyance, where there is no other objection to the grantor's right to convey except a prior conveyance made by himself, and unregistered, shall be preferred to the man who registers at a subsequent time the conveyance so made to him. This construction, on the one hand, excludes from the protection of s. 4 the grantee who has registered a conveyance made to him by a perfect stranger to the estate, and, on the other hand, includes within its protection, as between two grantees, that one who first registers his conveyance made by the owner of the estate. To apply which construction to the facts of the present case, the husband, but for the unregistered marriage settlement, would have had the right and title to have made the lease of 1800. For when he married the residue of the term of 999 years would have belonged to the wife's father for life, remainder to the wife. When the father died (as he did before the making of the lease of 1800), the term would have vested in the husband in right of his wife with full power in him alone to dispose of it. At the time, therefore, that the lease of 1800 was made, it would have been a good and valid lease, but for the unregistered settlement of 1779. The case, therefore, of these lessees, if there had been a subsequent registration of the marriage settlement, would have been argued upon s. 4, and upon that section the lessees would, as it appears to us have been entitled to the preference before any who claim under the marriage settlement.

It is urged that s. 5 is to be construed as if subject to the same condition. Even admitting that such should be the case, and incorporating that condition into s. 5, it would still seem that the unregistered settlement is to be held void against the registered lease, the latter being a lease granted by a person who would in all other respects, except so far as relates to the prior unregistered settlement, have had right and title to grant the lease. After all, why is the clear, intelligible language of s. 5 to be controlled by the more ambiguous language of s. 4? No rule of construction can require that when the words of one part of a statute convey

A a clear meaning according to their strict grammatical construction, a meaning which best advances the remedy, and suppresses the mischief, aimed at by the legislature, it shall be necessary to introduce another part of the statute which speaks with less perspicuity, and of which the words may be capable of such construction, as by possibility to diminish the efficacy of the other provisions of the Act.

B It has been further argued that the effect of the marriage settlement was to prevent the husband from having any right to grant the lease of 1800 at the time when it was made, for that the wife's right was effectually conveyed as between her husband and herself, by the deed of 1779; that she had no interest in her at the time she married; that she could, therefore, pass no interest to her husband by the marriage; that the husband, consequently, never had any right, and, therefore, could convey none to the lessee. It may be admitted, that as against the husband, C who was party to the deed of 1779, that deed was valid; it may be admitted, also, that he could not, of right, exercise any powers over the property inconsistent with that deed, but, as by the non-registration of that deed, the grantees suffered him to have the appearance of right to the world at large, neither they, nor any claiming under them, are at liberty to set up the deed in opposition to the persons D who have been deluded by the appearance of right in the husband. This argument, therefore, which would be good against the husband himself, cannot be heard from the parties claiming under the settlement against his grantee for a valuable consideration.

It is further urged in argument, that the Irish Registration Act never intended the register to contain a perfect history of the title for that devises are not required E to be registered by that Act, and that, therefore, the conveyance by the heir, although registered, may always be set aside by the devisee claiming under a will concealed, or subsequently discovered. It must be admitted that such is the necessary construction of the Act, and it is to be regretted that it is defective in that particular. But surely that defect affords no argument for so construing it in another of its provisions, as to make it efficacious against a former unregistered F conveyance. If the Act does not go far enough, at least the interpretation of a court of law should make it perfect as far as its enactments extend.

One objection taken in argument, to the right of the plaintiff below to recover in ejectment has been that he takes no legal interest in the premises. It has been asked: To whom does the rent reserved by this lease belong, and by whom could it be recovered? It should be observed that the same difficulty would have G occurred and the same questions might have arisen had both the deeds been executed by the appellant, and had the first deed been for any other purposes, and without any trust in favour of the wife. The first deed, the unregistered deed, would, as between her and the trustees, have effectually vested all her interest in the trustees, and she would have had no right, or title, or interest in herself. She would have had nothing of her own to convey, and, though her conveyance H would, by force of the Registration Act, have passed a good and valid legal estate to her lessee, she never would have been capable of taking the rent reserved upon it to her own use. How the rent would have been recoverable in either case, it is not necessary now to say; it is sufficient that, as against the unregistered settlement, the lease conveyed the legal interest to the lessee.

I Upon the whole, therefore, upon the first question submitted to us, we think the title of the assignees of the lease is to be preferred to that of the widow, or that of the trustees.

Upon the second question, after the full discussion of the principle on which we have arrived at the former opinion, it will be sufficient to say, we think the neglect to register the assignment of the lease does not invalidate the claim of the assignees, because the unregistered assignment passed the interest in the lease as between the lessee and the assignee, and there is no conflicting claimant under a registered deed.

In accordance with the opinion of the judges thus delivered, and without further observation, **LORD TENTERDEN,** expressing his concurrence in the opinion, moved that the judgment below should be affirmed.

Judgment affirmed.

LANGSTON *v.* LANGSTON

[HOUSE OF LORDS (Lord Brougham, L.C.), June 9, 1834]

[Reported 2 Cl. & Fin. 194; 8 Bli. N.S. 167; 6 E.R. 1128]

Will—Evidence to correct mistake—Contents of draft.

A mistake which is clear on the face of a will can be corrected on grounds in accordance with other terms contained in the will, but not by reference to evidence dehors the will, e.g., of the contents of a draft of the will.

Will—Construction—Ambiguous language—Comparison with clear provisions in other part of will.

Where a testator has adopted in one part of a will a clear and precise mode of expressing his intention, and his intention is, consequently, made clear, that language may be used for comparison when it is sought to interpret other words in the will where the meaning is doubtful.

Will—Construction—Preservation of instrument rather than destruction—Preference for construction preserving instrument—Supply of words clearly omitted by mistake.

If there are two modes of reading an instrument and one destroys the instrument and the other preserves it, one must lean towards that construction which preserves rather than to that which destroys. Ut res magis valeat quam pereat. This rule justifies the supplying of words which it is clear the maker of the instrument omitted per incuriam, without which words the instrument would be put an end to and the intention of the maker defeated.

Trust—Construction—Executory trust—Larger latitude than in construction of strict legal limitation.

A larger latitude can be given to the construction of an executory trust than to a strict legal limitation.

Notes. Distinguished: *Clarke* v. *Clemmans*, *Selway* v. *Clemmans* (1866), 36 L.J.Ch. 171. Considered: *Surtees* v. *Hopkinson* (1867), L.R. 4 Eq. 98; *Tuite* v. *Bermingham* (1875), L.R. 7 H.L. 634. Distinguished: *Locke* v. *Dunlop* (1888), 39 Ch.D. 387. Considered: *Re Haygarth*, *Wickham* v. *Haygarth*, [1913] 2 Ch. 9. Referred to: *Monypenny* v. *Dering* (1850), 7 Hare, 568; *Hart* v. *Tulk* (1852), 2 De G. M. & G. 300; *Grey* v. *Pearson* (1857), 6 H.L. Cas. 61; *Ricketts* v. *Carpenter* [1843–60] All E.R. Rep. 482; *Grant* v. *Grant*, [1861–73] All E.R. Rep. 308; *Re Thomson's Trusts* (1870), L.R. 11 Eq. 146; *Re Blake's Estate* (1871), 19 W.R. 765; *Tavernor* v. *Grindley* (1875), 32 L.T. 424; *Re Sassoon*, *I.R. Comrs.* v. *Raphael*, *I.R. Comrs.* v. *Ezra*, [1933] Ch. 858.

As to the construction of wills, see 39 HALSBURY'S LAWS (3rd Edn.) 973 et seq.; and for cases see 44 DIGEST 530 et seq.

Cases referred to in argument:

Thornhill v. *Hall* (1834), 2 Cl. & Fin. 22; 8 Bli. N.S. 88; 6 E.R. 1065, H.L.; 44 Digest 912, *7707*.

Doe d. James v. *Hallett* (1813), 1 M. & S. 124; 105 E.R. 47; 44 Digest 839, *6934*.

Clements v. *Paske* (1784), 2 Cl. & Fin. 230, n.; 3 Doug. K.B. 384; 99 E.R. 709; 44 Digest 849, *7030*.

Hay v. *Earl of Coventry* (1789), 3 Term Rep. 83; 100 E.R. 468; 44 Digest 1132, *9800*.

Gardiner v. *Sheldon* (1671), Freem. K.B. 11; 2 Keb. 781; Vaugh. 259; 1 Eq. Cas. Abr. 197; 89 E.R. 9; 44 Digest 1255, *10837*.

Faulkner v. *Faulkner* (1681), 1 Eq. Cas. Abr. 119; 1 Vern. 21; 23 E.R. 276; 44 Digest 1253, *10810*.

Bamfield v. *Popham* (1703), Holt, K.B. 233; 2 Vern. 449; 1 Eq. Cas. Abr. 183; 1 P. Wms. 54; Freem. Ch. 266; 90 E.R. 1028; sub nom. *Popham* v. *Bamfield*, Freem. Ch. 269; 2 Eq. Cas. Abr. 308; 1 Salk. 236; 44 Digest 1137, *9834*.

Newburgh v. *Newburgh* (1820), 5 Madd. 364; on appeal (1825), Sugden's Law of Property, 367, H.L.; 44 Digest 625, *4555*.

Dashwood v. *Peyton* (1811), 18 Ves. 27; 34 E.R. 227, L.C.; 44 Digest 603, *4295*.

Wilkinson v. *Adam* (1813), 1 Ves. & B. 422; 35 E.R. 163, L.C.; 44 Digest 1251, *10786*.

Allanson v. *Clitherow* (1747), 1 Ves. Sen. 24; 27 E.R. 867, L.C.; 44 Digest 1272, *10998*.

Door v. *Geary* (1749), 1 Ves. Sen. 255; 27 E.R. 1016; sub nom. *Dore* v. *Geery*, 1 Wils. 247, L.C.; 44 Digest 686, *5269*.

Garvey v. *Hibbert* (1812), 19 Ves. 125; 34 E.R. 465; 44 Digest 837, *6899*.

Jones v. *Lord Sefton* (1798), 4 Ves. 166; 31 E.R. 85, L.C.; 44 Digest 678, *5185*.

Stuart v. *Marquis of Bute* (1813), 1 Dow. 73; 3 E.R. 626, H.L.; 44 Digest 591, *4148*.

Michell v. *Michell* (1820), 5 Madd. 69; 56 E.R. 821; 44 Digest 694, *5354*.

Appeals from orders of Sir John Leach, M.R.

On May 24, 1817, the present respondent, James Haughton Langston, attained the age of twenty-one years, and on June 21, 1824, he filed his original bill of complaint in the High Court of Chancery in England, against the present respondents, Sir Charles Morice Pole and Haughton Farmer Okeover, and the present appellants, Maria Sarah Langston, Charles Barter the elder, and Elizabeth Catherine his wife, and Charles Barter the younger. The bill, after referring to the will and codicils of the testator, John Langston, prayed that the will and codicils might be established and the trusts thereof, so far as respected the settlement and conveyance of the manors, messuages, lands, tenements, hereditaments, and real estate of the testator so devised to the respondents, Sir Charles Morice Pole, and Haughton Farmer Okeover, and a deceased co-trustee, might be carried into execution by a settlement and conveyance to be made by Sir Charles Morice Pole, and Haughton Farmer Okeover, of the same manors, messuages, lands, tenements, hereditaments, and real estate, to the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, and declarations, to, upon, for, with, under, and subject to which, the same were by the will directed to be settled and conveyed, or as near thereto as the deaths of persons, or the circumstances of the case, would permit, and especially that, in making such settlement and conveyance, a limitation might be inserted therein, whereby the said manors, messuages, lands, tenements, hereditaments, and real estate might be limited, settled, and assured to the use of the respondent, James Haughton Langston's first son, in tail male, in remainder, immediately after the limitation to the use of trustees during the life of the respondent, James Haughton Langston, to preserve contingent remainders, and immediately before the limitation to the use of the respondent, James Haughton Langston's second son, in tail male, and for general relief.

The cause came on to be heard on Feb. 22, 1826, before Lord Gifford, M.R., who ordered that a Case should be made for the opinion of a court of law. In settling the form of the Case, it was assumed that the respondent, James Haughton Langston, had a first son of the name of Henry Langston, and, accordingly, the Case was directed by an order of Feb. 23, 1826, for the opinion of the

Court of King's Bench, and the question was to be whether Henry Langston, the first son of the testator's son, James Haughton Langston, took any estate under the testator's will. All proper facts necessary to bring the matters into question were to be stated in the Case.

In pursuance of the order, a Case was made for the opinion of the King's Bench containing a statement of the limitations of the will in the form of legal limitations, and a general statement of other parts of the will, stating that the testator died in February, 1812, leaving James Haughton Langston his only son and heir-at-law (then a minor), and several daughters, him surviving, having previously made three codicils to his will, the last of which bore date in February, 1812, and further stating that James Haughton Langston attained the age of twenty-one years in May, 1817, and had since that time married and had issue by his wife two sons, viz., Henry Langston, his eldest or first-born son, and Edward Langston, his second-born son. The judges of the Court of King's Bench, by their certificate bearing date April 30, 1827, certified that they were of opinion that Henry Langston, the first son of the testator's son, the said James Haughton Langston, did not take any estate under the will.

On Mar. 13, 1828, the Master of the Rolls made an order that a Case should be made for the opinion of the Court of Common Pleas. In settling this Case, it was also, for the purpose of raising the question in dispute, assumed that James Haughton Langston had a first son born of the name of Henry Langston, and the same question was put to the Common Pleas as had been put to the King's Bench. By a certificate dated Nov. 28, 1828, the judges of the Common Pleas stated that they were of opinion that Henry Langston, the first son of the testator's son, James Haughton Langston, took an estate in tail male under the will, expectant on the decease of James Haughton Langston.

On July 28, 1829, the cause came on to be heard before the Master of the Rolls for further directions upon the last-mentioned certificate when his Honour ordered that the certificate of the judges of the Court of Common Pleas should be confirmed, and declared that the first son of James Haughton Langston would take an estate in tail male under the will, expectant on the decease of his father. His Honour declared that the testator's will ought to be established, and the trusts thereof performed and carried into execution by the respondents, Sir Charles Morice Pole and Haughton Farmer Okeover, his surviving trustees, so far as related to the settlement and conveyance of the manors, messuages, lands, tenements, hereditaments, and real estates of the testator and of the accumulations arising from the rents and profits thereof, during the minority of James Haughton Langston which were by the will of the testator directed to be laid out and invested in the purchase of manors, messuages, farms, lands, tenements, and hereditaments. And it was ordered, that the respondents, Sir Charles Morice Pole and Haughton Farmer Okeover, the surviving trustees of the said will, should convey and assure the said manors, messuages, lands, tenements, hereditaments, and accumulations therein mentioned or referred to, to the uses, upon the trusts, and for the intents and purposes therein mentioned, or such of them as were then subsisting or capable of taking any effect, but so as to limit the same to the use of the first son of James Haughton Langston in tail male in remainder, immediately after the limitation to the use of trustees during the life of James Haughton Langston, such conveyance to be settled by the Master in rotation in case the parties differed.

In July, 1824, James Haughton Langston married Julia Frances Moreton, and after the last-mentioned decree and before any further proceedings in the cause the appellant, Julia Langston, was born of the marriage. She was the only child of James Haughton Langston, and, under the limitation by the will directed to be made, in default of issue male, to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of James Haughton Langston in tail, she became the first tenant in tail in esse of the manors, lands, and hereditaments, by the will so devised and directed to be settled as aforesaid.

On Feb. 17, 1830, James Haughton Langston filed his bill of complaint in the Court of Chancery against all the defendants in the first-mentioned suit, and also against the appellant, Julia Langston, and thereby prayed that the bill might be taken to be a supplemental bill to the former suit, and that he (James Haughton Langston) might be declared to be entitled to the benefit of, and to be at liberty to carry on and prosecute the decree, orders, and other proceedings, in the original cause against the appellant, Julia Langston and the other defendants thereto, and to have the same benefit thereof as if Julia Langston had been born and had been the first tenant in tail in esse when the original bill was filed and the other proceedings were had; that it might be decreed and declared in the supplemental or second suit, as an original suit, that the first son of James Haughton Langston would take an estate in tail male under the will expectant on the decease of James Haughton Langston, and that in that suit the testator's will and codicils might be established and the trusts thereof performed and carried into execution by the surviving trustees, so far as related to the settlement and conveyance of the manors, messuages, lands, tenements, hereditaments, and real estates of the testator, and of the accumulations in the will during the minority of James Haughton Langston, which were thereby directed to be laid out and invested in the purchase of manors, messuages, farms, lands, tenements and hereditaments; and that in the last-mentioned suit the surviving trustees might be decreed to make and execute such conveyance and assurance as was by the decree in the original or former suit, dated July 28, 1829, directed to be made and executed.

The last-mentioned suit came on to be heard on Mar. 5, 1830, before Sir John Leach, M.R., whereupon his Honour declared that the first son of James Haughton Langston would take an estate in tail male under the will, expectant on the decease of his father, and that the testator's will and two first codicils ought to be established, and the trusts thereof carried into execution by the respondents, Sir Charles Morice Pole, and Haughton Farmer Okeover, the surviving trustees, so far as related to the settlement and conveyance of the manors, messuages, lands, tenements, hereditaments, and real estates of the testator and of the accumulations arising from the rents and profits thereof, during the minority of James Haughton Langston, which, by the will of the testator, were directed to be laid out and invested in the purchase of manors, messuages, farms, lands, tenements and hereditaments. It was ordered, that the surviving trustees of the will should convey and assure the manors, messuages, hereditaments, and accumulations therein mentioned to the uses upon the trusts and for the intents and purposes therein mentioned, so as to limit the same to the use of the first son of James Haughton Langston in tail male in remainder, immediately after the limitation to the use of trustees during the life of the respondent, James Haughton Langston.

The Master of the Rolls pronounced these decrees in conformity with the certificate of the Court of Common Pleas, and against that of the Court of King's Bench, but he expressed an opinion that the trustees would be justified in not executing the settlement without the sanction of the House of Lords as to which of the two decisions of the courts of law was the right decision. The trustees, therefore, declined to execute such settlement.

The present appeals were against the decrees of July 28, 1829, and Mar. 5, 1830 (that is to say), as to so much of the said decree of July 28, 1829, as declared

> "that the first son of the testator's son, James Haughton Langston, will take an estate in tail male under the said will expectant on the decease of his father, James Haughton Langston, and as to so much thereof as directs that the certificate of the judges of His Majesty's Court of Common Pleas be confirmed, and that the said defendants, Sir Charles Morice Pole, and Haughton Farmer Okeover, the surviving trustees of the said will, do convey and assure the said manors, messuages, lands, tenements, hereditaments, and accumulations therein mentioned or referred to, so as to limit the same to the use of

the first son of the plaintiff, in tail male in remainder, immediately after the limitation to the use of trustees during the life of the said plaintiff;"

and also as to so much of the decree of Mar. 5, 1830, as declared and directed to the same purport or effect.

Knight and *Wray* for the appellants.

Sir Charles Pepys and *Jacob* for the respondents.

June 9, 1834. **LORD BROUGHAM, L.C.**—In this case a question arose upon the construction—or rather, if any way were open to us, of supplying a defect in the construction—of the will of the late Mr. Langston. The question assumes an importance beyond even what naturally belongs to it when we consider that, two cases having been sent for opinion from the Court of Chancery to two different courts, the higher courts of Westminster Hall, those two courts certified opinions directly in opposition to each other, but without stating their reasons. All that we know, therefore, is that the questions were argued by learned counsel in those courts, that time was taken in each case for the consideration of the court, and that, the question being whether Henry Langston took any and what estate under the will, in the one case the Court of Common Pleas certified their opinion that Henry Langston took under the will an estate tail in tail male, whereas the Court of King's Bench certified that Henry Langston took no estate whatever.

The will contains a series of limitations. It is penned with great care; it is the production of a professional man; it is a production of great professional skill and experience; it is one of the most artificial, one of the most elaborately penned, one of the most carefully conceived instruments, which it has ever been my lot to be called upon to examine. Nevertheless, it does so happen, as if to confound the pride of human learning and experience in legal matters, that this production of the most practised conveyancer has as much occasion for the helping interposition of a court of equity or of law before which it comes to give it effect as if it had been penned either by an ignorant peasant without any professional aid, or by one of those rustic artists whose partial knowledge of conveyancing—I mean those who sometimes make wills in the country for persons a little more ignorant, and but a little more ignorant, than themselves—whose handywork often gives rise to much labour and to inextricable difficulties in courts of justice.

No person out of court can read this instrument without being perfectly persuaded that an accident must have happened either in the framing of it originally, or in copying the draft, whereby a line or two has been left out. Either the limitation which was intended to be inserted, and which was taken for granted to have been inserted in the draft, was by some accident omitted, or, that being in the draft, a couple of lines were passed over in copying the draft into the engrossment. To show that this must be the case, the very first person that was likely to take any estate under the will after the only son of the testator in esse at the date of his will, the eldest son, is disposed of by being omitted. He is not named there at all. "Then are you," say the Court of King's Bench, "to give him an estate tail, or any estate at all, when he is not even named in the will? Named he is for other purposes and in other respects, but not to take anything—not to benefit under the will."

I here lay entirely out of view an incident which occurred during the argument. I had a curiosity to see the draft from which the engrossment was made, and one party was exceedingly anxious that my curiosity should be gratified, but that anxiety was met by an equal anxiety on the opposite side that it should remain unsatisfied. I at once, therefore, proceeded to have a still greater anxiety and curiosity, because I plainly saw it was likely to be a decisive matter. I was aware, as a lawyer, that I had no right to look at it, but, humanly speaking, it was impossible not to wish to see whether one's extra-judicial conjecture was well founded, namely, that the whole history of this was an error in copying, and accordingly, when I looked at it, I found that there was a limitation to the first son of the testator's

son, James Haughton Langston, which the person who made the engrossment had, for a very obvious reason, passed over in copying it, having in his haste gone from the same word in one line to the same word in another, in mistake. I here lay that entirely out of view. It has no right to enter into the consideration of the case, and I can positively assure your Lordships that I have formed my opinion upon the instrument as it now stands, without matters dehors, without having recourse to the draft. I have no right to look at the draft, but anybody who reads this will—and that is my first reason for agreeing with the Court of Common Pleas rather than the King's Bench—anybody who reads this will cannot, if he has his senses about him, doubt that some mistake must have happened, and that is a legitimate ground for construing an instrument, because that is a reason derived not dehors the instrument, but one for which you have not to travel from the four corners of the instrument itself.

The next point to which I advert as the second ground upon which I agree with the Court of Common Pleas and not with the King's Bench is that when the framers of this instrument really meant to exclude a child, or an eldest child, whether a son or a daughter, no persons knew better than they did how to effect that purpose. If your Lordships will look to the will itself, you will find that, in cases where they intended any such exclusion, no person knew better than they how to effect it. In the declarations of the trusts of the term for 800 years, for instance,

> "for raising the portion or portions of all and every such daughter and daughters of his the said testator's said daughter Caroline Langston other than and besides an eldest or only daughter;"

so also in another (the fourth) of the eight terms created by this will, are used the proper words of exclusion :

> "for the portion and portions of all and every such daughter and daughters of my said daughter Elizabeth Catherine Langston, other than and except an eldest."

So, again, the testator uses like words where a son is to be excluded, as in the power for James Haughton Langston to charge the estates in case there should be any child or children of his body lawfully begotten, "other than and besides an eldest or only son." This, therefore, is a circumstance always of some weight where you find it; it is a topic always worth considering. When you find that, where the meaning is clear and there is no doubt whatever as to the intention, he adopts an effectual, clear and precise mode of executing that intention, you may also safely and logically employ that to throw light on those other instances where it is doubtful, and where the question is whether he means this or that. If you find that he does not in those places use those words which he has used where there was no doubt what his intention was, you have a right to say that he did not mean the same thing, because, when he did clearly and undeniably mean this thing and not that, this was his mode of expressing himself in order to carry that intention into effect.

The third of the reasons is one which I cannot help feeling to be exceedingly powerful, and which presses forcibly upon my mind. The existence of a son is to defeat no less than eight terms raised most carefully, artificially and anxiously by the persons who penned this instrument, and yet that son whose existence is to produce such an effect, to create such destruction, to deal about such havoc upon the whole of this will, is not, according to the construction set up by the King's Bench and by the appellants, to benefit under it in the slightest degree. It is monstrous to suppose that any rational person could really intend to make so much depend upon the event of a person coming into existence, which person, nevertheless, was to be of no force, of no effect, of no value in his eyes, except to be used as an instrument of destruction—that he was only to be considered as the means

of taking away the benefit of other parts of this instrument and yet was himself to benefit nothing by that destruction.

In the fourth place Henry Langston's existence must be allowed, according to the argument of the King's Bench and of the appellants, to defeat nearly the whole of this will. If there are two modes of reading an instrument, and one destroys the instrument and the other preserves it, it is the rule of law and of equity following the law in this respect (for it is a rule of common sense, which I trust is common to both sides of Westminster Hall), that you should lean towards that construction which preserves rather than towards that which destroys. Ut res magis valeat quam pereat is a rule of common law and common sense, and much the same principle ought surely to be adopted where the question is, not between two rival constructions of the same words appearing in the same instrument, but where the question is on so ready an instrument as that you may either take it verbally and literally, as it is, or with a somewhat larger and more liberal construction, and by so supplying words as to read it in the way in which you have every reason to believe that the maker of it intended it should stand. Thus, again, according to the rule ut res magis valeat quam pereat, to supply, if you can safely and easily do it, that which he per incuriam omitted, that which instead of destroying preserves the instrument, and, instead of putting an end to the instrument and defeating the intention of the maker of it, tends rather to keep alive and continue and give effect to that intention. If this is a rule applicable to all cases, it surely is more peculiarly applicable to a case like the present, for I will only shortly advert to a circumstance which weighs in my mind materially in giving a larger effect than I otherwise might feel disposed to give to these considerations, and leads me to supply more readily than I should otherwise do, the words wanting. It is, that you are here dealing not with a legal limitation, but with an executory trust. It is sufficient simply to state that, and to advert to that consideration, to entitle me to think that I may, therefore, give a larger latitude by a good deal to the construction of an executory trust, than I might have been disposed to give if it had been a strict legal limitation. Nevertheless, I confess that, even if this, instead of being an executory trust, had been a legal limitation, the reasons I have already given and those I am about to add, which weigh more forcibly upon my mind than those I have gone over, would have been quite sufficient to compel me to read the legal limitation as the Court of Common Pleas has read this executory trust.

I wish to call your Lordships' attention to that extraordinary effect which of necessity must follow which I look upon to be almost a reductio ad absurdum, from the construction put upon it by the Court of King's Bench. Looking only to that same clause to which I have already alio intuitu referred, I mean the beginning of the clause where the power is to be inserted in the settlement for charging portions for James Haughton Langston's younger sons or daughters, and where the exclusion of James Haughton Langston's eldest or only son is effected by apt and proper words. It thus appears that this monstrous conclusion indisputably follows, that, if there were one son and one daughter, then there is to be charged £25,000 upon the daughter's estate for the behoof of that daughter herself! Absurdity could go no further. If the son is to take an estate, that you should provide most carefully for raising £25,000 by a charge for the benefit of the daughter, is perfectly intelligible, but here, according to the construction put by the Court of King's Bench, a sum of £25,000 is to be raised, for whom? Out of what estate? Not out of the son's estate, for he does not take an estate tail, but out of the daughter's estate, for she takes it to the exclusion of the son. For whose benefit is the £25,000 to be raised? Not for the son, but for the daughter, who takes an estate burdened with a power to raise her own £25,000! I cannot believe that this was ever argued before the Court of King's Bench. I cannot believe that it was even stated to the learned judges. It was not argued in banco, and that is one comfort for me to know, and another comfort I derive from it is that I had the good fortune to put an end to these sittings not in banco. A court of three judges,

sitting in a corner of Westminster Hall, with two counsel, one on each side, is not in my mind so satisfactory a way of putting an end to disputed points of law as where you have my Lord Chief Justice sitting as the head of his own court and the three puisne judges with him and all the Bar arranged around, witnessing the argument. That experiment of a three judges' court, which was of a temporary nature, was discontinued, but it was during its existence that this case was argued. There was no Lord Chief Justice present. There were three judges, undoubtedly of profound learning, who, if the case had been fully argued before them, would have had this point presented, which, there is no getting over it, is a contradiction in terms and implies what no rational being could ever have intended. If I have a son and a daughter and I give an estate tail to the son, there can be nothing more reasonable than my giving £25,000 by way of charge upon that estate while the estate tail of the son lasts so that the daughter may be provided for, inasmuch as she has no estate, but the son has it. But who ever thought of giving no estate tail to the son, but giving the whole estate to the daughter, and then raising £25,000 out of the daughter's estate, out of her own estate, for her own benefit, by way of a charge on her own estate tail in the same premises? I cannot understand how this could possibly have been overlooked if it had been stated to their Lordships. I think it must at once have disposed of the case.

I wish to say a word respecting the force of the term upon which the argument for the appellant mainly rests, the word "other." It is said that, if you can construe an instrument without supplying anything, omitting out anything, but upon its own terms, unaltered, unadded to, undiminished, you had better do so, as it is safer to take these terms than to introduce others. I agree with that proposition. It does so happen that, if you take these terms as they are here and neither alter, add to, nor diminish them, the words themselves that exist upon the face of the will are sufficient to carry an estate tail in the first instance to Henry Langston and to support all the terms and other limitations. But it is said by the Court of King's Bench and by the appellants that "other" always means "younger," "posterior," and no doubt I leaned at first towards that view of the subject. It is a very plausible argument, and it is true in point of fact. If anybody were to say first, second, third, fourth and other sons, it must mean the sons after the fourth, but why does "other" mean the sons after the fourth? It is because you have before enumerated all that come before the fourth, for you have said first, second, third and fourth. But suppose I had happened to have omitted the first, and instead of saying first, second, third, fourth and other sons, suppose I had said, to my second, third, fourth and other sons, leaving out the first, then it is perfectly clear that "other" no longer is of necessity confined to the fifth, sixth and seventh, but "other" there ex vi termini includes the first, because the first is literally the one who answers the description of something other than the second, third and fourth. The word "other" would then just as grammatically, as accurately, as strictly and as correctly describe the eldest son, as it would describe the fifth, sixth or seventh son, because the eldest son is a son other than the second, other than the third, other than the fourth. The only reason why "other" in all ordinary cases and in the common strain of conveyancing means a younger son is, that in all those cases they never think of leaving out the eldest.

These are the grounds which I have now gone over and upon which I have formed my judgment, though with great deference. I have taken a long time to consider it, I have frequently spelled over the instrument and looked into the argument. These are the grounds upon which it would be affectation to say I have any hesitation in agreeing with the Court of Common Pleas and differing entirely from the Court of King's Bench. My opinion is that we are to read these words as if there had not been the omission of those other words in the limitation, and that, even if we are to read them as they stand, the words are sufficient, literally and strictly construed, to carry an estate tail in the first instance to the eldest son, and to limit all the other terms. I go upon the whole instrument taken together. I go

upon the whole of the eight terms, and the destruction dealt out in those terms by limiting it in any other way. I go also upon the monstrous absurdity of supposing, according to the case put, that where the will has provided expressly for one son and one daughter, that the son is to take nothing and the daughter all, and yet, though she is to take the estate, she is carefully provided with a sum of £25,000 raised by a charge created upon the estate which she was to have altogether herself: nothing can be more absurd. What can be more common than to argue that words, which otherwise would give only an estate for life, given an estate in fee, if they are coupled with other words which intimate that there is to be a charge upon that estate which an estate in fee only could support? Anything that extends beyond a life estate converts that life estate into a fee, because it is clear that the person would not have given a life estate if he had meant that any burden should be saddled upon that life estate which nothing but a fee could support. So, in like manner, when an interest is given to A, which it can only be understood that A would have any occasion for in the event of B having the estate tail, can there be a sounder reason than that for so construing the instrument as to give the estate to B and not to A? Therefore, that view is of itself decisive of this question, and it would make absolute nonsense of the will to read it in any other way. Upon the whole I must advise your Lordships to agree with the Master of the Rolls, and to affirm this judgment, which proceeds upon a preference given to Henry Langston, who was for this purpose supposed to be in existence, entitling him to take an estate tail under the will. I agree, therefore, in the opinion that he took an estate tail clearly under this will taken altogether, adding to the other circumstances the consideration that we are here dealing, not with a legal limitation, but with an executory trust. Nevertheless, further adding, that if we were dealing, not with an executory trust, but with a legal limitation, I should say that, for the several reasons I have given to your Lordships, my opinion still would be that, even taking it as a legal limitation and not an executory trust, the eldest son upon coming in esse would have taken an estate tail.

Appeal dismissed.

DRAPER *v.* THOMPSON

[Court of Common Pleas (Tindal, C.J.), November 5, 1829]

[Reported 4 C. & P. 84]

Distress—For rent—Indemnity to bailiff—Indemnity against costs of legal proceedings—Action against bailiff for negligence—Damage to third party's goods—Negligence of bailiff's servants.

An indemnity given to a bailiff by a landlord on whose behalf he was to distrain against "all costs and charges, in respect to any law expenses, action or actions, that may arise" does not extend to damages paid by the bailiff in an action for damage done by his servants to the property of a third person which was on the premises where the distress was levied.

Notes. Referred to: *Ibbett* v. *De La Sale* (1860), 30 L.J.Ex. 44.

As to landlord's implied indemnity to a bailiff, see 12 Halsbury's Laws (3rd Edn.) 126, 127; and for cases see 18 Digest (Repl.) 319, 320. As to extent of liability under indemnity, see 18 Halsbury's Laws (3rd Edn.) 534, 535; and for cases see 26 Digest (Repl.) 246, 247.

Action of assumpsit on an indemnity.

It was stated in the first count of the declaration, that, in consideration that the plaintiff would act as the broker and agent of the defendant, and would seize and distrain the goods and chattels then in the possession of one, Thomas Danvers, for £103 0s. 3d., for arrears of rent then alleged to be due, the defendant undertook to indemnify him against all costs and charges in respect to any law expenses, action or actions, that might arise, or which might be brought against the plaintiff on that account. The plaintiff then averred that he seized divers goods of Thomas Danvers; and that subsequently certain action at law was brought against him by one William Godfrey Kneller, in His Majesty's Court of King's Bench, "for and on account of the said seizure and distress;" and that he was thereby obliged to pay a large sum of money; for which the defendant, did not, and would not indemnify him.

Serjeant Taddy and *Carrington* for the plaintiff.

Serjeant Wilde and *Hutchinson* for the defendant.

Serjeant Taddy for the plaintiff.—In December, 1826, the plaintiff was employed by the defendant to distrain the goods of Thomas Danvers, for an arrear of rent then due from Thomas Danvers to the defendant; and the following indemnity was given by the plaintiff to the defendant:

"Know all men by these presents, I do hereby authorise Mr. William Draper, 22, Wellclose Square, or his agent, as my agent, to seize and distrain the goods and chattels now in the possession of Mr. Thomas Danvers, situate and being No. ——, in Gower's Walk, in the parish of Saint Mary, Whitechapel, in the county of Middlesex, for the sum of £103 0s. 3d., being for arrears of rent due to me for the same, on Dec. 25 last; and, for your so doing, this shall be your sufficient warrant, authority, and indemnification against all costs and charges, in respect to any law expenses, action or actions, that may arise; and, as well as any other and all other charges or expenses that you or your agent may be at, or brought against you or your agent on this account. As witness my hand, this 26th day of December, 1826.

(Signed) James Thompson, jun.

Executor of the late landlord of the said premises."

Under this authority, the plaintiff entered and made the distress on Danvers, and that the plaintiff's men, finding a large cask in a part of the premises, which was too large to be brought out entire, took it to pieces. This cask contained something that looked like muddy water, which the son of Danvers told them was spent

liquor, of no value; but it was, in fact, valuable cochineal dye, belonging to a person named Kneller, who brought an action of trover against the plaintiff for the spilling of it, and recovered £50 damages.

The terms of the indemnity go to all actions brought against the plaintiff on account of this distress; it covers everything that is done, bona fide, in the progress of the distress. If the plaintiff had done any wilful mischief, or been guilty of any wilful default it would not cover that. It protects the plaintiff from all actions brought against him on account of his making the distress, if they arise from mistake or accident. If it only extended to cases where he was justified, it would be of no use, as he would not then want an indemnity.

TINDAL, C.J. It never could be intended that the defendant was to indemnify the plaintiff against the acts of his own servants, and I am of opinion that it only applies to cases where a distress was illegal, because the landlord had no right to put in such distress.

Nonsuit.

GRANGER *v.* GEORGE

[Court of King's Bench (Abbott, C.J., Bayley, Holroyd and Littledale, JJ.), January 25, 1826]

[Reported 5 B. & C. 149; 7 Dow. & Ry. K.B. 729; 108 E.R. 56]

Limitation of Action—Accrual of action—Conversion—Time running from date of conversion.

In an action of trover for conversion of property time under the Statutes of Limitation, in the absence of fraud, runs from the date of the conversion and not from the discovery of the conversion.

Notes. Referred to: *Philpott* v. *Kelley* (1835), 4 Nev. & M.K.B. 611; *Betts* v. *Metropolitan Police District Receiver* (1932), 96 J.P. 327; *Beaman* v. *A.R.T.S., Ltd.*, [1948] 2 All E.R. 89; *Cartledge* v. *E. Jopling & Sons, Ltd.*, [1963] 1 All E.R. 341.

As to the limitation of actions of trover, see 24 Halsbury's Laws (3rd Edn.) 221; and for cases see 32 Digest (Repl.) 404, 405.

Cases referred to:

(1) *Short* v. *M'Carthy* (1820), 3 B. & Ald. 626; 106 E.R. 789; 32 Digest (Repl.) 402, *268*.

(2) *Brown* v. *Howard* (1820), 2 Brod. & Bing. 73; 4 Moore, C.P. 508; 129 E.R. 885; 32 Digest (Repl.) 394, *213*.

Motion by the plaintiff for a rule nisi to set aside a nonsuit in an action for conversion.

In this action the plaintiff alleged that the defendant had not taken care of and re-delivered to him (the plaintiff) three boxes containing deeds, papers, etc., which had been delivered to defendant to be safely kept and re-delivered to plaintiff on request. There was also a count in trover in respect of the boxes. The defendant denied liability and pleaded that the causes of action in the declaration mentioned did not accrue within six years next before the exhibiting of the bill of plaintiff in this behalf. The plaintiff by his replication contended that the causes of action did accrue within six years.

At the trial before Abbott, C.J., it appeared that the boxes were placed in the defendant's custody about the year 1816. The plaintiff had before that time become bankrupt, and a commission issued against him, and on Nov. 10, 1818, the defendant had delivered up the boxes with their contents to certain persons describing themselves as assignees under that commission. The writ in the present action

was sued out on Nov. 26, 1824, returnable on the 29th, but the declaration was filed generally as of Michaelmas Term in that year. The boxes were demanded by the plaintiff in September, 1824, and there was no evidence that he knew of the conversion in 1818 until the defendant, at the time of the demand, said that he had delivered them up in that year (1818). In these circumstances it was contended for the plaintiff, that although the plea of the Statute of Limitations might be an answer to the first count, yet it could not to the count in trover; as the plaintiff never knew that the goods were parted with in 1818 until he demanded them in 1824 and that he was not bound to treat the act in 1818 as a conversion, but might rely upon the demand and refusal in September, 1824. It was also contended that the declaration must be taken to have been filed on the first day of the Michaelmas Term, and that the defendant could not in answer show the time when the writ was issued, his plea being that the cause of action did not accrue within six years before the "exhibiting of the bill," not "before the commencement of the suit."

The Lord Chief Justice thought that the Statute of Limitations was an answer to the plaintiff's case, and directed a nonsuit.

Scarlett for the plaintiff, moved to set it aside.

ABBOTT, C.J.—The evidence given on the part of the plaintiff did not make out, with any distinctness, either the time or terms of the actual deposit with the defendant. But it appeared that when in September, 1824, the boxes were demanded, the latter replied that in 1818 he had delivered them over to certain persons whom he named; and it was proved that he had so parted with them on Nov. 10 in that year. It also appeared that the plaintiff's declaration was filed generally as of Michaelmas Term; the writ, however, was returnable on Nov. 29. Under such circumstances, I thought I was bound to consider the bill as exhibited on that day, which left the effect of the Statute of Limitations open to the defendant. Upon that point I thought, and I still retain the same opinion, that the statute began to run from the time of the act done by the defendant, although the plaintiff had no notice of it; there not being evidence of any fraud practised by the defendant in order to prevent the plaintiff from obtaining knowledge of that which had been done. The plaintiff was certainly guilty of laches in not making inquiries respecting the property at an earlier period, and has no ground of complaint that he is not now entitled to recover.

BAYLEY, J.—The gist of this action is the conversion. When the defendant proved that the goods had been out of his possession for more than six years before the commencement of the action it was manifest that he could not have converted them within that period. *Short* v. *M'Carthy* (1), and *Brown* v. *Howard* (2) show that the want of knowledge in the plaintiff makes no difference. Upon the other point, it is true that the declaration relates prima facie to the first day of term, but that is matter of evidence, and when the writ was produced, returnable on Nov. 29, the presumption was that the party declared on that day. The nonsuit was, therefore, right.

HOLROYD and **LITTLEDALE, JJ.**, concurred.

Rule refused.

LORD PORTARLINGTON *v.* SOULBY

[Lord Chancellor's Court (Lord Brougham, L.C.), March 24, April 15, 1834]

[Reported 3 My. & K. 104; 40 E.R. 40]

Conflict of Laws—Injunction—Injunction restraining person within jurisdiction from bringing in foreign country proceedings invalid by English law.

An English court will grant an injunction against a person within its jurisdiction restraining him from bringing proceedings in a foreign country which would be invalid by English law. An injunction will, therefore, be granted restraining a person from bringing an action in a foreign country in respect of a dishonoured bill of exchange given in respect of a gambling debt.

Notes. Considered: *Carron Iron Co.* v. *MacLaren* (1855), 5 H.L. Cas. 416; *Pena Copper Mines, Ltd.* v. *Rio Tinto Co., Ltd.*, [1911-13] All E.R. Rep. 209. Applied: *Ellerman Lines, Ltd.* v. *Read*, [1928] All E.R. Rep. 415. Referred to: *Maclaren* v. *Stainton*, *Maclaren* v. *Carron Co.* (1855), 26 L.J.Ch. 332.

As to the practice of the English courts in respect of invalid judgments or actions contrary to natural justice in relation to foreign courts, see 7 Halsbury's Laws (3rd Edn.) 147, 148; and for cases see 11 Digest (Repl.) 546 et seq.

Cases referred to:

(1) *Love* v. *Baker* (1665), 1 Cas. in Ch. 67; Nels. 103; 22 E.R. 698; sub nom. *Lowe* v. *Baker*, Freem. Ch. 125, L.C.; 11 Digest (Repl.) 546, *1533*.

(2) *Wharton* v. *May* (1799), 5 Ves. 27; 31 E.R. 454, L.C.; 7 Digest (Repl.) 181, *135*.

(3) *Campbell* v. *Houlditch* (1820), unreported.

(4) *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 444; 27 E.R. 1132, L.C.; 11 Digest (Repl.) 377, *407*.

(5) *Toller* v. *Carteret* (1705), 2 Vern. 494; 1 Eq. Cas. Abr. 134, pl. 5; 23 E.R. 916; sub nom. *Anon.*, 1 Salk. 404; 11 Digest (Repl.) 375, *395*.

(6) *Lord Arglasse* v. *Muschamp* (1682), 1 Vern. 76; 23 E.R. 322, L.C.; 11 Digest (Repl.) 378, *413*.

(7) *Fryer* v. *Bernard* (1724), 2 P. Wms. 261; 24 E.R. 722, L.C.; 11 Digest (Repl.) 370, *364*.

Motion by the defendants that an injunction granted by Shadwell, V.-C., whereby the defendants were restrained from suing in Ireland upon the bill of exchange might be dissolved.

Rolfe for the defendants.

Sir Charles Pepys and *Bagshawe* for the plaintiff.

April 15, 1834. **LORD BROUGHAM, L.C.**—This was a motion to dissolve an injunction, granted to restrain the defendants from suing in Ireland upon a bill of exchange for £1,000 accepted by the plaintiff, payable to a person of the name of Aldridge, by whom it was endorsed and passed away to Mr. Brook, a retail dealer in wines, and by him to the defendants. The ground of the injunction is that the bill was given by Lord Portarlington for money lost at play.

Messrs. Soulby are respectable wine merchants, who had previously had dealings with Mr. Brook. In 1831, Mr. Brook, having occasion for a loan of money, applied to them, and proposed to them to discount the bill in question, and Messrs. Soulby thereupon advanced him £700, Brook agreeing to take £300 worth of wine to make up the residue, and at the same giving his own acceptance for the sum so advanced. The wine never was delivered, except to the value of about £38.

Upon this part of the transaction it may be remarked, that a party obtaining the loan of money, and not merely giving a security for repayment of the sum advanced to him, but giving another security to the amount of nearly half as much more, and then taking goods and not money to that whole amount, especially when he does

not put his own name on the back of the bill, affords, prima facie, a proof of his embarrassment—of the person so raising money being put to shifts, and even of his having some knowledge, which he withholds, of the origin of the security. This ought to excite suspicion, and to cause inquiry; nor can anyone doubt that Messrs. Soulby, as prudent men, must have questioned Mr. Brook as to how he came into possession of the bill bearing Lord Portarlington's name upon it.

Although there is sufficient ground for holding that the bill was taken in circumstances which were calculated to raise suspicion, and ought to have occasioned inquiry, still there is no necessity for proving such a case, much less for showing that the defendants knew of the illegal consideration, in order to sustain the injunction. The fact of the illegality of the consideration is distinctly alleged, with the circumstances of the gambling transaction; and to this allegation, supported by the plaintiff's oath, no contradiction whatever is given in the answer; nor do the defendants, who rely on their affidavit, as the answer has been excepted to and the exceptions allowed, aver anything but their own ignorance, and their belief of their father's ignorance of the origin of the bill; and they produce no affidavit at all from Brook, a circumstance of itself nearly decisive, both that the case made by the bill is true, and that Brook was aware of the fact. Nothing else can account for his not joining in an affidavit to answer that of the plaintiff, his interest being clearly identical with Messrs. Soulby's. It is further to be observed, that the defendants show by their affidavit that they have been in correspondence with Aldridge, and yet they do not swear that they are now ignorant of the illegal consideration, or of Aldridge keeping a gaming-house, but only that they knew it not in the year 1831, when they took the bill.

The case, therefore, is reduced to this. An illegal consideration distinctly stated, and not denied, with several circumstances leading to the belief, that the defendants now know such to have been the origin of the bill; and several circumstances also showing that it was taken by their late partner under suspicion, and yet without inquiry. It is, then, impossible to doubt that the injunction was well granted, and the whole question would be free from difficulty but for one peculiarity in the case, the action is brought in Ireland, and the interposition of this court is sought to stop proceedings there. That this is an unusual proceeding must be admitted, but I do not see any ground for questioning the competency of it.

Soon after the Restoration, and when this like every other branch of the court's jurisdiction was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of Chancellors, the Nottinghams and Macclesfields, the parents of equity, the point received a good deal of consideration in a case which came before LORD CLARENDON, and which is reported shortly in FREEMAN'S REPORTS, and somewhat more fully in CASES IN CHANCERY under the name of *Love* v. *Baker* (1). In *Love* v. *Baker* (1) it appears, that one only of several parties who had begun proceedings in the Court of Leghorn was resident within the jurisdiction here, and the court allowed the subpœna to be served on him, and that this should be good service on the rest. So far there seems to have been very little scruple in extending the jurisdiction. LORD CLARENDON refused the injunction to restrain those proceedings at Leghorn, after advising with the other judges; but the report adds: "sed quære, for all the Bar was of another opinion;" and it is said that, when the argument against issuing it was used, that this court had no authority to bind a foreign court, the answer was given, that the injunction was not directed to the foreign court but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might apply to a court within this country, which no order of this court ever affect to bind, our orders being only pointed at the parties to restrain them from proceeding.

Accordingly *Love* v. *Baker* (1) has not been recognised or followed in later times. Two instances are mentioned in MR. HARGRAVE'S collection of the jurisdiction being recognised; and in *Wharton* v. *May* (2) (5 Ves. at p. 71) which underwent so much discussion, part of the decree was to restrain the defendants from entering

up any judgment, or carrying on any action, in what is called "the Court of Great Session in Scotland," meaning of course the Court of Session. I have directed a search to be made for precedents in case the jurisdiction had been exercised in any instances which have not been reported; and one has been found directly in point. It is *Campbell* v. *Houlditch* (3) in 1820, where LORD ELDON ordered an injunction to restrain the defendant from further proceeding in an action which he had commenced before the Court of Session in Scotland. From the note which his Lordship himself wrote upon the petition, requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore, is of very high authority.

In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad—if, for instance, as in *Penn* v. *Lord Baltimore* (4) it can decree the performance of an agreement touching the boundary of a province in North America; or, as in *Toller* v. *Carteret* (5), can foreclose a mortgage in the Isle of Sark, one of the channel islands—in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act of pais, or the instituting or prosecution of an action in a foreign court.

It is upon these grounds, I must add, and these precedents, that I choose to rest the jurisdiction, and not upon certain others of a very doubtful nature, such as the power assumed in 1682, in *Lord Arglasse* v. *Muschamp* (6) and again by LORD MACCLESFIELD in 1724 in *Fryer* v *Bernard* (7) of granting a sequestration against the estates of a defendant situated in Ireland. The reasons given by that great judge in the latter case plainly show that he went upon a ground which would now be untenable, viz., what he terms the superintendant power of the courts in this country over those in Ireland, and, indeed, he supports his order by expressly referring to the right then claimed by the King's Bench in England to reverse the judgments of the King's Bench in Ireland. The pretension, however, has long ago been abandoned.

As to the argument that the courts of equity in Ireland can, if applied to, restrain the action, the same consideration would prevent an injunction from ever issuing to stay proceedings in this country; for it might be said that the Court of Exchequer has the power of restraining, and, therefore, there needs no interposition of the Court of Chancery. It suffices to say that the court in which the action is brought is a court of common law, and has no jurisdiction as such to stop the proceeding upon the ground now set forth.

I am, therefore, of opinion, that this injunction was well issued, and that it must be continued, and that this motion must be refused with costs.

Motion refused.

SHERRATT *v.* BENTLEY

[Rolls Court (Sir John Leach, M.R.), November 22, December 2, 21, 1833]

[Lord Chancellor's Court (Lord Brougham, L.C.), November 5, 6, 7, 1834]

[Reported 2 My. & K. 149; 39 E.R. 901]

Will—Construction—Inconsistent gifts—Prior gift revoked by subsequent gift.

Per Lord Brougham, L.C.: The great weight of authority, both of Lord Coke and of the modern decisions, is in favour of regarding a subsequent gift in a will as revoking a prior gift to which it is repugnant and not rendering the will void for uncertainty.

Will—Construction—General intention of testator clear—Rejection of inconsistent terms.

Per Sir John Leach, M.R.: If the general intention of the testator can be collected from the will as a whole, particular terms in the will which are inconsistent with that intention may be rejected as having been introduced by mistake or ignorance on the part of the testator as to the force of the words used.

Notes. Considered: *Shea* v. *Boschetti* (1854), 18 Beav. 321; *Re Brown's Trust* (1873), L.R. 16 Eq. 239; *Re Bagshaw's Trusts* (1877), 46 L.J.Ch. 567; *In the Estate of Lupton*, [1905] P. 321, *Re Alexander's Will Trusts*, [1948] 2 All E.R. 111. Referred to: *Hare* v. *Westropp* (1861), 4 L.T. 578; *Gravenor* v. *Watkins* (1871), L.R. 6 C.P. 500; *Re Stringer's Estate, Shaw* v. *Jones-Ford* (1877), 6 Ch.D. 1.

As to the construction of inconsistent gifts and inconsistent phrases in a will, see 39 Halsbury's Laws (3rd Edn.) 980, 981, 990; and for cases see 44 Digest 600–602, 606–609.

Cases referred to:

(1) *Sims* v. *Doughty* (1800), 5 Ves, 243; 31 E.R. 567; 44 Digest 601, *4272*.

(2) *Constantine* v. *Constantine* (1801), 6 Ves. 100; 31 E.R. 958; 44 Digest 607, *4339*.

(3) *Mohun* v. *Mohun* (1818), 1 Swan. 201; 1 Wils. Ch. 151; 36 E.R. 357; 44 Digest 611, *4378*.

(4) *Ulrich* v. *Litchfield* (1742), 2 Atk. 372; 26 E.R. 625; sub nom. *Francis* v. *Dichfield*, 2 Coop. temp. Cott. 531, L.C.; 44 Digest 632, *4642*.

(5) *Paramour* v. *Yardley* (1579), 2 Plowd. 539; 75 E.R. 794; 44 Digest 606, *4335*.

(6) *Ridout* v. *Pain* (1747), 3 Atk. 486; 1 Ves. Sen. 10; 26 E.R. 1080, L.C.; 44 Digest 608, *4354*.

(7) *Wykham* v. *Wykham* (1811), 18 Ves. 395; 34 E.R. 366, L.C.; 40 Digest (Repl.) 641, *1335*.

(8) *Coryton* v. *Helyar* (1745), 2 Cox, Eq. Cas. 340; 30 E.R. 156; Digest Supp.

(9) *Doe d. Leicester* v. *Biggs* (1809), 2 Taunt. 109; 127 E.R. 1017; 44 Digest 607, *4340*.

Also referred to in argument:

Boon v. *Cornforth* (1751), 2 Ves. Sen. 277; 28 E.R. 179, L.C.; 44 Digest 600, *4253*.

Doe d. Cotton v. *Stenlake* (1810), 12 East, 515.

Smith v. *Pybus* (1804), 9 Ves. 566; 32 E.R. 722; 44 Digest 600, *4258*.

Appeal to Lord Brougham, L.C., from a decision of the Master of the Rolls on a bill raising questions regarding the construction of a will.

By the will of William Harrison:

"First, I direct the payment of all my just debts, funeral expenses, and the charges of proving this my will, and also the legacy of my sister, Sarah Stonier, for her life, and afterwards to her son John, under my late father's

will, when the same shall become due and payable. Also I give and bequeath unto my executors hereinafter named the sum of £400, upon trust that they, or the survivor of them, their executors, administrators, or assigns, do and shall put and place the same out to interest on government or such other security or securities as they shall think proper, and do and shall pay and apply the interest, dividends, and produce of the said sum of £400 to Henrietta Slater, daughter of Ann Robotham, for and during the term of her natural life; and from and after her decease, then I give and divide the said sum of £400 to and among all and every of the lawful child or children of the said Henrietta Slater, share and share alike, when and at such time as such child or children shall severally attain the age of twenty-one years, and in case any of them shall die before his or her legacy shall become due and payable, leaving lawful issue, such issue to take and be entitled to their parents' part or share. But in case the said Henrietta Slater shall depart this life without leaving lawful issue, then I give, devise, and bequeath the said sum of £400 unto my loving wife Margaret Harrison, to dispose of the same in what way and in such manner as she may think proper. I give, devise, and bequeath unto my said wife Margaret Harrison the messuage or tenement situate at Doveridge, in the said county of Derby, with the hereditaments and appurtenances thereunto belonging, which I lately purchased of Mr. Joseph Sadler, and all other my real estates whatsoever and wheresoever, and also all my household goods, furniture, implements of household, the stock upon my farm, as well quick as dead, and also my ready money, moneys out upon securities, and all other my personal estates whatsoever and wheresoever, and of what nature or kind soever, to hold to my said wife, her heirs, executors, administrators, and assigns for ever. I further order and direct that none of the legatees, as before mentioned, shall be entitled unto the whole or any part of his, her, or their legacy or bequests so bequeathed, until the full term and end of twelve months after my said wife Margaret Harrison's decease, and in case my said wife shall happen to die in my lifetime, and the before-mentioned devises and bequests to her thereby lapse, I do give, devise, and bequeath the estate and effects, as well real as personal, comprised therein, to my brother-in-law William Sherratt, his heirs, executors, administrators, and assigns, upon trust that the said William Sherratt, his heirs, executors, administrators, and assigns, do and shall stand and be seised and possessed thereof respectively, to the use of such person or persons, and for such estate and estates, intents and purposes, and in such manner and form as my said wife shall in her lifetime, by any writing under her hand, direct or appoint the same. I hereby further give unto my sister Ann Smith the interest of £250, and at her decease the said principal or sum of £250 to be equally divided among her children, share and share alike. I give and bequeath unto my brother Thomas Harrison the interest of £200, and at his decease the said principal or sum of £200 to be equally divided among his children, share and share alike. I give unto my sister Coxon's children, viz., William Coxon, Michael Coxon, and Eliza Wagstaff, the sum of £50 each. I give and bequeath unto Elizabeth Sherratt, daughter of William and Hannah Sherratt, the sum of £600, and provided she dies leaving no lawful issue, then I give the said sum of £600 unto the whole of her brothers and sisters, excepting John Sherratt, share and share alike. I also further give, devise, and bequeath unto William Allen, junr., of the Windy Bank, and the whole of my brother-in-law, William Sherratt's, children, the rest, residue, and remainder of my real and personal estates, of what kind and sort soever and wheresoever, to be equally divided among them, share and share alike, at the decease of my said wife Margaret Harrison."

The will contained the usual clauses authorising the executors to reimburse

themselves their reasonable costs and charges, and declaring that they should severally be answerable for their own wilful neglect or default only, and it concluded by appointing the testator's wife, Margaret Harrison, and his brother-in-law, William Sherratt, his executrix and executor.

After the death of the testator, his widow, Margaret Harrison married the defendant Bentley, who survived her, and, upon her decease, became entitled, by virtue of an appointment made in execution of a power reserved to her on her second marriage, to whatever interest she took under the will of Thomas Harrison.

The bill was filed for the purpose of obtaining the opinion of the court upon the construction of the will, and the material question was whether under the will, Margaret Harrison took the real and personal estate of the testator absolutely, or for life only, or whether, as was insisted on behalf of the testator's heir-at-law and next of kin, the will, or the greater part of it, was void for uncertainty.

Pemberton and *Temple* for the surviving executor.

Wright for the heir-at-law, contended, first, that the will was void for uncertainty; and, secondly, that, if the court did not arrive at that conclusion, the clause which cut down the absolute interest given to the wife in the prior part of the will to an estate for life must be considered as operative, upon the principle that, where there was a repugnance between two clauses in a will, the latter clause would prevail over the former.

Dixon for one of the next of kin: The rule that the latter part of a will shall prevail over the former is applicable only to cases where the provisions in the prior and subsequent parts of the will are plainly inconsistent. Thus in *Sims* v. *Doughty* (1), LORD ALVANLEY says (5 Ves. at p. 247):

> "If two parts of a will are totally irreconcilable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention. The court is in a dilemma, and cannot act at all, unless they do that."

The same learned judge in *Constantine* v. *Constantine* (2) adheres to the opinion he had given on this point in *Sims* v. *Doughty* (1), and further lays down the principle that where it is wholly doubtful in what manner a testator's meaning is to take effect, the will must be declared void for uncertainty. The present case falls within this principle, since it is impossible to say how the provisions of this will can be carried into execution. In *Mohun* v. *Mohun* (3), where the testator made a general bequest to all his grandchildren in one part of the will, and to his grandchildren and nieces in another, the will was declared void for uncertainty, and SIR THOMAS PLUMER observed (1 Swan. at p. 203):

> "The court could not insert or transpose words for the purpose of giving a meaning to instruments which had none."

In the present case it is sought to transpose not merely words, but whole clauses, in order to give effect to an instrument which is, upon the face of it, unintelligible.

Bickersteth and *Jacob* for parties interested in the dispositions made by the testator in the latter part of his will.

Tinney and *G. Richards* for the defendant Bentley.

Treslove for the defendant Slater (legatee of the £400).

SIR JOHN LEACH, M.R. In this most inaccurate will it is impossible to give effect to every expression used by the testator, several of those expressions being necessarily inconsistent with each other. There are, however, two principles of construction upon which it appears to me that a court may come to a conclusion without the necessity, which, if possible, is always to be avoided, of declaring the will void for uncertainty. First, if the general intention of the testator can be collected from the whole will, particular terms used which are inconsistent with that intention may be rejected as introduced by mistake or ignorance on the part of the testator as to the force of the words used; secondly, where the latter part

of the will is inconsistent with a prior part, the latter part of the will must prevail.

The testator begins his will by directing that his just debts, and a legacy given to his sister by his father's will, should be paid. He then gives a sum of £400 to Henrietta Slater for her life and after her death to her lawful children when they shall severally attain the age of twenty-one years, and in case Henrietta Slater should die without leaving lawful issue, he gives the same sum of £400 to his wife Margaret Harrison, to dispose of the same as she shall think proper. He proceeds to give the whole of his real and personal estate whatsoever and wheresoever and of what nature or kind soever unto his wife, her heirs, executors, administrators, and assigns for ever, and then directs that the legatees before mentioned, by whom must be intended Henrietta Slater and her children, shall not be entitled to the whole or any part of the legacies until the full term of twelve months after the death of his wife. The will, thus far, therefore, is not altogether consistent. It cannot be consistent that the wife, her heirs, executors, administrators and assigns, shall take the whole real and personal estate, and that twelve months after her death the legatees shall take this sum of £400 from the same property. The will then provides that, if the wife shall happen to die in her husband's lifetime and the before mentioned devises and bequests to her thereby lapse, the estate and effects of the testator, as well real as personal, shall go to his brother-in-law, William Sherratt, his heirs, executors, administrators, and assigns, upon trust for such persons and for such estates and interests as the testator's wife in her lifetime, by any writing under her hand, shall direct. The testator then further gives, devises, and bequeaths unto certain persons therein described the rest, residue, and remainder of his real and personal estate of what kind and sort soever and wheresover to be equally divided among them, share and share alike, after the decease of his said wife.

The wife having survived the testator, the gift to her in case she died before him is now out of the question, except in so far as it may be used to evidence the intention of the testator. It is argued that the subsequent pecuniary legacies, and the gift of the rest and residue of the testator's real and personal estate after the wife's decease are to be understood as applying only to the case of the wife dying in the lifetime of the husband and making no appointment, and that the construction is to be the same as if these latter provisions had been prefaced by such a declaration. But it must be observed, that if the court could in any case go to such a length, it would not be warranted in so doing in the present instance, because the gifts are to take effect immediately upon the wife's decease and not upon the decease of the wife in the event of her surviving her husband. Although the terms of the first gift to the wife would give her the whole real and personal estate, it appears to me that it is to be intended that the testator did not understand the force of the words used; that his general intention was to give to the wife the full enjoyment of all his property during her life, and to give it over to the persons named in the latter part of his will after her decease. To give effect to that general intention, I reject the words "heirs, executors, administrators, and assigns for ever," as used by the testator without full knowledge of their force; and I call in aid the second rule to which I have referred, that, if there be doubts as to the general intention, the latter part of a will shall prevail against inconsistent expressions in the prior part of it.

The defendant Bentley appealed.

Tinney and *Richards* for the appellant.
Rolfe and *Jacob* for the devisees over.
Dixon for the next of kin.
Wright for the heir-at-law.

Nov. 7, 1834. **LORD BROUGHAM, L.C.**—The question which immediately presents itself is this. Could the testator, who thus explicitly gives six legacies amounting to £1,200, describing in detail how they shall vest, some absolutely

and some for life, and in one case excluding a particular individual (J. Sherratt), from the remainder expectant upon the life interest first given, and then gives the whole residue of his estate real as well as personal in the most express terms to a particular class of persons, have intended, by the devise in the first part of the will, to give all his estates real and personal to his wife absolutely? The same thing is given twice, and to different persons, and the two gifts would be quite inconsistent and repugnant, if the words which close the second gift, "after the decease of Margaret Harrison," were rejected. Such at least is the plain and obvious construction of the concluding series of bequests, although it is argued that, but for the words last cited, the whole may be brought under the clause providing for a lapse, and may be read as provisions applicable to the event of the wife predeceasing the testator without executing the singular power of appointment given to prevent a lapse. I think that this is a very forced interpretation. Nothing can be less natural than the meaning imposed upon the word "further," in order to serve the purpose of this argument. It is supposed that by this word the testator meant "in pursuance of this last-mentioned design," or "for default of such appointment," whereas nothing is more ordinary than the use of the word very much in the sense of a connecting particle, a mark of continuing, or rather additional purpose or intention; and the plain meaning of it as here employed is "in the next place," or "moreover," or "to proceed."

It appears clear to me upon the whole that, if this series of bequests, including the gift of the residue, had stood alone without the last words "after Margaret Harrison's death," the sound construction would have been to hold the second clause a revocation of the first, to which it would plainly have been repugnant, as a gift to A. of the same thing which had before been given to B.; and thus, after giving the several legatees their legacies, the residue would have gone to the residuary legatees, and the wife have been excluded altogether. The rule has often been cited, though very seldom made the ground of judicial determination, which requires us to give effect to the last of two repugnant clauses in a will, though in a deed the first shall prevail. It is, indeed, as old as the time of LORD COKE, who states it in the FIRST INSTITUTE (Co. Litt. 112 b); and it is curious to observe how he deduces it from the text. LITTLETON (s. 168) simply says

> "that if a man at divers times makes divers testaments and divers devises, &c., the last devise and will shall stand."

His learned and subtle commentator educes from the "&c." this further meaning:

> "Here, by '&c.,' is to be understood also that in one will where there be divers devises of one thing, the last devise taketh place; cum duo inter se pugnantia reperiuntur testamento, ultimum ratum est."

Subsequent authority has, though by no means uniformly, adopted this principle. Some have held that both of the repugnant gifts are void, and MR. BUTLER, in his note to Co. Litt. 112 b, n. 1, says that the better opinion is that each devisee takes a moiety. I think, however, that the weight of authority is the other way, and I feel bound to say that the law is otherwise, and that LORD COKE'S doctrine is the sound one. I do so in deference to the weight of authority, and not to the reason of the rule. For, besides the inconvenience of so severing the parts of one instrument as to set the latter against the former instead of construing the whole together (which would lead either to giving effect to both or to neither), the refinement seems sufficiently puerile which introduces this rule of construction in the case of wills, merely because of the maxim voluntas est ambulatoria usque ad mortem, whereas ample effect would be given to the principle if the whole will were considered as one act instead of being separated into parts, an earlier and a later. Besides, there is manifest inconsistency in this doctrine, for, if the last expression of all is to prevail wherever the will is executed by signing and publication, necessarily the last act of all, the latest expression of intention is the execution, and this refers to the earlier as well as to the later clauses, and recalls

them into existence, if they had been destroyed by those later clauses. Such appears to be the reasonable view of the subject, and it would lead either to the opinion of those who have held that both clauses are destroyed, or to that which considers both devisees to take equally, on the sounder principle of giving effect as far as possible to the whole instrument. The weight of authority, however, is against this opinion.

Ulrich v. *Litchfield* (4) is reported in a very slovenly way, but it appears that LORD HARDWICKE, so far as his opinion can be gathered from it, inclined to the rule laid down by LORD COKE, and dissented from the opinion of PLOWDEN and from *Paramour* v. *Yardley* (5). But in *Ridout* v. *Pain* (6), which was decided five years afterwards, LORD HARDWICKE puts the case of a devise to A. and his heirs of a farm in Dale, and in a subsequent part of the will a devise of the same to B. and his heirs, and says that

> "though the old books held this to be a revocation, yet latterly it has been construed either a joint tenancy, or tenancy in common, according to the limitation."

Were it not for the opinion expressed by LORD HARDWICKE upon the import of the cases, I should have said that these decisions do not materially depart from or conflict with LORD COKE's rule, for he evidently contemplates devises irreconcilably repugnant, which, in no way of reading them, can stand together, where the authorities have held the two devisees to take jointly or in common there was no irreconcilability, repugnancy, or necessary revocation of the one by the other. I incline to think that the TOUCHSTONE takes the same view of the matter (p. 451), as the learned editor MR. PRESTON certainly does in his edition of that valuable publication. But I speak with much distrust of my own view of the subject when I find that the point struck LORD HARDWICKE in a different light.

In *Wykham* v. *Wykham* (7) LORD ELDON considers LORD HARDWICKE as having decided *Coryton* v. *Helyar* (8) (a report of which had not then been published) on what his Lordship calls the doctrine prevailing in all times as to wills, that a subsequent limitation inconsistent with a former one cuts down the former by a necessary implication. But in *Coryton* v. *Helyar* (8), LORD HARDWICKE supplied the words in the gift of a term of 99 years, "if he should so long live," so that it should seem the case was one of construction and not of revocation. I nevertheless must regard this expression of LORD ELDON as lending the sanction of his authority to the doctrine he refers to in *Wykham* v. *Wykham* (7).

LORD ALVANLEY had occasion more than once to consider this subject. In *Sims* v. *Doughty* (1) he says that where two parts of a will are perfectly irreconcilable so that they cannot be made to stand together by rejecting words in either part as inserted by plain mistake, he knows of no rule but by taking the subsequent words as an indication of a subsequent intention, and he adds: "the court is in a dilemma and cannot act at all unless they do that." Again in the last case which this learned and laborious judge decided, *Constantine* v. *Constantine* (2), he refers to the opinion just cited and says that he adheres to it, admitting, however, that where the same thing has been given to two persons in different parts of a will, doubts have been entertained whether they should not both take as joint-tenants.

But in *Doe d. Leicester* v. *Biggs* (9) the doctrine was carried further than I am aware of its having been carried in any other case. The question there arose upon the construction of repugnant words in the same clause, and it was whether a devise to A. in trust to pay into or to permit and suffer B. to receive the rents and profits was a trust or a use executed in B., and MANSFIELD, C.J., delivered the judgment of the court after time taken to consider. The court, consisting of three most eminent common lawyers besides the Chief Justice, viz., HEATH, LAWRENCE, and CHAMBRÉ JJ., held

> "the use executed in B., and expressly upon the ground of the general rule

that, if there be a repugnancy, the first words in a deed and the last in a will shall prevail."

The Chief Justice added that "for want of a better reason the court was forced to give the beneficial with the legal estate," and he prefaced his judgment by observing that "the case might be argued and considered for ever without advancing it at all in law, reason, or precedent." But these observations most probably referred to the peculiarity which marked the case of the repugnant words being parts of the self-same gift. Had the irreconcilable opposition been between different clauses separated by a considerable interval, there cannot be a doubt that the court would have applied the rule without any hesitation.

It must, then, be admitted that the great weight of authority, both of LORD COKE and of the modern decisions, is in favour of regarding a subsequent gift in a will as revoking a prior one to which it is repugnant and not rendering it all void for uncertainty. How far that repugnancy could be got rid of by presuming an intention to give each legatee an equal moiety where the very same thing is given first to one and then to another, there being no expressions excluding such intention, might be a different question. The repugnancy which existed in those other cases may be said not to arise here. If in one part of a will an estate is given to A., and afterwards the testator gives the same estate to B., adding words of exclusion, as "not to A.," the repugnance would be complete, and the rule would apply. But if the same thing be given first to A. and then to B., unless it be some indivisible chattel, as in the case which LORD HARDWICKE puts in *Ulrich* v. *Litchfield* (4), the two legatees may take together without any violence to the construction. It seems, therefore, by no means inconsistent with the rule as laid down by LORD COKE, and recognised by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that, where the same thing is given to two different persons in different parts of the same instrument, each may take a moiety though, had the second gift been in a subsequent will, it would, I apprehend, work a revocation.

It is, however, the less necessary to consider how far this joint estate may be thus implied as it is also unnecessary to consider the admissibility of the construction put by the appellant upon the latter series of bequests, supposing that series had stood alone and in opposition to the preceding gift to the wife, because words are added which appear to call for another construction altogether—a construction not revoking the preceding gift, but only cutting it down to a life estate. The residue is given absolutely to W. Allen and J. Sherratt's children, "after the decease of Margaret Harrison." Therefore, it is to be considered, first, that this is wholly incompatible with the argument of the appellant which treats all the latter bequests, including the residuary clause, as conditional upon the event of Margaret Harrison predeceasing the testator, and not executing the power, and, secondly, that the latter gift of the residue both excludes the possibility of Margaret Harrison taking an absolute interest, and assumes that she takes another interest, viz., an interest for life. The testator first gives her the fee simple immediately on his own decease. He afterwards gives that fee simple to others, not immediately on his own death, but in remainder expectant on the determination of Margaret Harrison's life. Either, therefore, he had changed his intention, and was minded to give her a life estate instead of the fee he had at first given her, or he was ignorant of the force of the words he had originally used, and those words must be rejected as having been used by mistake. The former alternative is the one to which the rule sanctioned by modern decisions, as well as by LORD COKE's opinion, leads. The latter is the inference drawn, not unfairly, from the whole instrument taken together. For if probabilities are to be weighed, it is much more likely that the testator did not well understand the force of the words he used in giving the residue to the wife, than that he was ignorant that he was giving to W. Allen and J. Sherratt's children

an interest which should only take effect after his wife's decease—the period he expressly fixes. His wife's life interest seems more than once to have been distinctly in his contemplation in the course of the will; for he declares that the legacies first given shall not take effect till a year after her death. Either supposition, however, will suffice to support the conclusion, which I adopt, that she only took a life interest. The decree must be affirmed, but without costs.

Appeal dismissed.

ATTORNEY-GENERAL *v.* IRONMONGERS' COMPANY

[ROLLS COURT (Sir John Leach, M.R.), November 12, 1833]

[LORD CHANCELLOR'S COURT (Lord Brougham, L.C.), November 18, 21, 1834]

[Reported 2 My. & K. 576; 3 L.J.Ch. 11; 39 E.R. 1064]

Charity—Cy-près doctrine—One charitable fund given to several objects—Impossibility of applying one part of fund to specified object—Exclusion of doctrine by express provision.

When a testator gives one charitable fund to several classes of objects, unless he excludes by most express provisions the application of one portion to the purpose to which the others are destined, the court may, in the event of it becoming impossible to apply that portion to the destination mentioned in the will, execute the testator's intention by applying the doctrine of cy-près.

The character of charity is impressed on the whole fund. There is good sense in presuming that, had the testator known that the object was to fail, he would have given its appropriated fund to the increase of the funds destined to the other objects of his bounty, and there is convenience in acting as he himself would have done. That is the foundation of the doctrine of cy-près.

Notes. Referred to: *Lyons Corpn.* v. *East India Co.* (1836), 1 Moo. P.C.C. 175; *Re Slevin, Slevin* v. *Hepburn*, [1891–4] All E.R. Rep. 200.

As to cy-près doctrine, see 4 HALSBURY'S LAWS (3rd Edn.) 317–325; and for cases see 8 DIGEST (Repl.) 459 et seq.

Cases referred to:

(1) *A.-G.* v. *Bishop of Chester* (1785), 1 Bro. C.C. 444; 28 E.R. 1229, L.C.; 8 Digest (Repl.) 422, *1129*.

(2) *Moggridge* v. *Thackwell* (1803), 7 Ves. 36; 32 E.R. 15, L.C.; affirmed (1807), 13 Ves. 416, H.L.; 8 Digest (Repl.) 450, *1462*.

(3) *Simon* v. *Barber* (1828), 5 Russ. 112; 38 E.R. 970; 8 Digest (Repl.) 409, *1013*.

(4) *Hayter* v. *Trego* (1830), 5 Russ. 113; 38 E.R. 970; 8 Digest (Repl.) 463, *1629*.

(5) *A.-G.* v. *Bishop of Llandaff* (1819), cited in 2 My. & K. 586; 39 E.R. 1068; 8 Digest (Repl.) 464, *1642*.

Also referred to in argument:

A.-G. v. *London Corpn.* (1790), 3 Bro. C.C. 171; 1 Ves. 243; 29 E.R. 472, L.C.; 8 Digest (Repl.) 462, *1625*.

A.-G. v. *Andrew* (1798), 3 Ves. 633; 30 E.R. 1194, L.C.; affirmed (1800), Feb. 20, H.L. (see 7 Ves, 223); 8 Digest (Repl.) 466, *1669*.

Appeal to the LORD CHANCELLOR from an order of the Master of the Rolls regarding the application of a testamentary gift.

The residuary clause of the will of Thomas Betton, which was dated in February, 1723, provided:

"I give and bequeath the rest, residue, and remainder of my estate, whatsoever and whatsoever, to the Worshipful Company or Corporation of Ironmongers of the City of London, and to their successors, making them my executors

upon this special trust and confidence in them reposed, that is to say, that they do, with all convenient speed that may be after my decease, place my estate out at interest upon good securities, positively forbidding them to diminish the capital sum by giving away any part thereof, or that the interest and profit arising be applied to any other use or uses than hereinafter mentioned and directed, namely, that they do pay one full half part of the said interest and profit of my whole estate, yearly and every year for ever, unto the redemption of British slaves in Turkey or Barbary, one full fourth part of the said interest and profit, yearly and every year for ever, unto charity schools in the city and suburbs of London, where the education is according to the church of England, in which number that in this parish is to be always included, and not giving to any one above £20 a year. And in consideration of the said Ironmongers' Company's care and pains in the execution of this my will, the other fourth part of the said interest and profit, yearly and every year for ever, to the uses following, namely, £10 a year to such minister of the church of England as they shall from time to time entertain in their aforesaid hospital for performing divine worship and other duties belonging to that holy order; the remains unto necessitated decayed freemen of the said company, their widows and children, not exceeding £10 a year to any family; but first deducting and paying quarterly out of this last-named fourth part of the interest and profit £100 a year in discharge of the annuity given to my kinswoman, Mrs. Eleanor Smith, during the term of her natural life; and also, always reserving sufficient for keeping my tomb in good repair."

It appeared by the Master's report made in pursuance of the decree upon this information, that a large fund had accumulated from the unapplied portion of the moiety of the income of the testator's estate which was, by his will, directed to be applied to the redemption of British slaves in Turkey or Barbary, few objects of the charity having been found during the last century. The Master had approved of a scheme given in by the defendants by which it was proposed that a sum of £7,000 should be set apart out of the accumulated fund for the purpose of redeeming such objects of the original charity as might still from time to time be discovered, and that the remainder of the accumulations and the future annual income should be applied to the other charitable purposes mentioned in the testator's will. A scheme submitted by the relators, and rejected by the Master, had for its object the application of the surplus income and accumulations to the purposes of education only. Objections were taken on the part of the relators to the Master's report, upon which it was agreed to take the opinion of the court, without filing exceptions. When the information came on to be heard for further directions upon the Master's report it was suggested by the Master of the Rolls that it might be a question whether this was not a case in which the Crown was entitled to dispose of the fund by sign manual, and, if the court should be of opinion that the fund ought not to be disposed of by the King's sign manual, a further question might arise whether the court had jurisdiction to apply the fund to other purposes than those expressly pointed out by the testator, and whether it might not be necessary to apply for the aid of the legislature in that respect. The cause was directed to stand over to be argued on those points.

The Attorney-General, on the part of the Crown, now stated that he had looked into the cases on this subject, and he felt that he could not successfully argue that this was a case in which the fund in question ought to be disposed of by the King's sign manual. The charitable purpose to which the fund was devoted had not wholly failed; it appeared that it still occasionally happened that British subjects were made captives on the coast of Africa, and it was impossible to say how far, by a Turkish war or otherwise, the number of persons who might become objects of the testator's charitable purpose might be increased. If a fund were not immediately applicable to a charitable purpose expressed by a testator, it did not follow

that it might not, at a future time, become applicable, and the jurisdiction of the court remained as to the administration of the fund, whether it thought proper to retain the fund until it should become applicable to the expressed object of the testator, or to apply it to purposes approximating as nearly as might be to that expressed object. In *A.-G.* v. *Bishop of Chester* (1), a legacy given towards establishing a bishop in America was held not to be void though no bishop was yet appointed, and the money was retained in court till it should be seen whether any such appointment should take place. Ultimately, the legacy became applicable to the purpose expressed by the testator, upon the appointment of a bishop of Canada, and it was applied accordingly.

Pemberton for the relators.

Wray for the Attorney-General.

Bickersteth for the defendants, submitted that the court had jurisdiction to apply the surplus to the purposes specified in the scheme approved by the Master. Those purposes were perfectly consistent with the general charitable intentions of the testator for they were the very purposes to which he had devoted the other moiety of his property, and to which it might reasonably be presumed that he would have been desirous of applying the surplus had he foreseen that the redemption of British slaves in Turkey and Barbary was an object to which he had devoted too large a portion of his bounty. The distinction was that where property was left for charity generally, or where the charitable purpose of the testator was so vaguely expressed as to be incapable of receiving any definite construction, or where the charitable purpose failed and no trustees were appointed, the property was to be disposed of by the King's sign manual, but where, in such cases, trustees were appointed, the property was to be administered cy-près by this court. In *Moggridge* v. *Thackwell* (2), LORD ELDON observed (7 Ves. at p. 83) that

> "it is very difficult to raise a solid distinction between an original gift absolutely indefinite and without qualification, and a case in which, by matter ex post facto, the gift stands before the court in consequence of that accident, as if it had been originally given indefinitely, without any means for carrying it into execution prescribed."

The result, however, of an elaborate examination of all the authorities made by that learned judge was (ibid. at p. 86), that

> "the general principle most reconcilable to the cases is, that where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the King by sign manual; but where the execution is to be by a trustee with general or some objects pointed out, there the court will take the administration of the trust."

The distinction taken by LORD ELDON in *Moggridge* v. *Thackwell* (2) had been acted upon in the recent cases of *Simon* v. *Barber* (3) and *Hayter* v. *Trego* (4).

SIR JOHN LEACH, M.R.—This testator has directed that the income of his property be applied to the uses after stated in his will and to no other use, and by his will he gives one half part of the income of his property for the redemption of British slaves in Turkey and Barbary. The altered circumstances of these countries leave at present little or no demand for this bounty of the testator, and the consideration is what is now to become of this unappropriated property. The jurisdiction of courts of equity with respect to charitable bequests is derived from their authority to carry into execution the trusts of any will or other instrument, and the court is to proceed according to the intention expressed in the will or instrument. Here the testator wills that one moiety of the income of his property shall be applied to the redemption of British slaves in Turkey or Barbary, and to no other use. If this court were to take upon itself to apply the moiety of the testator's property in question to any other use, it would not be executing the expressed intention of the testator, but would be acting in direct opposition to

that intention. I cannot, therefore, assume a jurisdiction to devote this property to any other purpose, although it is extremely fit that some beneficial use should now be made of it. It appears to me that this can only be effected by the supreme power of the legislature, and that I must refer it to the Master to approve of a scheme for the future application of this property to be submitted to the consideration of the legislature, and the Attorney-General and the parties interested in the disposition of the other half of the testator's estate are to attend the Master upon the reference as to such scheme.

The Ironmongers' Co. appealed.

Sir Edward Sugden and *Duckworth* for the appellants.
The Solicitor-General (*Rolfe*) and *Wray* for the Crown.
Sir W. Horne, *Anderton* and *Bethell* for the relators.

Nov. 21, 1834. **LORD BROUGHAM, L.C.**—The question which the appeal raises is this: Was the court entitled, upon the construction of the will, to repudiate the jurisdiction? But another view has been taken by the relators' counsel. They deny that His Honour did repudiate the jurisdiction. They say he sustained it, entertaining the question and referring it to the Master to settle a scheme for a private Act of Parliament. I cannot at all take this view of the decree. The declaration is express, that the court has no jurisdiction to apply the fund otherwise than to the redemption of British slaves, and, as there is none such to redeem, the declaration is that the fund shall have no application until a new and improbable state of things arises. It is said that this is only a suspension of the fund, but the question is (and that comes under the general argument on the construction) whether or not the will authorises the court to apply the fund to other objects than the redemption of slaves, which His Honour's declaration negatives entirely. As for the reference to the Master to approve of a scheme for an Act of Parliament, I do not profess to understand how that alters the import of the declaration. His Honour declares that at present the court has no jurisdiction, and desires a bill to be presented to Parliament for the purpose of obtaining powers, which he considers the court not now to possess. It would be hard to conceive a more complete denial of the court's jurisdiction than this course. The meaning of it is plain, that, as the law now stands, the court has no jurisdiction to apply the fund except in redemption of slaves, and will never have any such jurisdiction until the law is altered. There is no foundation for that proposition, nor has this court anything to do with directing Bills to be brought in for the purpose of extending its power to objects of bounty not named in the will or in the testator's contemplation.

We come then to the only question here raised, and that is upon the construction of the will. When a testator gives one charitable fund to three several classes of objects, unless he excludes by most express provisions the application of one portion to the purpose to which the others are destined, it is clear that the court may thus execute his intention in the event of an impossibility of applying that portion to its original destination. The character of charity is impressed on the whole fund. There is good sense in presuming that, had the testator known that one object was to fail, he would have given its appropriated fund to the increase of the funds destined to the other objects of his bounty, and there is convenience in acting as he would himself have done. This is the foundation of the doctrine of cy-près.

The unreported case, with which I have been furnished, of *A.-G.* v. *Bishop of Llandaff* (5), resembles the present in many particulars. It arose upon Lord Craven's will in 1647, which gave part of his property to endow scholarships at the two universities and the residue to redeem British captives exactly as this will does. Upon a reference to the Master it was found that there was none to redeem, and a scheme, being approved, was sanctioned by the court for using all the fund, except a moderate portion set apart in case captives should be made, and applying

the residue to increase the number and income of the scholars. Nothing can be conceived more like than that case to this, the only difference, indeed, being that there are said to be, here, words of exclusion. Let us then see if this be so.

I should have been disposed to favour the relators' argument, on which the decree must rest, had the will been that one half should be employed in redeeming captives and in no other way whatever, or that the two fourths should be employed in the other charities, and no more than these two fourths in those or any such charities. But that is far from being the case. The testator says:

> "The capital shall not be diminished by giving away any part thereof, and the interest shall not be applied to any other use or uses than those hereinafter mentioned."

The object of this general prohibition plainly is to secure the whole fund, principal and interest, to charitable uses—to forbid any alienation of the capital, and any diversion of the income to any other purposes than those which he specifies. The expression "use or uses," even literally taken, lets in all the charities specified, provided the fund be given among them, and not otherwise applied. Undoubtedly, the funds must be applied in the proportions specified; one half to one, and one fourth to each of the two other objects, and it would be a breach of trust to give part of the moiety to either of the two other purposes as long as there remained captives to redeem. But, then, it would be just as much a breach of trust without the prohibitory clause as with it. If I bequeath £100 to A., and £50 to each of two other persons, B. and C., my will is broken if my executor gives B. and C. more than £50 each, taking the excess out of A.'s £100, but it is not the more broken because I use words of superfluity, and say: "I bequeath £200 as follows, and to no other use or uses." So, here, the prohibition is merely superfluous and has no greater operation in preventing an appropriation of the fund in proportions different from those specified than if the prohibition had been entirely omitted. Expressio eorum quæ tacite insunt nihil operatur.

So, in the case of a charity, where I bequeath £100 to one object and £50 each to two other objects of bounty, my trustees violate their duty if they give less than £100 to the one and more than £50 to each of the other two, and that, whether I use words of exclusion, such as "no otherwise," "no other charities," or omit to use them. But when the one object fails, the doctrine of cy-près becomes applicable although it has no place in legacies to individuals, and the intention to which the court is to approximate will be gathered from the other gifts and from the gift itself. Should words be used which positively exclude such an approximation—as, for instance, if there be an express direction that each of the charities named shall have so much and neither more, nor less, and one shall not be extended in case the objects of another fail—then, clearly, the doctrine can have no place, but that is because the will of the testator has expressly said so, and by acting against his clear intent, the court would not be executing cy-près (as near as possible), but departing as far as possible from that intent. This cannot be said of the general words used here which are abundantly satisfied if no part of the capital is given away at all, and no part of the interest to any other than the specified purposes. Nor is the will at all violated by applying the undisposed and undisposable surplus of one branch to increase the objects of the other branches of the same charity.

The decree must, therefore, be altered as regards the declaration and the reference to approve of a scheme to be submitted to Parliament. Instead of that, the declaration is, that the court has jurisdiction to apply the surplus income of the moiety of the charity property in question in the cause and the accumulations thereof as near as may be to the intentions of the testator, having regard to the bequest touching British captives and also to the other charitable bequests in the will, and refer it back to the Master to approve a proper scheme for such application.

Order accordingly.

A

DAVIS *v.* RUSSELL

[Court of Common Pleas (Best, C.J., Park, Burrough and Gaselee, JJ.), February 9, 1829]

[Reported 5 Bing. 354; 2 Moo. & P. 590; 7 L.J.O.S.M.C. 52; 130 E.R. 1098]

B *False Imprisonment—Questions for judge and jury—Function of jury to find facts—Question of reasonable and probable cause for judge.*

In an action for false imprisonment the question whether the defendant acted with reasonable and probable cause is one for the judge, but it is for the jury to say whether they believe the evidence for the defence which is said to establish the facts constituting the reasonable and probable cause and C believe that the defendant was acting honestly.

Arrest—Arrest without warrant—Arrest by private person—Suspicion of felony—Need to prove commission of felony—Arrest by constable—Reasonable cause to suspect commission of felony.

To justify a private person in arresting another person he must not only make out a reasonable ground of suspicion, but must also prove that a felony D has been actually committed. A constable, however, who has reasonable ground to suspect that a felony has been committed is entitled to detain the person suspected until inquiry can be made by the proper authority.

Notes. Referred to: *West* v. *Baxendale* (1850), 9 C.B. 141; *Griffin* v. *Coleman* (1859), 4 H. & N. 256; *Hailes* v. *Marks* (1861), 7 H. & N. 56; *Diamond* v. *Minter*, E [1941] 1 All E.R. 390.

As to arrest without warrant, see 10 Halsbury's Laws (3rd Edn.) 342–354, and as to false imprisonment see ibid., vol. 38, pp. 764–770. For cases see 14 Digest (Repl.) 194 et seq.; 46 Digest (Repl.) 430 et seq.

Cases referred to:

(1) *Beckwith* v. *Philby* (1827), 6 B. & C. 635; 9 Dow. & Ry. K.B. 487; 4 Dow. F & Ry. M.C. 394; 5 L.J.O.S.M.C. 132; 108 E.R. 585; 14 Digest (Repl.) 195, *1601*.

(2) *Samuel* v. *Payne* (1780), 1 Doug. K.B. 359; 99 E.R. 230; 14 Digest (Repl.) 196, *1612*.

(3) *Hill* v. *Yates* (1818), 8 Taunt. 182; 2 Moore, C.P. 80; 129 E.R. 353; 46 Digest (Repl.) 443, *855*.

G Also referred to in argument:

Mure v. *Kaye* (1811), 4 Taunt. 34; 128 E.R. 239; 14 Digest (Repl.) 196, *1611*.

Sutton v. *Johnstone* (1785), 1 Term Rep. 493; 99 E.R. 1215; on appeal sub nom. *Johnstone* v. *Sutton* (1786), 1 Term. Rep. 510, Exch.; on appeal sub nom. *Sutton* v. *Johnstone* (1787), 1 Term Rep. 784; 1 Bro. Parl. Cas. 76, H.L.; 33 Digest (Repl.) 393, *60*.

H *Reynolds* v. *Kennedy* (1748), 1 Wils. 232; 95 E.R. 591; 33 Digest (Repl.) 417, *356*.

Tindal v. *Brown* (1786), 1 Term Rep. 167; 99 E.R. 1033; affirmed (1787), 2 Term Rep. 186, Exch.; 6 Digest (Repl.) 245, *1747*.

Swinton v. *Molloy* (1783), cited in 1 Term Rep. at p. 537; 99 E.R. 1239; 39 Digest (Repl.) 397, *177*.

I *Wright* v. *Court* (1825), 4 B. & C. 596; 6 Dow. & Ry. K.B. 623; 3 Dow. & Ry. M.C. 299; 4 L.J.O.S.K.B. 17; 107 E.R. 1182; 14 Digest (Repl.) 191, *1562*.

Ledwith v. *Catchpole* (1783), Cald. Mag. Cas. 291; 14 Digest (Repl.) 195, *1598*.

Rule Nisi obtained by the plaintiff for the new trial of an action for assault and false imprisonment.

At the trial before Gaselee, J., at Gloucestershire Assizes, the plaintiff, an elderly female, proved that on Jan. 27, 1827, between ten and eleven at night, the defendant, a constable, without producing any warrant, took her from her bed at her

lodgings in Cheltenham and conveyed her to prison, where she remained till the next morning when she was carried before Mr. Capper, a magistrate upon a charge of theft which was ultimately dismissed. The defence was that in the month of November preceding, a robbery had been committed in the house of Ann Hamerton, a milliner at Cheltenham with whom the plaintiff at that time lodged and that on that occasion Miss Hamerton's trunk had been broken open and a £10 note and many other articles had been taken from it. The plaintiff shortly afterwards went to reside in the house from which the defendants took her. On Jan. 27 Miss Hamerton showed the defendant, Russell, the superintendent of the Cheltenham police, a letter addressed to the plaintiff at Miss Hamerton's house and bearing the Cheltenham postmark. Miss Hamerton said that, on looking in at the ends of the letter, she believed it to contain some allusion to the robbery and so induced Russell to break it open. The letter, which was anonymous, purported to come from an accomplice in the robbery residing in London, and demanded money at the hands of the plaintiff as a joint perpetrator of the offence. Miss Hamerton also told Russell that four days after the robbery a letter had arrived for the plaintiff in the same handwriting with the London postmark, and that the plaintiff had refused to show it to her. She then expressed her suspicions of the plaintiff being concerned in the robbery, and said she thought Russell ought to take her into custody. After reading the above letter, Russell, assisted by the other defendants, went to the plaintiff's house, the door of which was opened to him when he knocked.

The learned judge said that, if the constable had a complaint made to him under such circumstances as to induce him to believe it true, he had a right to take into custody the party complained against, provided the facts were such as to warrant an apprehension, and he desired the jury to consider whether the statement they had heard satisfied them, looking at the letter and the other facts, that the defendant had reasonable ground to suppose the plaintiff implicated in the felony with which she had been charged, and whether, standing in his place, they would have acted as he had done. A verdict was found for the defendant.

Serjeant Russell for the plaintiff, moved for a new trial, on the grounds (i) that the question whether or not the defendant had reasonable and probable cause for apprehending the plaintiff was a question of law which ought not to have been left to the jury, and (ii) that the jury ought to have been directed to consider whether, supposing the arrest justifiable, the circumstances of the case warranted the degree of coercion resorted to by the defendants. A rule nisi was granted.

Serjeant Ludlow for the defendant, showing cause against the rule: The learned judge's direction to the jury was in substance correct. By desiring the jury in effect to find whether the constable acted on a belief of the representation made to him by Miss Hamerton, the learned judge impliedly decided that that representation, if believed, formed a probable ground for the apprehension of the plaintiff. The direction was in substance conformable to that in *Beckwith* v. *Philby* (1), a case in which the law on the subject was well considered. As to the alleged omission to leave to the consideration of the jury the question, whether or not the defendant had employed the precise measure of coercion necessary for his purpose, such a question might have arisen if the plaintiff had been loaded with fetters, but, short of apprehension, no precaution would have been adequate to ensure her forthcomingness except the placing a guard round her house all night, a step totally unfitted to the occasion and probably not in the constable's power.

Serjeant Russell, supporting the rule, relied on the authorities mentioned on p. 625 ante as having been referred to in argument.

BEST, C.J.—This was an action for false imprisonment. The defendant, a constable, gave in evidence circumstances to show that in the execution of his duty he had a probable cause for apprehending and imprisoning the plaintiff. The jury having found a verdict in his favour, a new trial has been moved for on the ground that the jury were misdirected (i) in the circumstance that they were

left to consider whether the defendant had probable cause for arresting the plaintiff, and (ii), in the circumstance that they were not requested to consider whether or not the defendant had resorted to a degree of coercion unnecessary for the occasion.

The question of probable cause is, no doubt, a question for the judge, but the jury must first find the facts which are supposed to constitute the probable cause, and it is sometimes difficult to draw the line between the law and the fact. It has been argued in effect that, if the jury had intimated their belief of the facts, the plaintiff ought to have been nonsuited. But on these facts the judge could not properly have directed a nonsuit. It was necessary to leave to the jury whether, admitting the facts, the defendant acted honestly, for if he did not—if he acted without giving credit to the statement made to him by Hamerton—the verdict ought to have been against him and with heavy damages. But the learned judge tells them:

> "If you believe the facts, and thence infer that the defendant was acting honestly, you must find for him."

This was saying in substance that, in his opinion, the facts, if believed, furnished a probable cause for the defendant's conduct. If the direction to the jury were, on the whole, substantially right, a mere inaccuracy of expression will not render it necessary to have recourse to a new trial. This direction was substantially right. It was for the jury to say whether they believed the facts, and, if they believed them, whether the defendant were acting honestly, in other words, whether the jury, under the same circumstances, would have done as he did.

It has been further contended that without a warrant from a magistrate a constable has no right to apprehend upon suspicion unless there be danger of escape if he forbear to apprehend. The law, however, is not so, for though a private individual cannot arrest upon bare suspicion a constable may. This has been decided in so many cases that it is unnecessary to refer to them, and, unless the law were so, there would be no security for person or property. Had the constable in this case reason to suspect that a felony had been committed? Hamerton told him that the plaintiff had robbed her and that her suspicions were confirmed by an anonymous letter which had fallen into her hands. The constable had no means of knowing that this letter had been written by Hamerton herself, and, if he believed it genuine, it afforded ample ground for suspicion. That has all been left to the jury, and they have come to that conclusion. A passage has been referred to in 4 Co. INST. 177, to show that a constable cannot arrest upon suspicion, but the words are, "bare surmise," which is a very different thing.

> "One or more justices of peace cannot make a warrant upon a bare surmise to break any man's house to search for a felon, or for stolen goods; for they, being created by Act of Parliament, have no such authority granted to them by any Act of Parliament; and it should be full of inconvenience that it should be in the power of any justice of peace, being a judge of record, upon a bare suggestion to break the house of any person, of what state, quality, or degree soever, and at what time soever, either in the day or night, upon such surmises."

The authority of HALE is against the position contended for.

> "A constable may, ex officio, arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice of peace. . . . If a felony be committed, and A. acquaints him that B. did it, the constable may take him and imprison him, at least till he can bring him before some justice of peace. But if there be only an affray, and not in the view of the constable, it hath been held he cannot arrest him without a warrant from the justice; but it seems he may, to bring the offender before a justice, though not compellable."

Then, *Samuel* v. *Payne* (2) is an express decision that a constable may justify an arrest upon reasonable suspicion.

It has further been insisted that, at all events, an undue degree of coercion was resorted to—that the plaintiff ought not to have been apprehended at night or compelled to go from her home. But what was the constable to do? Was he to go home, or to watch the plaintiff's house all night? Hamerton had required his assistance, and if the plaintiff had escaped he would have been responsible. A person in his situation has little discretion left to him. If a charge be made he must act, and the defendant would not have been justified if, after the information he had received, he had not gone that night to the plaintiff's house. He used no unnecessary violence; he did not break the door; and he was bound to make the arrest.

The case has been ably argued, and is of great importance. It is important that constables should not abuse their authority, and equally so that they should not be discouraged in the due discharge of their duty. We cannot uphold the notion that a constable is not permitted to go into a house at night to apprehend a person suspected. Severity, indeed, is not necessary, and parties charged should be treated according to their condition, but it is necessary that the constable should have their persons secure. The sufferings of the plaintiff in this case are indeed to be regretted, but they have been occasioned by the wickedness of Hamerton of whom the defendant was the innocent instrument, and, therefore, the rule for a new trial must be discharged.

PARK, J.—I do not impeach any of the cases that have been decided on this subject, nor had I ever a doubt that it is the province of the judge on such occasions to determine the point of law, but, as that must be compounded of the facts and as the jury must decide on them, my practice has been to say: "You are to tell me whether you believe the facts stated on the part of the defendant, and if you do, I am of opinion that they amount to a reasonable and probable cause for the step he has taken." I do not direct a nonsuit, because the fact is so closely connected with the law. The direction of the learned judge in this case is conformable to that mode of proceeding, and is substantially the same as in *Hill* v. *Yates* (3), and *Beckwith* v. *Philby* (1). In *Beckwith* v. *Philby* (1) LITTLEDALE, J., directed the jury to find a verdict for the defendants if they thought upon the whole of the evidence that the defendants had reasonable cause for suspecting the plaintiff of felony. LORD TENTERDEN said (6 B. & C. at pp. 638, 639):

> "Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury. . . . There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorised to detain the party suspected, until inquiry can be made by the proper authorities."

The direction of the learned judge in the present case was tantamount to this: "If you think the defendant acted bona fide, I am of opinion he had probable cause for the course he pursued."

It has also been objected that there was no necessity for apprehending the plaintiff at night, and a case has been put of the apprehension of a judge at his own house. But was the constable to stay in the street all night after the information he had received, or in the plaintiff's room? No. The very circumstance of the magistrate's committing the plaintiff the next day affords a presumption that the defendant was acting bona fide. The circumstance of a felony having been imputed

A to the plaintiff was a sufficient reason why the constable should apprehend an escape.

BURROUGH, J.—A constable has always reason to apprehend an escape when he receives information of this nature, and, if he did not act upon such supposition, there would be no safety for property in London. I am clearly of opinion that the B defendant might have justified this conduct in a plea stating that a felony had been committed and that he had been informed of it. What Hamerton told him, added to the letter she produced, was sufficient to raise a strong suspicion in the mind of a constable, and such a justification could not have been got rid of by denying the facts alleged. Here they were true, and, if the constable had ground to believe them, that was sufficient for him. The question is, on what grounds and C motives the constable acted at the time. He had reasonable ground to believe the charge, and it was his duty to apprehend the plaintiff. That being so, the learned judge's direction was right in substance.

GASELEE, J.—On a review of all that has been said, I do not alter the opinion I had formed at the trial. I said to the jury in substance what has been stated, but D I never meant to leave to them the legal question of probable cause, for I had *Beckwith* v. *Philby* (1) before me. I was requested to nonsuit the plaintiff, but I could not do so upon the plaintiff's case, though, in similar causes, I have occasionally done so, after hearing the defendant's case. When, however, there is any doubt as to the facts they must be found by the jury. By leaving them to the jury in this case and also the question whether the defendant acted bona E fide, I intimated, in effect, that if they were satisfied on that head, the defendant stood accused. As to the point about the probability of escape, none of the authorities cited goes the length of saying that the constable cannot detain except where he has reason to apprehend an escape.

Rule discharged.

DAVIS *v.* BANK OF ENGLAND

[Court of Common Pleas (Best, C.J., Park, Burrough and Gaselee, JJ.), November 29, 1824]

[Reported 2 Bing. 393; 9 Moore, C.P. 747; 3 L.J.O.S.C.P. 4; 130 E.R. 357]

Company—Shares—Government stock—Transfer—Forged transfer—Ownership of shares and stock remaining in original holder—Duty of company or Bank of England—Precaution against registration of forged transfer—Right of owner to dividend or interest on shares or stock wrongfully transferred.

Government stock or shares of a company cannot be transferred out of the ownership of the stock or share holder by any act of the Bank of England or of the company without the authority of the stock or share holder; and, therefore, such a holder is not divested of the ownership of his stock or shares by the operation of a forged transfer. A transfer of stock or shares is effected by an assignment by the holder and an acceptance by the transferee; the only function of the Bank of England or of the company is to see that the transfer is properly registered in their books. It is the duty of the bank or company to prevent the entry of a transfer until they are satisfied that the person who claims to be allowed to make it is in fact duly authorised to do so. It is, therefore, the bank or company and not the stock or share holder who is to suffer if, for want of inquiring, they are imposed upon and allow to be entered in their books a transfer made without proper authority. The owner of the stock or shares is entitled to the interest or dividends payable thereon (in the case of government stock it being shown that the government had provided the money required by the bank to pay the interest), unless his conduct has been such as to lead the bank or company to believe that the transfer was valid.

Company—Estoppel—Shares—Government stock—Transfer—Forged transfer—Registration—Estoppel of company or Bank of England from denying validity of transfer.

By registering the transfer of government stock or the shares of a company the Bank of England or the company are estopped from denying that the transfer was valid, even though it is shown that the transfer was obtained by a forged transfer, and, semble, they cannot refuse to pay interest or dividends to subsequent purchasers of the stock or shares.

Per Best, C.J.: You cannot look further, nor is it the practice ever to attempt to look further, than the books of the bank [or of the company] for the title of the person who proposes to transfer to you stock [or shares].

Public Policy—"Doctrine on which judges should proceed with caution"—Only applicable where action brought to do something injurious to public.

Per Best, C.J.: Public policy is a doctrine on which judges should proceed with caution, otherwise the rights of the subjects of this country would depend on their discretion. . . . Policy prevents the assertion of a civil right only in cases where the action is brought for doing something directly injurious to the public or declared to be so by positive law.

Notes. Considered: *Coles* v. *Bank of England* (1839), 10 Ad. & El. 437; *Carlisle* v. *South Eastern Rail. Co.* (1850), 1 Mac. & G. 689. Explained: *Bank of Ireland* v. *Evans' Trustees* (1855), 25 L.T.O.S. 272. Applied: *Taylor* v. *Midland Rail. Co.* (1860), 28 Beav. 287. Considered: *Barton* v. *North Staffordshire Rail. Co.*, [1886–90] All E.R. Rep. 288. Explained: *Bank of England* v. *Cutler*, [1907] 1 K.B. 889. Followed: *Welch* v. *Bank of England*, [1955] 1 All E.R. 811. Referred to: *Hume* v. *Bolland* (1826), Ry. & M. 371; *Re Marsh, Ex parte Bolland* (1828), Mont. & M. 345; *Stracy* v. *Bank of England* (1830), 6 Bing. 754; *Marsh* v. *Keating* (1834), 1 Bing. N.C. 198; *Peer* v. *Humphrey* (1835), 2 Ad. & El. 495; *Slowey* v.

A *Bank of England* (1845), 14 Sim. 475; *Johnston* v. *Renton*, *Johnston* v. *Parsey* (1870), L.R. 9 Eq. 181; *Bank of England* v. *Cutler*, [1908] 2 K.B. 208.

Cases referred to:

(1) *Bird* v. *Randall* (1762), 3 Burr. 1345; 1 Wm. Bl. 387; 97 E.R. 866; 34 Digest (Repl.) 214, *1508*.

B (2) *Hull* v. *Pickersgill* (1819), 1 Brod. & Bing. 282; 3 Moore, C.P. 612; 129 E.R. 731; 1 Digest (Repl.) 471, *1179*.

(3) *Dawkes* v. *Covencigh* (1652), Sty. 346; 82 E.R. 765; 1 Digest (Repl.) 74, *554*.

(4) *Higgins* v. *Butcher* (1606), Yelv. 89; 80 E.R. 61; sub nom. *Huggins* v. *Butcher*, 1 Brownl. 205; sub nom. *Higgins' Case*, Noy. 18; 74 E.R. 989;

C 1 Digest (Repl.) 73, *548*.

(5) *Cooper* v. *Witham* (1668), 1 Lev. 247; 1 Sid. 375; 2 Keb. 399; 83 E.R. 390; 27 Digest (Repl.) 210, *1669*.

(6) *Breton* v. *Cope* (1791), Peake, 43; 3 Digest (Repl.) 140, *89*.

(7) *Marsh* v. *Collnett* (1798), 2 Esp. 665, N.P.; 3 Digest (Repl.) 140, *90*.

(8) *Auriol* v. *Smith* (1811), 18 Ves. 198; 34 E.R. 292, L.C.; 3 Digest (Repl.)

D 140, *91*.

(9) *Battley* v. *Faulkner* (1820), 3 B. & Ald. 288; 106 E.R. 668; 32 Digest (Repl.) 386, *158*.

(10) *Short* v. *M'Carthy* (1820), 3 B. & Ald. 626; 106 E.R. 789; 32 Digest (Repl.) 402, *268*.

(11) *Brown* v. *Howard* (1820), 2 Brod. & Bing. 73; 4 Moore, C.P. 508; 129 E.R.

E 885; 32 Digest (Repl.) 394, *213*.

(12) *Harrison* v. *Harrison* (1740), 2 Atk. 121; 26 E.R. 476; sub nom. *Harrison* v. *Pryse*, Barn. Ch. 324, L.C.; 43 Digest 968, *4082*.

Action on the case for breach of duty in permitting a transfer of the plaintiff's stock without his authority and refusing to pay him the dividends thereon.

F The first count of the declaration stated that the plaintiff, Horatio Davis, was entitled to £10,000 3 per cent. consolidated annuities standing in his name in the books of the defendants, the Bank of England, and that the defendants, contrary to their duty, permitted this stock to be transferred out of the plaintiff's name without his authority, by which the plaintiff had lost the stock, and all benefits and advantages that he would have acquired if it had continued in his name. The second count stated that the plaintiff was possessed of the consolidated annuities

G mentioned in the first count and that he had authorised no transfer of his property, and yet the defendants refused to comply with a demand he had made on them to pay him the dividends due on this stock. The third and fourth counts related to a transference of £75 long annuities belonging to the plaintiff.

The cause was tried at the sittings after Trinity Term, 1821, and a second time

H at the sittings after Hilary Term, 1822, before DALLAS, C.J., when a verdict was found for the defendants. The facts were afterwards ordered by the court to be reduced into the following Case.

The plaintiff, in May, 1819, had standing in his own name in the books of the defendants, £10,000 3 per cent. consolidated bank annuities, £178 10s. per annum long annuities, and £800 navy 5 per cent. annuities, and was at that time entitled

I to and in the receipt of the dividends arising from the said stocks. In July, 1819, he received the dividends on the 3 per cent. consolidated, and on the 5 per cent. navy annuities, and in October, 1819, that upon the bank long annuities. The dividends upon 3 per cent. consuls and navy 5 per cents. being payable Jan. 5 and July 5 in every year, and those upon long annuities being payable on April 5 and Oct. 10 in every year. On Oct. 12, 1819, Messrs. Drummond, the bankers, sold out £5,000 3 per cent. consols, part of the consols then standing in the name of the plaintiff in the books of the defendants, and on Nov. 16 following, the further sum of £5,000 3 per cent. consols, then also standing in the name of the plaintiff in

the books of the defendants under and by virtue of two instruments bearing date respectively Oct. 6, 1819, and Nov. 12, 1819, purporting to be powers of attorney authorising Drummonds to sell out the two several sums of £5,000 consols, and purporting to have been executed by the plaintiff in the presence of and attested in the names of F. Davis and John Henry Davis, but the signatures to those instruments and the attestations purporting to be the signatures of F. Davis, were forged by J. H. Davis. In January, 1820, the plaintiff purchased the further sum of £100 navy 5 per cents., and on Feb. 10, 1820, Drummonds sold out £75 bank long annuities, part of the long annuities then standing in the name of the plaintiff in the books of the defendants under and by virtue of another instrument, bearing date Feb. 2, 1820, purporting likewise to be a power of attorney, authorising Drummonds to sell out the sum of £75 bank long annuities, but the signature to this instrument in the name of the plaintiff, as well as the attestation of F. Davis, was forged by J. H. Davis. The plaintiff never had any dealings with Drummonds, nor did he ever directly or indirectly authorise or empower J. H. Davis to sell any of the securities sold, nor did he afterwards receive any moneys arising from the sale of those securities knowing the same to be the produce of those sales, or either of them.

On Mar. 3, 1820, J. H. Davis was apprehended to be brought before the Lord Mayor of London for examination on a charge of forgery of certain acceptances purporting to be of Messrs. Drummond with which the Bank of England had no connection. On Mar. 5 the plaintiff, in a conversation which he had with J. H. Davis, said to him: "As you are charged with committing a forgery on a stranger, have you done anything with regard to my property?" To which J. H. Davis replied that he had taken £10,000 consols, belonging to the plaintiff, and £75, part of the £178 10s. long annuities. The plaintiff observed: "Then you have endeavoured to beggar me." This was the first occasion on which the plaintiff became acquainted with the sales of the £10,000 consols and the £75 long annuities. On April 3 J. H. Davis drew a draft addressed to Messrs. Drummond, desiring them to pay to the plaintiff the balance of his (J. H. Davis's) account in their hands. By virtue of this draft the plaintiff, on June 2, applied to Messrs. Drummond, and obtained from them £23 2s. 6d., being the balance of J. H. Davis's account with them.

On April 7, before his examination before the Lord Mayor, J. H. Davis escaped from detention and ultimately got out of the kingdom. The plaintiff neither gave information to any person respecting the forgeries or sale, nor made any claim upon the defendants in respect of the sums so sold out, until Sept. 30, 1820, when he executed two powers of attorney, bearing date Sept. 27, 1820, authorising Robert Marsden and Charles Shaw to receive the dividends due upon the £10,000 consols, and £178 10s. per annum, long annuities. In pursuance of these powers of attorney, Marsden and Shaw applied to the defendants for the purpose of receiving the dividends upon those sums, but they refused to pay the plaintiff any dividends upon the £10,000 consols, or on the £75 per annum of the long annuities.

The jury found that the plaintiff did not know of the forgeries until Mar. 5, 1820, and that he concealed them until Sept. 30, 1820, and that they had no other evidence of adoption than such concealment. If the court should be of opinion that the plaintiff was entitled to recover, a verdict was to be entered for him for such sum as the court should think fit for the value of the stock, together with the dividends which would have accrued due thereon if the stock had remained standing in the books of the defendants in the name of the plaintiff, but if the court should be of opinion that the plaintiff was not entitled to recover, the verdict was to stand.

The case was argued twice—by *Serjeant Onslow* for the plaintiff and *Serjeant Lawes* for the defendants, in Easter Term, 1824, and by *Serjeant Vaughan* for the plaintiff, and *Serjeant Taddy* for the defendants in Michaelmas Term, 1824.

On the part of the plaintiff it was contended that the bank, as agents for the public, and thence for every individual concerned in the public funds, were liable

to make good the amount of any stock which might have been lost through their own want of caution. The bank, receiving a remuneration under the Bank of England Act, 1791 [repealed Statute Law Revision Act, 1870] for the office of paying the dividends due on the public funds, were guilty of a breach of duty in refusing to pay to those who had a claim, for which breach of duty they were liable to pay damages in action on the case: COMYNS' DIGEST, Action upon the Case for Damages, A.4. It might be alleged that the plaintiff ought to have disclosed to the bank all the circumstances of the forgery, but the transaction on which the bank grounded their refusal to pay the plaintiff's dividends, namely, the unauthorised transfer by the plaintiff's brother, took place, and his right of action accrued five months before he knew of the forgery. There was no adoption by the plaintiff of his brother's act nor even an assent, for such an assent would have amounted to a felony with which there was no pretence to charge him, the jury having found there was no adoption nor assent, nor any evidence to afford a presumption thereof, except what was occasioned by the concealment from March to September.

Argument for the defendants.—There are two grounds which preclude the plaintiff from recovering the dividends in question. First, the nature of an action on the case. Second, considerations of public policy. In an action on the case, a plaintiff is not entitled to recover on any single fact he may be able to establish, but on the justice and equity of all the circumstances of his case taken together, and, if it appear that the injury of which he complains is in any way occasioned by himself, his claim is thereby defeated. Even when a complete right has accrued, that right may be divested by subsequent circumstances. As in *Bird* v. *Randall* (1), where in an action for seducing an apprentice, the court held that the master having recovered satisfaction from one party could not recover it from another. In the present case the defendant having so conducted himself as seriously to injure the bank, cannot claim at their hands the money which he permitted them to lose. The plaintiff knew on Mar. 5 of the improper transfer which had taken place, and this knowledge he concealed from the bank until the month of September following, when he asked for those dividends which he knew must have been in the meantime paid to other individuals, and the payment of which he might have prevented by an earlier communication of the knowledge he possessed on this subject. What if this were the case of a private individual? If a man knew that a forgery was about to be committed on his banker or steward, and instead of warning them, were to suffer the matter to pass without observation, and, beyond that, were afterwards to hold communication with the offender himself, and subsequently, when he had escaped, come upon the banker or steward for money which had been paid to the criminal, would he be suffered to maintain his action? If goods be stolen from a carrier, and the owner knows and assists in concealing the thief, could he recover against the carrier? or if a creditor received or aided a debtor in escaping from the sheriff, could he recover against the sheriff for the escape? An action on the case supposes wrong to have been done by the defendant, but the only wrong in the present case was committed by the plaintiff, who, by the course he has pursued, has, at all events, waved his right to the dividend in question. As to the plaintiff's not having known of the offence till some months after it was committed, his concealment of it then has a retrospective effect, and is the same as if he had known and concealed it from the beginning; just as an assent by assignees of an uncertificated bankrupt, to a trespass committed on his effects, by subsequent creditors, was holden an adoption of the trespass, though the assent was given long afterwards: *Hull* v. *Pickersgill* (2). Secondly, upon grounds of public policy the plaintiff ought not to be permitted to recover against the defendants. No man can sue on a contract which has been carried into effect in violation of law, and where a felony has been committed and the felon is known, no action arising directly or collaterally out of the felony, can be maintained till public justice has been satisfied. The public justice of this country, has, in a great degree, been entrusted to the integrity and exertions of individuals, and until

the individual has rendered the public service required at his hands, he is not in a condition to sue. The plaintiff, therefore, cannot sue unless he has performed his duty by giving to the bank the information he possessed. In *Dawkes* v. *Coveneigh* (3), ROLLE, C.J., held that the party injured could not sue a housebreaker in trespass till after conviction. In that case the action grew immediately out of the felony. The same law appears as to third persons in *Higgins* v. *Butcher* (4) (confirmed in *Cooper* v. *Witham* (5), 1 Lev. 247), in 2 HALE'S PLEAS OF THE CROWN, 76, in 2 ROLLE'S ABRIDGMENT, 557, and in BRACTON'S DE CORONA, Bk. 3, c. 3, p. 1186, from which authorities it may be collected that the private injury is merged in the public felony. The plaintiff was guilty of misprision of felony (1 HAWKIN'S PLEAS OF THE CROWN 73) and if this action could be maintained the consequences would be most pernicious to the bank since, if a party could recover in spite of his own misconduct, he would have no motive to make the necessary communications to a magistrate. The plaintiff permitted the criminal to enjoy the fruits of his crime during a space of six months, and if he could recover under such circumstances, he would be equally entitled to recover though he should have connived at the offence during a whole life.

BEST, C.J., delivered the following judgment of the court. The first question we are to decide is: Have the stocks which stood in the plaintiff's name in the books of the bank been transferred out of that name? We think that the plaintiff's property in the funds has not been transferred; that he is still the legal holder of these funds, and entitled to the dividends payable on account of them. He cannot, therefore, have a verdict on the first or third counts, and there is no occasion for us to consider what verdict is to be entered for the value of the stock which those counts state that the plaintiff has lost by an unauthorised transfer.

The 3 per cent. consolidated annuities are perpetual annuities, which have been created by Parliament in consideration of loans made to the State by the original proprietors, subject to a right of redemption in government. The long annuities were created by the same authority and for similar loans for a certain number of years. Both the consolidated annuities and the long annuities are transferable at the defendant bank. This is not a species of property that could be transferred by delivery; the assent of the owner to part with it must be expressed in writing, and it will be found that it has always been the practice to transfer by writing, and that the case requires such a mode of transfer. I take it to be clear that a transfer in writing not made by the party transferring, or some agent duly authorised, can have no effect. A forged endorsement on a bill of exchange conveys no interest in such bill. Transferable shares of the stock of any company cannot be divested out of the proprietors by any act of the company without the authority of the stockholders. The Bank of England has no more authority to affect the interest of any stockholder than the most insignificant chartered company has to dispose of the shares of any of the members of such a company. The legislature (so far from allowing any act of the bank to deprive the stockholder of his interest) has taken care to direct in what manner the interest he has in the public annuities shall be conveyed away, and to declare that no other mode of conveyance shall be legal. Under the early Loan Acts tallies were delivered to the first contractors and they were authorised to transfer their interest by endorsement on their tallies; which endorsements were directed to be registered in the books of the bank. The entry in the bank books of these endorsements were only to inform the government who were the persons to whom the dividends were payable, the right of these persons depending entirely on the endorsement on the tally. With this endorsement the bank had no more to do than they have with the endorsement on any bill which they have accepted, and yet they were as much bound to pay the dividends according to the endorsement on the tally as they are to pay their acceptance according to the endorsement on the bill accepted. These tallies are not now used, but the shares of the loan contractors and their assignees are registered in books kept at the bank.

In many, if not all, the Loan Acts the mode of transferring stock is prescribed by the following words:

> "There shall be kept in the office of the accomptant in London, books wherein transfers of stock shall be entered, which entries shall be signed by the parties making such transfers, or by their attorneys authorised by writing under their hand and seal, and attested by two witnesses; and the persons to whom such transfers are made, shall underwrite their acceptance, and no other method of transferring stock shall be good."

The assignment by the stockholder, and the acceptance by the assignees complete the transfer. The bank have no part in this transaction: they are only to see that it is properly registered in their books.

In the present case the assignment by the stockholder is wanting, the persons who made the assignment having no authority from the stockholder. The bank books should contain a perfect transfer, and I admit that even copies of these books are prima facie evidence in a court of justice that such a transfer has been duly made. This is settled by *Breton* v. *Cope* (6), *Marsh* v. *Collnett* (7), and *Auriol* v. *Smith* (8). [See now Bankers' Books Evidence Act, 1879, and 2 HALSBURY LAWS (3rd Edn.) 242-245]. In *Auriol* v. *Smith* (8), LORD ELDON, L.C., made an exception to this rule, which applies to the present case. HIS LORDSHIP says (18 Ves. at pp. 206, 207):

> "Where the question is whether a transfer purporting to be the handwriting of an individual is genuine, the books themselves must be produced."

Why? That the party supposed to have made the transfer might show that it was not his handwriting. If a stockholder is permitted to show that a transfer purporting to be made by himself is not his writing, he must be permitted to show that when a transfer is made by attorney the pretended attorney had no authority, the power under which he claimed to act being a forgery.

We are not called on to decide whether the bank, the parties who presented the forged power of attorney, or the parties who accepted the stocks under the transfer are to endure the loss. We know that funds will not be issued from the exchequer to pay the dividends on the stock in the plaintiff's name and the same stock in other persons' names. We feel that these circumstances may occasion difficulty and embarrassment to the bank. We think, however, that the bank should be subjected to such difficulty and embarrassment rather than the stockholder should suffer injustice. It is the duty of the bank to prevent the entry of a transfer until they are satisfied that the person who claims to be allowed to make it is duly authorised to do so. They may take reasonable time to make inquiries and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be. It is the bank, therefore, and not the stockholder who is to suffer if, for want of inquiring—and it does not appear that any inquiry was made in this case—they are imposed upon and allow a transfer to be entered in their books, made without a proper authority. We cannot do justice to this plaintiff unless we hold that the stocks are still his. If we say that they have been transferred and that he must take a verdict for compensation for the loss of them (as these transactions occurred four years ago), the highest sum that we can give upon this verdict will fall very short of what it will cost the plaintiff to replace his capital, and he must besides lose all the dividends that have become due since the trial, which took place nearly two years ago. In every case that can occur the stockholder (if he is to proceed for compensation) must run the risk of having his capital and income diminished by a rise in the funds between the verdict and judgment, and, if that judgment be delayed, as will frequently happen by the occurrence of any legal difficulty, he will lose the dividends that would have become due to him during that time. This case shows that time may be several years. It may be said he may prevent this by replacing the stock, but it may frequently happen that he is not in a condition to do this.

Another consequence of the stocks being considered as transferred will be most alarming to those who live at a distance from London and receive their dividends by attorney, namely, that their claim to compensation in case their stocks should be transferred without their authority may be barred by the Statute of Limitations. What has lately occurred has shown us that the forging of powers of attorney to transfer stock may be concealed for more than six years, and the cases of *Battley* v. *Faulkner* (9), *Short* v. *M'Carthy* (10), and *Brown* v. *Howard* (11), prove that the Statute of Limitations begins to run from the time of the act being done that gives occasion to the action although it was was not known to the party who suffers from it. [But see Limitation Act, 1939 (13 HALSBURY'S STATUTES (2nd Edn.) 1159), s. 26].

I can find no case in which the question whether the stock is transferred by the act of the bank has been raised. There is one in BARNADISTON'S REPORTS OF CASES IN CHANCERY, 324 (*Harrison* v. *Pryse* (12)), where a man of the name of Edward Harrison got South Sea stock which belonged to another Edward Harrison put to his account in the books of the company, and then transferred this stock to his broker to sell, which stock the broker sold. A bill was filed by the executor of Edward Harrison, the owner of the stock, against the executor of Edward Harrison who so fraudulently procured it to be put into his name, and the Chancellor said that the plaintiff should have a quantity of stock equal to that transferred bought for him or else have a satisfaction for the stock equal to what it was worth at the time it was sold out. His Lordship added that there is another and more difficult question, and that is how far the company may be liable to make satisfaction in case there are not sufficient assets left by the Harrison who improperly possessed himself of this stock. In that case it seems to be assumed that the stock had passed out of the name of the owner by the transfer under a fraudulent assumption of his name, although he never assented to that transfer, but whether it had so passed or not was not considered, and I, therefore, cannot think that case any authority against our opinion if it were correctly reported. I think, however, that that case is not correctly reported by BARNADISTON. The same case is to be found in 2 ATKINS, 121, in the name of *Harrison* v. *Harrison* (12). In this report it appears that the stock was transferred by a trustee, and, if so, the question whether a transfer unauthorised by the stockholder would alter the property in the stock could not arise, the trustee having a legal authority to transfer although he might be guilty of a breach of trust by exercising that authority. This circumstance also accounts for the doubtful manner in which LORD HARDWICKE speaks of the liability of the company to replace the stock. The question there was whether the South Sea Co. were bound to prevent a breach of trust and not whether a stockholder's name can be taken from the books without his own authority, and the company that has permitted this act not be responsible for the consequence of it.

We are not called on to decide whether those who purchase the stock transferred to them under the forged powers might require the bank to confirm that purchase to them and to pay them the dividends on such stocks, or whether their neglect to inquire into the authenticity of the power of attorney might not throw the loss on them that has been occasioned by the forgeries. But to prevent as far as we can the alarm which an argument urged on behalf of the bank is likely to excite, we will say that the bank cannot refuse to pay the dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers: "The persons of whom you bought were not legally possessed of the stocks they sold you," the answer would be that the bank, in the books which the law requires them to keep and for the keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been an object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser

should be required to look to the regularity of the transfers to all the various persons through whom such stock had passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as you can that of an estate. You cannot look further, nor is it the practice ever to attempt to look further, than the bank looks for the title of the person who proposes to transfer to you.

These stocks remaining the property of the plaintiff and his right to them not being affected by the forgeries, what is to prevent his recovering the dividends due in respect of such stocks? It appears in this case that he did not know of the forgeries until several months after they were committed. It is true that when his brother informed him that he had committed these forgeries, the plaintiff did not communicate such information either to the bank or to any magistrate until after the brother had escaped from the prison in which he was confined, and was probably out of the kingdom. The plaintiff also accepted from his brother a draft for the balance which he had in Drummond's hands. This conduct of the plaintiff might amount to a misdemeanour, the law of England, which gives to individuals the important right of prosecuting criminals, requiring all men to assist in the furtherance of such prosecutions and punishing those who conceal or compound felonies. It has been truly said that the plaintiff could in this case only seek to recover such dividends as he had required the bank to pay him, which they, having been so required, had refused to pay, and that the dividends demanded were those which became due on the long annuities on April 5, 1820, and those on the consols, which became due in the July of the same year. These dividends, it is insisted, the plaintiff is barred from recovering because the bank (the plaintiff not having given them information of the forgeries) may have paid them to other persons. We agree with the counsel for the bank that, if it had appeared that the bank had paid these dividends to persons to whom (if the plaintiff had informed them of the forgeries as he ought to have done on Mar. 5, 1820) they could have refused to pay them, he cannot recover such dividends in this action. We say in the language of LORD MANSFIELD, in *Bird* v. *Randall* (1) (3 Burr. at p. 1353):

> "Whatever will in equity and conscience according to the circumstances of the case bar the plaintiff's recovery may be given in evidence by the defendant, because the plaintiff must recover upon the justice and conscience of his own case, and on that only."

But we say that it does not appear on this case that anything was given in evidence by the defendants that did in equity and conscience bar the plaintiff. It is not enough for the defendants to say that they might have paid these dividends to other persons. To defend the action on the principle laid down by LORD MANSFIELD they must prove that they have paid them to persons to whom they could have refused to pay them had they been informed of the forgeries. No evidence of any such payment appears on the case.

It has been insisted at the Bar that upon principles of public policy we ought not to permit the plaintiff to prevail in his action. Public policy is a doctrine on which judges should proceed with caution, otherwise the rights of the subjects of this country would depend on their discretion. There are many things which most of us think against good policy, for which actions are brought. We ought not to trust ourselves with so dangerous a power as that of acting judicially on disputable policy. Can we say that indisputable policy requires that a man should lose his all for misprision of felony? Policy prevents the assertion of a civil right only in cases where the action is brought for doing something directly injurious to the public or declared to be so by positive law. Thus, if the law has forbidden the doing of an act, it has recognised the impolicy of doing it, or if it has commanded an act to be done, it has recognised the impolicy of not doing it, and the courts would not allow

an action to be maintained for doing the act prohibited or abstaining from doing the act commanded.

Therefore, if the plaintiff's action had been founded on the concealment of the forgeries, it could not have been supported, but the action is founded on the refusal of the bank to pay on demand the dividends of the plaintiff, due on stocks belonging to him. The misprision of felony of which he has been guilty forms no part of his case. If misprision of felony is to be opposed to the action, it must be on the ground that the plaintiff, having had a good cause of action on account of the bank's refusing to do their public duty by paying him his dividends, has forfeited his right to maintain such action by being guilty of misprision of felony. We know nothing of forfeitures on notions of public policy. For forfeitures we must have positive law. Misprision of felony is but a misdemeanour, and punished, not by any forfeiture, but by fine and imprisonment at the discretion of the court before which the offender is convicted. The defendant's counsel have attempted to apply to this case the rule that civil actions are merged in a felony. If the plaintiff was seeking to recover what had been obtained by means of these forgeries, either from the forger or any person who had received it from him, the defendants might protect themselves under this rule. But it has never been held that the owner cannot, before prosecution of the felon, proceed for redress against the persons through whose negligence the thief committed the felony. If goods are stolen from a carrier or innkeeper, the owner may bring his action against them without instituting any prosecution against the felon. The bank stand in the situation of the carrier and innkeeper. It has never been decided that a concealment of the felony from the carrier or innkeeper by the owner of the goods was an answer to such an action. Concealment can be no answer, except the jury were to infer from it that the owner was privy to the robbery or the defendant could show that such concealment had prevented him from recovering the goods.

This case was put to us in argument. A., knowing that B. has forged A.'s name to a dratt on his banker, sees B. come out of the banker's shop with the money obtained by the forgery, and neither arrests B. nor gives any information to the banker. Could A. recover this money again from the banker? A jury in such a case must find that A. was privy to the forgery at the time it was committed, and would, I think, infer that A. assented to it, and such finding would prevent his recovering in an action against the banker. But in the present case the jury have expressly negatived all knowledge on the part of the plaintiff until three months after the forgeries. They have also negatived assent, saying they have no evidence of assent except the concealment of what came to the plaintiff's knowledge five months after the forgeries, from which they have not inferred assent, nor can we. A verdict must, therefore, be entered for the plaintiff on the second and fourth counts, for the amount of the dividends demanded by him from the bank, and which they, contrary to their duty, refused to pay him.

Judgment for plaintiff.

On an appeal by the bank to the Court of King's Bench it was contended by their counsel, *Serjeant Bosanquet*, that it was not alleged in the declaration, nor found as a fact in the special verdict, that any money had ever been issued by the government to the bank for the purpose of paying the dividends. *Tindal* for the plaintiff, said that this point had not been made in the court below, and it must be presumed that the government had issued money to the bank for the purpose of paying the dividends.

Per Curiam. We can only decide upon the facts stated upon the record. The second and fourth counts of the declaration upon which the Court of Common Pleas have given judgment in favour of the plaintiff represent the duty of the bank to be to pay the dividends. It could not be the duty of the bank to pay the dividends until they had received them from government. There is no allegation in the declaration that the bank ever had received the dividends from the government, nor is there

any fact found by the jury to cure the want of that allegation. Without saying what would have been our decision if that fact had been alleged or found by the jury, we are of opinion, that the second and fourth counts of the declaration are not sufficient, and that the judgment must on that ground be reversed.

Appeal allowed.

DONELLAN *v.* READ

[COURT OF KING'S BENCH (Littledale, Parke and Taunton, JJ.), May 30, June 15, 1833]

[Reported 3 B. & Ad. 899; 1 L.J.K.B. 269; 110 E.R. 330]

Land—Interest in—Disposition—Need for contract to be in writing—Verbal agreement by tenant to pay increased rent in consideration of landlord's making improvement to premises.

A landlord, who had demised premises for a term of years at £50 a year, agreed with the tenant to lay out £50 in making certain improvements on the premises, and the tenant undertook to pay him an increased rent of £5 a year during the remainder of the term, several years of which were unexpired, to commence from the quarter preceding the completion of the work. The landlord completed the work. The agreement was not signed by either party, and, although the landlord completed the work, the tenant refused to pay the extra rent.

Held: the landlord was entitled to recover arrears of the £5 a year against the tenant, because the agreement was not with regard to an interest in land within s. 4 of the Statute of Frauds [now s. 40 (1) of the Law of Property Act, 1925], and, therefore, need not be in writing, nor was it, from the tenant's point of view, an advantage relating to the property, nor from the landlord's point of view, purchase of extra rent relating to the land.

Notes. Applied: *Lambert* v. *Norris* (1837), 2 M. & W. 333. Considered: *Maples* v. *Pepper* (1856), 18 C.B. 177; *Reeve* v. *Jennings*, [1910] 2 K.B. 522. Referred to: *Cherry* v. *Heming and Needham* (1849), 4 Exch. 631; *Maples* v. *Pepper* (1856), 18 C.B. 177; *Smith* v. *Neale* (1857), 2 C.B.N.S. 67; *Miles* v. *New Zealand Alford Estate Co.* (1888), 32 Ch.D. 266; *Re Savile Settled Estates, Savile* v. *Savile*, [1931] All E.R. Rep. 556; *Duke of Westminster* v. *Store Properties, Ltd.*, [1944] 1 All E.R. 118; *Re Arkwright's Settlement, Phoenix Assurance Co.* v. *Arkwright*, [1945] 1 All E.R. 404; *Associated London Properties, Ltd.* v. *Williams*, [1948] 1 All E.R. 442.

As to the nature and reservation of rent, see 23 HALSBURY'S LAWS (3rd Edn.) 536 et seq.; and for cases see 31 DIGEST (Repl.) 233 et seq.

Case referred to:

(1) *Hoby* v. *Roebuck and Palmer* (1816), 7 Taunt. 157; 2 Marsh. 433; 129 E.R. 63; 31 Digest (Repl.) 248, *3826*.

Rule Nisi to enter the verdict for the plaintiff, the landlord, in an action brought by the plaintiff to recover arrears of rent.

The defendant was tenant to the plaintiff of a house and bakehouse under a lease for twenty years, commencing from June 7, 1822, at the yearly rent of £50, payable at the usual quarter days. The tenant being desirous of some improvements in the house, proposed to the landlord in August or September, 1827, to lay out £50 on such alterations, which the landlord consented to do; and the tenant thereupon undertook to pay him an increased rent of £5 a year during the remainder of the term, to commence from the quarter preceding the completion of the work. A memorandum in writing was prepared to that effect, but the tenant for some reason refused to sign it. The alterations were completed in November, 1827,

at an expense of £55, and the tenant, after Christmas, 1827, paid the increased rent for the first quarter, but afterwards refused to pay any more than the original rent of £50. The landlord brought an action of assumpsit for the increased rent. ALDERSON, J., nonsuited the landlord on the ground that this was the purchase of a rent issuing out of the premises and, accordingly, within the provisions of s. 4 of the Statute of Frauds [now s. 40 (1) of the Law of Property Act, 1925], though he held that the agreement meant an additional rent payable on the quarterly days of the old rent and was not a warrant of the original agreement. A rule nisi was obtained by the landlord.

Manning and *Follett* for the tenant, showed cause against the rule.
Serjeant Merewether for the landlord, supported the rule.

Cur. adv. vult.

June 15, 1832. **LITTLEDALE, J.,** delivered the following judgment of the court in which he stated the facts, and continued: We are of opinion that the case does not fall within the Statute of Frauds. The most favourable words for the defendant are that it is a contract for an "interest in or concerning land." But no additional interest in the land is given to the defendant by this contract, for his interest is the same as before; it is only that there are bricks and other materials removed from the house and some others substituted in their room. Then is there any additional interest in the land given to the landlord? It is said to be a purchase of a rent of £5 a year for the sum of £50 and, therefore, an interest in or concerning the land; but though it be called a rent in the present contract, and also a rent in the declaration, yet we are of opinion that it is not rent in the legal sense and understanding of the word rent, and that the word is not to be understood in its legal sense either in one or the other. It could not be distrained for, for there is no lease which embraces it; the lease is for £50 a year, and there is no lease at £55. If there be a power of re-entry for non-payment of the rent, as is probably the case, there could be no ground for enforcing it in respect of the additional £5. The assignee of the term could not be charged with the increased rent; the assignee of the reversion could not claim it because it is not annexed to the reversion; if the lessor should die, the rent of £50 would go to his heir or devisee, but the right to this additional £5 being a mere matter of personal contract would go to his executor. The only way in which it could be taken to be rent would be that this contract creates a new demise at an increased rent and that, therefore, by operation of law, the old lease is surrendered by such new demise; but it could never be supposed to be in the contemplation either of the landlord or the tenant that the old lease should be at an end and that, instead of it, a new lease should be created which, being only by parol, could only have the effect of a lease at will. As it is quite improbable that such should be the intention of either party, we think that, though the word rent has been used, it is too much to treat it as rent in the technical strict meaning of the term and that all that the parties meant was a personal contract to pay an additional £5 a year; and we think this case is to be governed by *Hoby* v. *Roebuck and Palmer* (1), for though the agreement there was to pay ten per cent. on the money laid out, and it was not called rent, yet that was in truth the same thing, and it only amounted to a collateral contract. . . .

With regard to the variance as to the time of payment of the rent, we think that there is no ground for that objection.

On the whole, therefore, we are of opinion that the rule to enter a verdict for the plaintiff should be made absolute.

Rule absolute.

KEMBLE *v.* FARREN

[COURT OF COMMON PLEAS (Tindal, C.J., Park, Burrough and Gaselee, JJ.), July 6, 1829]

[Reported 6 Bing. 141; 3 Moo. & P. 425; 7 L.J.O.S.C.P. 258; 130 E.R. 1234]

Contract — Breach — Damages — Liquidated damages or penalty — Agreement containing stipulations of varying importance — Stipulations to which liquidated damages to be confined not specified.

Liquidated damages cannot be recovered on an agreement containing various stipulations of various degrees of importance, unless the agreement specifies the particular stipulation or stipulations to which the liquidated damages are to be confined.

Notes. Considered: *Boys* v. *Ancell* (1839), 5 Bing. N.C. 390. Followed: *Horner* v. *Flintoff* (1842), 9 M. & W. 678. Considered: *Green* v. *Price* (1845), 13 M. & W. 695; *Galsworthy* v. *Strutt*, [1843-60] All E.R. Rep. 515; *Atkyns* v. *Kinnier* (1850), 4 Exch. 776; *Ranger* v. *Great Western Rail. Co.* (1854), 5 H.L. Cas. 72; *Bonsall* v. *Byrne* (1867), 16 W.R. 372; *Thompson* v. *Hudson* (1869), L.R. 4 H.L. 1. Applied: *Magee* v. *Lavell* (1874), L.R. 9 C.P. 107. Considered: *Re Newman, Ex parte Capper* (1876), 4 Ch.D. 724; *Wallis* v. *Smith* (1882), 21 Ch.D. 243. Followed: *Hope* v. *Burns and Oates* (1885), 1 T.L.R. 272; *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, [1914-15] All E.R. Rep. 739. Considered: *Stockloser* v. *Johnson*, [1954] 1 All E.R. 630. Referred to: *Beckham* v. *Drake* (1849), 2 H.L. Cas. 579; *Reynolds* v. *Bridge* (1856), 6 E. & B. 528; *Cass* v. *Thompson* (1857), 5 W.R. 289; *Mercer* v. *Irving* (1858), E.B. & E. 563; *Reindel* v. *Schell* (1858), 4 C.B.N.S. 97; *Betts* v. *Burch* (1859), 28 L.J.Ex. 267; *Lea* v. *Whitaker* (1872), L.R. 8 C.P. 70; *Johnson* v. *Colquhoun* (1883), 32 W.R. 124; *Catton* v. *Bennett* (1884), 51 L.T. 70; *Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; *Law* v. *Redditch Local Board*, [1891-4] All E.R. Rep. 891; *Ward* v. *Monaghan* (1895), 59 J.P. 532; *Willson* v. *Love*, [1895-9] All E.R. Rep. 325; *Cooden Engineering Co.* v. *Stanford*, [1952] 2 All E.R. 915.

As to liquidated damages and penalties, see 11 HALSBURY'S LAWS (3rd Edn.) 298–300; and for cases see 17 DIGEST (Repl.) 157 et seq.

Case referred to:

(1) *Astley* v. *Weldon* (1801), 2 Bos. & P. 346; 126 E.R. 1318; 17 Digest (Repl.) 150, *495*.

Also referred to in argument:

Street v. *Rigby* (1802), 6 Ves. 815; 31 E.R. 1323; 2 Digest (Repl.) 466, *298*.

Lowe v. *Peers* (1768), 4 Burr. 2225; 98 E.R. 160; affirmed (1770), Wilm. 364, Ex. Ch.; 17 Digest (Repl.) 94, *112*.

Reilly v. *Jones* (1823), 1 Bing. 302; 8 Moore, C.P. 244; 1 L.J.O.S.C.P. 105; 130 E.R. 122; 17 Digest (Repl.) 161, *584*.

Barton v. *Glover* (1815), Holt, N.P.; 43, N.P.; 17 Digest (Repl.) 153, *511*.

Farrant v. *Olmius* (1820), 3 B. & Ald. 692; 106 E.R. 814; 17 Digest (Repl.) 165, *611*.

Crisdee v. *Bolton* (1827), 3 C. & P. 240, N.P.; 17 Digest (Repl.) 153, *512*.

Davies v. *Penton* (1827), 6 B. & C. 216; 9 Dow. & Ry. K.B. 369; 5 L.J.O.S.K.B. 112; 108 E.R. 433; 17 Digest (Repl.) 155, *524*.

Randall v. *Everest* (1827), 2 C. & P. 577; Mood. & M. 41, N.P.; 17 Digest (Repl.) 94, *111*.

Rule Nisi obtained by the plaintiff for increasing the damages awarded to him at the trial of £750 to £1,000 in an action of special assumpsit brought by the plaintiff, the manager of Covent Garden Theatre, against the defendant, an actor, to recover liquidated damages for the violation of an agreement to perform at the theatre for four seasons.

By an agreement between the plaintiff and the defendant the defendant agreed to act as a principal comedian at Covent Garden Theatre for four seasons commencing October, 1828, and to conform to the regulations of the theatre. The plaintiff agreed to pay the defendant £3 6s. 8d. every night on which the theatre should be open for theatrical performances and allowed the defendant one benefit night during each season on certain specified terms. The agreement provided that if either of the parties should neglect or refuse to fulfil the agreement or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1,000 to which sum it was agreed that the damages sustained by any such omission, neglect, or refusal should amount; this sum was declared to be liquidated and ascertained damages and not a penalty or penal sum, or in the nature thereof.

The breach alleged was that the defendant refused to act during the second season. At the trial before TINDAL, C.J., at Westminster the jury gave a verdict for the plaintiff for £750 damages, subject to a motion for increasing them to £1,000 if the court should be of opinion that on the agreement the plaintiff was entitled to the whole sum claimed as liquidated damages. The plaintiff obtained a rule nisi to that effect.

Serjeant Spankie for the defendant, showed cause against the rule.

Serjeant Wilde for the plaintiff, supported the rule.

Cur. adv. vult.

July 6, 1829. **TINDAL, C.J.,** delivered the following judgment of the court.—This is a rule which calls upon the defendant to show cause why the verdict which has been entered for the plaintiff for £750 should not be increased to £1,000. [HIS LORDSHIP stated the facts substantially as set out above, and continued]: It is undoubtedly difficult to suppose any words more precise or explicit than those used in the agreement, the same declaring not only affirmatively that the sum of £1,000 should be taken as liquidated damages, but negatively also that it should not be considered as a penalty, or in the nature thereof. If the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1,000; for we see nothing illegal or unreasonable in the parties by their mutual agreement settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases it saves the expense and difficulty of bringing witnesses to that point. But in the present case the clause is not so confined: it extends to the breach of any stipulation by either party. If, therefore, on the one hand the plaintiff had neglected to make a single payment of £3 6s. 8d. per day, or on the other hand the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms: the case being precisely that in which courts of equity have always relieved and against which courts of law have, in modern times, endeavoured to relieve by directing juries to assess the real damages sustained by the breach of the agreement.

It has been argued at the Bar that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it, but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case in principle from *Astley* v. *Weldon* (1), in which it was stipulated that either of the parties neglecting to perform the

agreement should pay to the other of them the full sum of £200 to be recovered in His Majesty's courts at Westminster. Here there was a distinct agreement, that the sum stipulated should be liquidated and ascertained damages. In that case there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments. The action was brought for the breach of a clause of an uncertain nature and yet it was held by the court that for this very reason it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle and to apply to that under consideration, we think it right to adhere to it and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it. The consequence is we think the present verdict should stand and the rule for increasing the damages be discharged.

Rule discharged.

ROGERS *v.* ROGERS

[COURT OF ARCHES (Sir John Nicholl), Trinity Term, 1830]

[Reported 3 Hag. Ecc, 57; 162 E.R. 1079]

Divorce—Connivance—Bar to petitioner obtaining decree—Passive acquiescence in respondent's conduct—Proof of intentional concurrence therein—Presumption where facts equivocal.

On the principle volenti non fit injuria connivance in the adultery of the respondent by the petitioner in a suit for divorce will bar him from obtaining the relief he seeks. To constitute connivance active corruption is not necessary. Passive acquiescence in the respondent's conduct, with the intention and in the expectation that guilt will follow, is sufficient, but there must be consent, something more than mere negligence, inattention, over-confidence, or misplaced confidence, dullness of apprehension, or mere indifference. Evidence of connivance can hardly be other than circumstantial. Where the facts are equivocal the presumption is in favour of the absence of intention on the part of the petitioner.

Notes. Considered: *Phillips* v. *Phillips* (1846), 4 Notes of Cases, 523; *Lloyd* v. *Lloyd and Leggeri*, [1938] 2 All E.R. 480; *Mudge* v. *Mudge and Honeysett*, [1950] 1 All E.R. 607; *Manning* v. *Manning*, *Fellows* v. *Fellows*, [1950] 1 All E.R. 602; *Douglas* v. *Douglas*, [1950] 2 All E.R. 748; *Gorst* v. *Gorst*, [1951] 2 All E.R. 956. Referred to: *Seaver* v. *Seaver* (1846), 2 Sw. & Tr. App. II, 665; *Glennie* v. *Glennie and Bowles* (1862), 32 L.J.P.M. & A. 17; *Lankester* v. *Lankester and Cooper*, [1925] P. 114; *Godfrey* v. *Godfrey*, [1964] 3 All E.R. 154.

As to connivance, see 12 HALSBURY'S LAWS (3rd Edn.) 297–300; and for cases see 27 DIGEST (Repl.) 378–388.

Cases referred to:

(1) *Timmings* v. *Timmings* (1792), 3 Hag. Ecc. 76; 162 E.R. 1086; 27 Digest (Repl.) 400, *3299*.

(2) *Lovering* v. *Lovering* (1792), 3 Hag. Ecc. 85; 162 E.R. 1089; 27 Digest (Repl.) 378, *3119*.

(3) *Moorsom* v. *Moorsom* (1792), 3 Hag. Ecc. 87; 162 E.R. 1090; 27 Digest (Repl.) 384, *3161*.

(4) *Gilpin* v. *Gilpin* (1804), 3 Hag. Ecc. 150; 162 E.R. 1112; 27 Digest (Repl.) 383, *3148*.

(5) *Walker* v. *Walker* (1796), 3 Hag. Ecc. at p. 59.

(6) *Creave* v. *Creave* (1800), 3 Hag. Ecc. 123; 162 E.R. 1102; 27 Digest (Repl.) 389, *3220*.

(7) *Hodges* v. *Hodges* (1795), 3 Hag. Ecc. 118; 162 E.R. 1100; 27 Digest (Repl.) 385, *3168*.

Appeal from the Consistory Court of London in a suit for divorce brought by John Rogers against Mary Ann Rogers, his wife, by reason of her adultery. The libel was admitted without opposition, and an allegation on behalf of the wife pleading the connivance of the husband was rejected.

The King's Advocate and *Phillimore* for the husband.
Addams and *Haggard* for the wife.

Cur. adv. vult.

SIR JOHN NICHOLL. This is an appeal from the rejection of an allegation given on behalf of the wife in the Consistory Court of London. The suit was originally brought by the husband for separation on account of the wife's adultery, and the outline of the case, as stated in the libel, is, that the parties, being both of age, were married in 1810, cohabited at Ranby in Nottinghamshire till June, 1829, and had several children, none of whom is living. The adultery is charged to have been committed with Joseph Whitaker, a young man living at Morton Grange in the same neighbourhood. It is stated that a separation took place in consequence of a quarrel, but no adultery or any indecent familiarities are charged before the separation. On the separation, the wife went to Leamington, and then to Scarthing Moor in Nottinghamshire, where she met Whitaker, and it is alleged that they afterwards arrived together in London, and, at the service of the citation, were cohabiting together in a state of adultery. On the part of the wife an allegation is offered, not defensive in respect of the adultery after separation, but charging the husband with previous connivance -a defence which does not necessarily admit the charge of any adultery.

Without doubt, connivance on the part of the husband will, in point of law, bar him from obtaining relief on account of the adultery which he has allowed to take place. Volenti non fit injuria is the principle on which the rule has been founded. Several cases have occurred within my recollection when the wife has been dismissed on that ground, though the adultery has been fully proved against her: *Timmings* v. *Timmings* (1); *Lovering* v. *Lovering* (2). In both these cases the court held the adultery fully proved, but it held the corrupt connivance of the husband to be likewise clearly established. Allegations pleading connivance have also been admitted in other cases. In *Moorsom* v. *Moorsom* (3) such an allegation was admitted, though the proof of it failed. In *Gilpin* v. *Gilpin* (4) a similar allegation was also admitted, as well, probably, also as in several other cases.

In these cases it was held not to be necessary that any active steps should be taken on the part of the husband to corrupt the wife, to induce and encourage her to commit the criminal act. Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention and in the expectation that she would be guilty of the crime, but, on the other hand, it has always been held that there must be a consent. The injury must be volenti —it must be something more than mere negligence, than mere inattention, than over-confidence, than dullness of apprehension, than mere indifference: It must be intentional concurrence in order to amount to a bar. Thus in *Walker* v. *Walker* (5), Lord Stowell, after stating that the adultery was fully proved—that the intercourse was for a long time carried on with considerable secrecy—proceeded:

"The defence is not a denial of the fact, but that which, if established, is said to be equivalent in law. It is said, that the husband connived; but they do not impute active means, but a passive consent. I take the position laid down by Dr. Arnold, to be the true doctrine—that passive consent is sufficient; but there must be a consent, an acquiescence of his will; not mere negligence, not too high a confidence or a misplaced confidence:—there must be evidence that he was passively concurrent; that he saw the train laid for the corruption

A of his wife; that he saw it with pleasure, and gave a degree of passive concurrence to it."

So in *Moorsom* v. *Moorsom* (3), to which I shall presently have occasion to refer more fully, the same learned judge laid it down (3 Hag. Ecc. at pp. 106, 107):

B "The first general and simple rule is, if a man sees what a reasonable man could not see without alarm; if he sees what a reasonable man could not permit, he must be supposed to see and mean the consequences; but this is not to be too rigorously applied, without making allowance for defective capacity. Dullness of perception, or the like, which exclude intention is not connivance."

C Again:

"Though, to bar the husband, there must be intention on his part, I have no difficulty in saying, that mere passive connivance is as much a bar as active conspiracy."

The evidence to establish connivance can hardly in any case be other than circumstantial. It can seldom happen that the connivance can be proved by one D or two broad facts; that two cases of circumstances can exactly coincide in all their features. In *Gilpin* v. *Gilpin* (4), several strong circumstances occurred which are not to be found in the present case, as there are circumstances in the present case which did not occur in that case. There, the husband himself introduced the asserted paramour to his young wife, did everything in his power to promote the intimacy, invited him to visit his wife when he, Gilpin, was from E home, requested him to attend her to the rooms at Bath, and among other circumstances, the fact (strongly relied upon by the judge in admitting the allegation) of the husband, his wife, and this man walking, one evening, out of Bath to the lodgings of the husband, who remained and slept there, allowing the wife and her gallant to return together to Bath for the night. Even that might have been F explained away, but that and the other circumstances coupled together amounted, on the whole, to such a case of consent and intention as required the court to admit the allegation to proof.

It will be proper, then, to examine this allegation in order to see whether, if all the facts detailed in it were proved, the court must impute to the husband this base conduct of consenting to the wife's criminality. If the facts are equivocal, G the presumption is in favour of the absence of intention. It cannot readily be presumed that any husband would act so contrary to the general feelings of mankind as to be a consistent party to his own dishonour, the effect of which would be to leave him legally bound for life to a corrupt and adulterous wife. It is necessary, therefore, to see what are the facts laid, and also to compare them with some cases which have turned upon the same point.

H [HIS LORDSHIP examined the allegations made by the wife, and continued]: In the whole of this allegation I do not see any one fact from which the court can necessarily infer a knowledge of the wife's misconduct, or even a suspicion that an adulterous intercourse was formed or was about to be formed, nor is the whole taken together sufficient to warrant the court in imputing to the husband a consent to the wife's dishonour, or an intention that she should form an illicit connection, I or even in concluding that adulterv had been committed before separation, for none is charged or admitted, though something of an insinuation of that sort may be intended in articles respecting the taking of separate beds and rooms by the spouses and the subsequent birth of a child.

Rogers is described as morose, penurious, and unkind; not as an affectionate, attentive husband warmly attached to his wife. A husband of the former description is not likely to perceive little attentions which would excite the alarm and rouse the jealousy of the latter. The warmer the affection, the more jealous and vigilant and the more likely to take alarm is the person who entertains such affection.

Rogers had also been married nearly ten years before the acquaintance began, and he might feel, and must naturally be presumed to feel, full confidence in his wife's chastity though she might take advantage of the attentions and civilities of this young man, and find it convenient that he should accompany her to different places and give her the amusement of his society as the husband and wife were not very fond of each other's company. The acquaintance continues for nearly ten years more, yet, as far as appears, no indecent familiarity ever passed either in the presence of the husband or at all. On one occasion there was a kiss. What accidental circumstance might lead to it is not explained, but the husband resented it, he showed that he thought it too great a freedom, he appeared displeased, and no such freedom, or any other, is ever again repeated. It is said that their intimacy was the talk among the neighbours and servants; such scandal often exists without any just foundation — often, at all events, without the husband hearing or suspecting his own dishonour; but it is not suggested that any servant or friend hinted to the husband that such reports existed, still less that any facts had taken place which should require his vigilance.

I have already noticed that, to amount to connivance so as to bar the husband, there must be circumstances fixing upon him "intentional concurrence." To show the degree of proof required by these courts before such baseness can be imputed to a husband and before such a heavy grievance can be inflicted upon him as that of remaining fixed with an adulterous wife, I will state the judgments given in two or three cases in which the point has arisen.

In *Moorsom* v. *Moorsom* (3) the connivance was pleaded and an allegation admitted. The following was the sentence at the final hearing upon the evidence:

> "In pronouncing for a separation, I feel that I shall tolerate a negligent inattention to marital duty; and that I shall pronounce a decree which will not lead to the peace and honour of families, nor to the purity of private life —to which this court always attends. On the other side, there are facts of adultery which are grossly and palpably proved, combated by presumptions which the court is to found by inference, on particular facts, and which, very possibly, the court, not knowing the husband's feelings, may misinterpret to his disadvantage; and, attributing to intention what is merely the result of dullness of apprehension, injure him by a refusal of relief. But the court must decide. If the question were, whether Moorsom acted as a prudent, a wise, or an attentive man, the result would be unfavourable: if it were a question, whether, in fact, he contributed to the disgrace of his family, the answer would again be unfavourable; but the question is whether he contributed with a corrupt intention: and, on a consideration of the evidence, I do not think myself judicially warranted to pronounce that he did so; I am bound to pronounce judicially, and I accordingly do pronounce that he is entitled to his separation."

In my opinion the circumstances in that case were infinitely stronger than those imputed to Mr. Rogers, yet the court would not venture to refuse a separation by pronouncing that there was intentional consent. I may add that no judge was more alive to any misconduct on the part of the husband than the eminent individual who then presided in the Consistory Court [LORD STOWELL], but he was also cautious in administering justice according to law.

In *Creuze* v. *Creuze* (6), adultery was charged. The connivance was not pleaded; the wife did not give any defensive plea, nor even cross-examine the witnesses. There was much the appearance of collusion, and that as well as connivance were suggested in argument. The judge made several difficulties and postponed the decision before he finally pronounced sentence. He said (3 Hag. Ecc. at p. 137):

> "Not being able to affect the husband with a direct knowledge [of the wife's adultery]; and there being three witnesses who swear, in express terms, that they verily believe in their consciences the visits [of the wife's lover] were

unknown to the husband. I think it would be taking upon myself too much to affirm, in contradiction, that they were known to him. Therefore, under all these difficulties I am compelled to pronounce for the divorce, though with no great satisfaction of mind."

In this case, again, the circumstances are infinitely stronger than those laid in the present allegation. In *Crewe* v. *Crewe* (6) the adultery was notoriously going on for four years together, and, in both, during cohabitation. In the present case no adultery is charged nor admitted till after the separation. To support such a case as the present, where no adultery is charged nor admitted during cohabitation, it would require the clearest possible evidence of intention and consent. There is some doubt whether connivance at adultery during cohabitation would be even a bar, in point of law, against a suit for adultery with a different person, long subsequent to separation. I say that there is a doubt, on the authority of my predecessor in *Hodges* v. *Hodges* (7).*

In this present case during cohabitation there was no adultery—no, not even any indecent familiarity. I do not say that, if, during cohabitation, connivance at actual adultery, or proximate acts, or even at such gross familiarity as necessarily inferred consent and intention to prostitute his wife were clearly established, the husband could not obtain relief because the wife continued, or even commenced, an adulterous intercourse with the same person after separation. That would be a case different from *Hodges* v. *Hodges* (7), but, in the present case, my opinion is that the facts are not sufficient to fix any connivance. No defence is offered to the charge of adultery. It is not admitted in the wife's plea, unless, as I have said, it is intended to be admitted by insinuation in the articles respecting the separate beds, and the subsequent pregnancy and birth of a child, but this is so ambiguous that the court cannot rely on it. The adultery must be proved. If the husband fails in the proof the wife will be entitled to her dismissal, but, if the adultery be proved, then all the circumstances laid in this allegation would not, if they also were proved, establish connivance, and, therefore, would be no legal bar to a sentence of separation. Whether such a husband, morose, severe, inattentive, negligent, should be entitled to a special legislative interference, dissolving the marriage and enabling him to marry again, is quite a different question and rests upon very different principles, but his conduct does not amount to a legal bar to a sentence a mensa et thoro, and, therefore, on the grounds stated, thinking the Chancellor of London did right to reject the allegation, I pronounce against the appeal, and remit the cause.

Appeal dismissed.

On July 17, 1830, the cause came on in the Consistory Court upon the proofs in support of the libel, and, after adverting briefly to the evidence, the court signed the sentence of separation.

* It was held by the House of Lords in *Godfrey* v. *Godfrey* (1964, 3 All E.R. 154) that there was no absolute rule of law "once connivance, always connivance". The question whether connivance had become spent was a question of fact.

CROFTS *v.* WATERHOUSE

[COURT OF COMMON PLEAS (Best, C.J., Park and Burrough, JJ.), November 26, 1825]

[Reported 3 Bing. 319; 11 Moore, C.P. 133; 4 L.J.O.S.C.P. 75; 130 E.R. 536]

Negligence—Defence—Inevitable accident—Driving by night—Direction to jury.

The proprietor of a stage-coach is not liable for an injury sustained by a passenger in consequence of the overturning of the coach, unless the accident is occasioned by the negligence or misconduct of the driver.

Where the cause of an accident was the removal, since the coach had last passed, of one of two cottages that had previously stood on an angle of the road, by which means the driver was deceived as to the course of the road, it being night, though moonlight,

Held: the question which should have been left to the jury was whether or not the driver had been guilty of negligence.

Notes. Considered: *Readhead* v. *Midland Rail. Co.*, [1861–73] All E.R. Rep. 30. Referred to: *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 184; *Parish* v. *Judd*, [1960] 3 All E.R. 33.

As to the defence of inevitable accident, see 28 HALSBURY'S LAWS (3rd Edn.) 80, 81; and for cases see 8 DIGEST (Repl.) 76.

Cases referred to in argument:

Aston v. *Heaven* (1797), 2 Esp. 533, N.P.; 8 Digest (Repl.) 76, *499*.

Christie v. *Griggs* (1809), 2 Camp. 79, N.P.; 8 Digest (Repl.) 79, *531*.

Rule Nisi obtained by the defendant for the new trial of an action brought by the plaintiff against the defendant, a coach proprietor, for having by the negligence and improper conduct of his servants overturned the coach in which the plaintiff was travelling thus injuring the plaintiff.

At the trial before LITTLEDALE, J., the plaintiff's witnesses proved that the defendant's coachman, in turning a corner on the right hand side of the road, had driven so near to the side as to gather a bank, by which the coach was overset: that, though this was between two and three in the morning, there was a full moon and light enough to distinguish objects of all kinds; that the road was twenty-four feet wide, and at the time clear of all obstructions, so that there was nothing to prevent the coachman from keeping to the middle or even the left side of the road. The defence was that between the time of the accident, and the time when the coachman had last passed the spot where it happened (about twelve hours before) the first of two cottages which stood close to the corner in question, had been pulled down and the rubbish left by the side of the road; that the coachman, mistaking the second cottage for the first, and wishing to save his horses by going as close to the corner as possible, drove out of the road over the rubbish of the demolished cottage.

The judge told the jury that as there was no obstruction on the road the coachman ought to have kept within the limits of it and that the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict. The jury found a verdict for the plaintiff with £150 damages. *Serjeant Wilde* for the defendant, obtained a rule nisi for a new trial.

Serjeant Onslow and *Serjeant Taddy* for the plaintiff, showed cause against the rule.

Serjeant Wilde for the defendant, supported the rule.

BEST, C.J. The coachman was bound to keep in the road if he could, and the jury might, from his having gone out of the road, have presumed negligence, and on that presumption have found a verdict for the plaintiff. But the judge, instead of leaving it to the jury to find whether there was any negligence, told them that the coachman having gone out of the road, the plaintiff was entitled to a verdict.

A This action cannot be maintained unless negligence be proved, and whether it be proved or not is for the determination of the jury, to whom in this case it was not submitted. The coachman must have competent skill and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength and properly made; and also with lights by night. If there be the least failure in B any one of these things, the duty of the coach proprietors is not fulfilled and they are answerable for any injury or damage that happens. But with all these things and when everything has been done that human prudence can suggest for the security of the passengers, an accident may happen. The lights may in a dark night be obscured by fog, the horses frightened, or, as it happened in the present case, the coachman may be deceived by a sudden alteration in objects near the C road, by which he had used to be directed on former journeys. It is not his fault, if having exerted proper skill and care, he from accident gets off the road and the proprietors are not answerable for what happens from his doing so. I think this case must be again submitted to a jury.

PARK, J.—The distinction between carriers of goods and carriers of passengers D was not sufficiently left to the jury. A carrier of goods is liable in all events except the act of God or the king's enemies, a carrier of passengers is only liable for negligence. It is not clear that negligence can be laid to the defendant's charge in the present case, for his coachman had no means of knowing that the cottage, his accustomed land-mark, had been removed.

BURROUGH, J., concurred.

E *Rule absolute.*

NYE AND OTHERS *v.* MOSELEY

F [COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Michaelmas Term, 1826]

[Reported 6 B. & C. 133; 9 Dow. & Ry. K.B. 165; 4 L.J.O.S.K.B. 178; 108 E.R. 402]

Contract—Bond—Illegality—Immorality—Past immoral consideration—Public policy.

G A married man, living in the same house as his wife, cohabited for six years with another woman, who knew that he was married, but until that time had conducted herself with propriety and morality. At the expiration of the six years the man ceased to cohabit with her, giving her a bond to secure an annuity to her for her life and the payment of a sum of money as a provision for the children which she had borne to him during the cohabitation.

H **Held:** an action at law might be maintained upon this bond.

Notes. Referred to: *Hyams* v. *Stuart King*, [1908] 2 K.B. 696; *R.* v. *Bernhard*, [1938] 2 All E.R. 140.

As to bonds for illicit cohabitation, see 3 HALSBURY'S LAWS (3rd Edn.) 336; and for cases see 7 DIGEST (Repl.) 173–175.

I Case referred to:

(1) *Priest* v. *Parrot* (1751), 2 Ves. Sen. 160; 28 E.R. 103, L.C.; 7 Digest (Repl.) 173, *55*.

Also referred to in argument:

Walker v. *Perkins* (1764), 1 Wm. Bl. 517; 3 Burr. 1568; 96 E.R. 299; 7 Digest (Repl.) 174, *57*.

Turner v. *Vaughan* (1767), 2 Wils. 339; 95 E.R. 845; 7 Digest (Repl.) 174, *65*.

Lady Cox's Case (1734), 3 P. Wms. 339; 2 Eq. Cas. Abr. 182, pl. 6; 24 E.R. 1091; 7 Digest (Repl) 174, 56.

Marchioness of Annandale v. *Harris* (1727), 2 P. Wms. 432; 1 Eq. Cas. Abr. 87, pl. 6; 24 E.R. 801, L.C.; affirmed (1728), 1 Bro. Parl. Cas. 250, H.L.; 7 Digest (Repl.) 174, *63*.

Spicer v. *Hayward* (1700), Prec. Ch. 114; 24 E.R. 55; 12 Digest (Repl.) 199, *1375*.

Matthews v. *L — e* (1816), 1 Madd. 558; 56 E.R. 205; 12 Digest (Repl.) 296, *2282*.

Hunt v. *Maunsell* (1813), 1 Dow, 211; 3 E.R. 676, H.L.; 39 Digest (Repl.) 204, *795*.

Case for the opinion of the court.

In 1808 the first plaintiff, Sophia Nye, became the servant of John Moseley, the defendant, and continued to live in his family as cook until 1812. At the time of Nye becoming his servant Moseley was, and continued to be, a married man living with his wife, but he had ceased to have sexual intercourse with his wife by medical advice. In 1810 cohabitation took place between Moseley and Nye, previously to which Nye had always conducted herself with propriety and morality; she continued to live in Moseley's family and to cohabit with him until 1812, when he provided and fitted up a cottage for her in the neighbourhood of his residence. In that year she resided at the cottage and cohabited with him there until 1816. In the course of cohabitation Nye had one child, the second plaintiff, and at the determination of cohabitation she was pregnant, and then had another child, the third plaintiff. In 1816 Moseley determined cohabitation and he executed a bond to Nye, conditioned for the payment of an annuity of £100 to her for the term of her natural life, and for the payment of £500 each to the children at his death. The annuity was unpaid for one year. The question submitted by SIR JOHN LEACH, V.-C., for the opinion of the court was whether the circumstances of the case afforded Moseley a defence at law to an action on the bond by Nye to recover the arrears of the annuity.

Storks for the plaintiffs.

Lovatt for the defendant.

BAYLEY, J.—It is clearly established that a bond given to a single woman by a single man as premium pudicitæ, at the time when he determines the illicit connection, is valid between the parties. In such a case it is true the woman has been guilty only of fornication. But fornication is immoral as well as adultery. Both are offences punishable in the spiritual court. In the latter there is undoubtedly a greater degree of immorality than in the former. But it is extremely difficult for a court of law to measure precisely the different degrees of immorality and to say that an act shall be void where the party who seeks to take advantage of it has been guilty of one degree of immorality, but that it shall be valid where the party has only been guilty of a less degree of immorality. It having been once established that a bond given to secure a provision to a woman who has lived with a man in a state of fornication is valid, my present impression is that we ought not to hold that a bond given to a woman who has lived with a man in a state of adultery is void, because in one case the woman has been guilty of a greater degree of immorality than in the other. *Priest* v. *Parrot* (1) is by no means a decisive authority to show that such a bond may not be enforced in a court of law, for the decree was that the bill should be dismissed, and that decree may have proceeded on the ground that the bond might be enforced at law. If the decree had been that the bond should be delivered up to be cancelled, then it would have been a strong authority in support of the position contended for on the part of the defendant.

The following certificate, signed by BAYLEY, HOLROYD and LITTLEDALE, JJ., was afterwards sent into Chancery:

"This case has been argued before us by counsel. We have considered it, and are of opinion that the circumstances of this case do not afford a good ground of defence at law to an action by the said Sophia Nye against the said John Moseley upon the said bond to recover the arrears of the said annuity."

A

MESSENGER *v.* ANDREWS

[Lord Chancellor's Court (Lord Lyndhurst, L.C.), January 25, 26, 1828]

[Reported 4 Russ. 478; 38 E.R. 885]

B *Will—Condition—Bequest subject to payment of debts.*

A trader by his will bequeathed his business premises, stock and goodwill to a son who had been employed in them, and directed that in consideration of the bequest his son should pay legacies given by the will and the testator's debts, and he appointed him residuary legatee and sole executor. The son proved the will, took possession of the business and obtained a new lease of the C premises. It was found that the testator's debts far exceeded his personal assets and the executor sought to make the testator's real estate liable for the balance.

Held: on the construction of the will, the direction to pay debts was a condition of the bequest regardless of the sufficiency of the property bequeathed, and it was a question of fact (to which the insufficiency of the property would D be a relevant circumstance) whether the legatee had accepted the bequest.

Notes. Applied: *Rees* v. *Engelback* (1871), L.R. 12 Eq. 225. Referred to: *Woodhouse* v. *Walker* (1880), 5 Q.B.D. 404; *Re Williames*, *Andrew* v. *Williames*, [1881-5] All E.R. Rep. 1009; *Batthyany* v. *Walford* (1886), 33 Ch.D. 624; *Re Williams*, *Williams* v. *Williams*, [1897] 2 Ch. 12; *Re Lester*, *Lester* v. *Lester*, [1942] 1 All E.R. 646.

E By s. 32 (1) of the Administration of Estates Act, 1925 (9 Halsbury's Statutes (2nd Edn.) 733) the real and personal estate of a deceased person are assets for payment of debts and liabilities, and any disposition by will inconsistent with this enactment is void against the creditors.

As to acceptance and disclaimer of gifts, see 39 Halsbury's Laws (3rd Edn.) 931, 932; and for cases see 44 Digest 395 et seq.

F **Appeal** to the Lord Chancellor.

The testator by his will gave his son Richard Messenger a legacy of £100, and devised to him a real estate at Croydon; he gave his daughter, Marian, a freehold-house, all the furniture, plate and linen in a public house called The Gun, which he occupied, and a legacy of £700 with interest from the day of his death; and he gave G to his son James Messenger a farm at Woodside with the stock and utensils upon it, subject to certain contingent interests in remainder, limited to the wife and children of James. The will then proceeded in the following words:

"I also will and bequeath unto my son James Messenger my lease and goodwill of the public-house called The Gun in Church Street, Croydon, with all the stock of beer, and wine and spirituous liquors on the said premises at the time H of my decease, and my will is that in consideration of the above bequest to my son James Messenger he shall pay to my daughter Marian her legacy or sum of £700, and all my debts which I may owe at the time of my decease, and that he also pay unto my son Richard Messenger the legacy I have bequeathed to him of £100, and after collecting all my debts which are due to me of every kind whatsoever and paying the legacies above-named and the sum of £60 to William I Waters, in such proportions as he shall think fit, at or before he arrives at twenty-one years of age, I constitute and appoint him my son, James Messenger, residuary legatee of all my personal property whatsoever, and I do hereby also appoint him my said son James Messenger, my whole and sole executor."

The testator died in December, 1818: he was a trader at the time of his death. James Messenger proved the will, collected the testator's personal estate entered into possession of The Gun public-house, and the stock of wine, beer, and spirituous liquors, and carried on the business in it. Some time afterwards he surrendered the

existing lease, of which about ten years were unexpired, and obtained a new lease under which he still occupied the premises and carried on the trade. In 1823 he filed a bill alleging that the debts of the testator considerably exceeded the value of all the personal assets, that he had applied in payment of the debts not only all the personal estate of which he had possessed himself, but moneys of his own, far exceeding the value of the lease and goodwill of The Gun public-house and what he was bound to contribute in respect of the freehold estate devised to him, and that he had entered upon and retained the public-house not by virtue of the bequest but in part satisfaction of the moneys so advanced by him. The prayer was that the sum by which the personal estate was insufficient for the payment of the testator's debts, might be raised rateably out of the different freeholds devised by his will. The defendants by their answers insisted that the bequest of The Gun public-house and the stock in it was subject to the condition that James Messenger was to satisfy the debts and legacies, that he had accepted the bequest and that he had thereby taken upon himself the payment of the testator's debts and legacies.

On June 30, 1825, the cause was heard before SIR JOHN LEACH, V.-C., who declared that the plaintiff, by accepting the bequest of the lease and goodwill of The Gun with the stock, was bound to pay the debts which the testator owed at his death. It was ordered that it should be referred to the Master in rotation to inquire and state to the court whether the plaintiff did accept the bequest and the Master was to be at liberty to state special circumstances.

The plaintiff appealed and the principal question was whether the words of the will merely created a trust, charging the debts of the testator on the specific bequest to James Messenger and making it incumbent on him to satisfy the debts, so far as the specific bequest would extend or whether they imposed a condition which rendered it obligatory on the legatee, if he accepted the bequest, to satisfy the debts however much they might exceed in value the worth of the subject of the gift.

Another question raised was whether the trust or condition extended to the Woodside Farm devised to James Messenger, or was confined to the bequest of the public-house and stock of liquors.

Sir Charles Wetherell and Jacob for the appellant.
Sugden and *Ching* for the respondents.

LORD LYNDHURST, L.C.—The points raised in this cause depend entirely upon the terms of the will. The first question is whether the qualification annexed to the bequest to James Messenger is a trust or condition; and, the second, whether it attaches upon the devise of the Woodside Farm as well as The Gun public-house, or upon the latter only. I am of opinion that the words "and my will is, that, in consideration of the above bequest to my son James Messenger, he shall pay . . . all my just debts . . .," annex a condition to the bequest, but that the condition is annexed to the bequest of the public-house and stock in trade only, and not to the devise of the farm at Woodside. The testator's intention was to give to his son, who had long been employed in his trade, the option of taking the business, provided he paid the debts. The testator does not provide for the payment of his debts thereout, but he makes the payment of his debts the price at which his son was to purchase the public-house and goodwill: and I see nothing unreasonable in such a bequest.

Another question made in this cause was whether the legatee has accepted the bequest, so as to be bound by the condition. If I were called upon to decide that question now, I confess I should hold that he has by his acts accepted this bequest and is bound by the condition. As he had resided many years with his father, and had managed this business for him, he must have had the best opportunity of knowing both the value of the premises and business, and the amount of his father's debts: still he would be entitled to a reasonable time and opportunity to judge of the value of the property and the burden of the condition. But how does he deal with this property? Immediately after his father's death he takes possession of it, carries

on the trade for four years and upwards, sells and consumes the stock, and renews the lease as his own and in his own name. Under such circumstances, if I were now called upon to decide the point, it would be difficult to say that he had not accepted the bequest. If, however, it should turn out upon inquiry, as it has been alleged in argument, that the debts were five times more in amount than the value of the property, that would be a circumstance to be taken into consideration as evidence that it was not so onerous a condition; and the Master will allow due weight to it, as a circumstance of evidence, in the inquiry before him. But at present I can only affirm the vice-chancellor's judgment, so as to give both parties an opportunity of bringing all the facts of the case before the court.

Appeal dismissed.

DIMES *v.* SCOTT

[Rolls Court (Lord Gifford, M.R.), August 19, 1824]

[Lord Chancellor's Court (Lord Lyndhurst, L.C.), December 7, 1827, April 15, 1828]

[Reported 4 Russ. 195; 38 E.R. 778]

Administration of Estates—Apportionment between tenant for life and remainderman—Rule in Howe v. Dartmouth—Residuary personalty—Direction in will for conversion—Failure by executors to convert income-producing property—Income produced greater than if conversion had taken place.

A testator gave the residue of his personal estate to trustees, directing them to convert it into money and invest the proceeds in government or real securities, of which they were to stand possessed upon trust for A. during her life, and after her death, for B. The trustees permitted a share, which the testator had in an Indian loan, bearing interest at 10 per cent., to remain for several years on that security during which time they paid to A. the interest at ten per cent., which it yielded annually. The loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low that the amount of stock purchased was considerably greater than it would have been if the conversion had taken place at the end of a year from the testator's death.

Held: (i) the tenant for life was not entitled to the actual interest which the money yielded while it remained on the Indian security, but only to the dividends of so much 3 per cent. stock as would have been purchased with it at the end of a year from the testator's death: and (ii) the trustees ought to be charged with the whole of the stock actually purchased and all the sums actually received in respect of the Indian rate of interest; and they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends if the money had been transferred from the Indian security and invested in the 3 per cent. stock at the end of a year from the testator's death.

Notes. Where, under a will, income-producing property which ought to have been sold has in fact been retained, the rate of interest now allowed to the tenant for life is normally four, not three, per cent.: see 16 Halsbury's Laws (3rd Edn.) 383.

Considered: *Douglas* v. *Congreve* (1836), 1 Keen, 410; *Taylor* v. *Clark* (1841), 1 Hare, 161; *Sutherland* v. *Cooke* (1844), 1 Coll. 498; *Wastell* v. *Leslie*, *Carter* v. *Leslie* (1884), 13 L.J.Ch. 205. Followed: *Morgan* v. *Morgan* (1851), 14 Beav. 72. *Considered:* *Macpherson* v. *Macpherson* (1852), 19 L.T.O.S. 221. Distinguished: *Morley* v. *Mendham* (1856), 2 Jur. N.S. 998. Considered: *Holgate* v. *Jennings* (1857), 24 Beav. 623; *Stroud* v. *Gwyer* (1860), 28 Beav. 130; *Yates* v. *Yates* (1860), 28 Beav. 637; *Scholefield* v. *Redfern* (1863), 32 L.J.Ch. 627. Distinguished: *Bulkeley* v. *Stephens* (1863), 3 New Rep. 105. Applied: *Brown* v. *Gellatly* (1867),

2 Ch. App. 751. Considered: *Re Parry, Brown* v. *Parry*, [1946] 2 All E.R. 412. Referred to: *Caldecott* v. *Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Band* v. *Fardell* (1855), 7 De G.M. & G. 628; *Re Llewellyn's Trust* (1861), 29 Beav. 171; *Anderson* v. *Read* (1874), 22 W.R. 527; *Re Chaytor, Chaytor* v. *Horn*, [1904-7] All E.R. Rep. 230; *Slade* v. *Chaine*, [1908] 1 Ch. 522; *Re McEuen, McEuen* v. *Phelps*, [1911-13] All E.R. Rep. 176.

As to the rule in Howe v. Dartmouth, see 16 HALSBURY'S LAWS (3rd Edn.) 381–384 and 34 HALSBURY'S LAWS (3rd Edn.) 625–627; and for cases see 40 DIGEST (Repl.) 729–732.

Cases referred to:

(1) *Fearns* v. *Young* (1804), 9 Ves. 549; 32 E.R. 716, L.C.; 43 Digest 619, *590*.

(2) *Howe* v. *Earl of Dartmouth, Howe* v. *Countess of Aylesbury* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 43 Digest 869, *3142*.

Also referred to in argument:

Gibson v. *Bott* (1802), 7 Ves. 89; 32 E.R. 37, L.C.; 43 Digest 619, *592*.

Angerstein v. *Martin* (1823), Turn. & R. 232; 2 L.J.O.S.Ch. 88; 37 E.R. 1087, L.C.; 43 Digest 616, *574*.

Hewitt v. *Morris* (1824), Turn. & R. 241; 2 L.J.O.S.Ch. 87; 37 E.R. 1090, L.C.; 43 Digest 616, *575*.

Exceptions made by the plaintiffs to the report of the Master on the taking of accounts in respect of the residuary estate of Captain Piercy, the defendants being the executors of his will.

Captain Piercy, by his will, dated September 24, 1801, bequeathed all his ready money, securities for money, and all other his personal estate and effects not thereinbefore specifically disposed of, unto John Atkins and John Corderoy, upon trust to convert the same into money, and thereout to pay his debts and funeral and testamentary expenses, and to stand possessed of, and interested in, the residue of the money to arise and be produced by his estate and effects, in trust, to place out or invest the same in or upon government or real securities, as to his trustees should seem meet, and to stand possessed of and interested in the money so to be invested or placed out at interest, upon trust, after paying certain annuities, to pay the interest, dividends, and annual produce to his wife Mary during her life; and, after her decease, to stand possessed of the principal, in the events which happened, in trust for Elizabeth Wintersgill, her executors, administrators, and assigns; and he appointed Atkins, Corderoy, and his wife Mary, executors of his will.

The testator died on Jan. 30, 1802; and, shortly afterwards, his widow and Corderoy proved the will.

Part of Captain Piercy's property, at the time of his death, consisted of a sum of £2,000, which, when in Calcutta in 1799, he had invested in a fund of the East India Co., called the decennial loan. That loan was irredeemable for ten years from Jan. 1, 1800: it bore interest at the rate of £10 per cent., payable annually, either in cash at Calcutta or by bills drawn upon the directors in London, and payable fifteen months after date. The principal was to be repaid at the end of ten years; a power, however, being reserved to the company of postponing the payment for one or two years longer, upon paying, during such additional period, interest at either £10 per cent. or £5 per cent., according as the payment was to be made in India or in London. The shares in the loan were transferable. Captain Piercy, before he left India, directed the interest on his portion of the loan to be paid to him in London. The £2,000, invested in this loan, remained upon that security till 1813, when the principal was paid off and laid out in the purchase of £3 per cent. stock. Corderoy, as executor and trustee, had, during all this time, received the interest, and paid it over to the widow, who had married a Mr. Scott.

In June, 1820, Elizabeth Wintersgill, and her husband, filed their bill against the executors of Corderoy and the widow of the testator for an account of his assets. The bill charged, that "the testator's interest in the decennial loan ought, as being a beneficial property, to have been sold, or otherwise the interest ought to have been invested as principal money for the benefit of the testator's estate; and that Mary Scott and Richard Scott, or the personal representatives of Corderoy, ought to be charged with the interest received by Corderoy and Mary Scott in respect of the said loan."

At the hearing, the common accounts were directed. The Master in his report allowed to the executors of Corderoy the payments of the interest on the decennial loan, which Corderoy had made to Mrs. Scott, the tenant for life of the residue. The plaintiffs excepted to this part of the report, on the ground that "Mary Scott, being only tenant for life of the residue, was not entitled to be paid the interest upon the subscription of £2,000 to the decennial loan, to the prejudice of the plaintiff, who was the person entitled to the residue immediately after the death of Mary Scott; but that the interest upon the said subscription ought, as it became due and was received by Corderoy, to have been considered and treated by him as part of the general residue of the testator's personal estate, and, as such, laid out and invested, as directed by the testator's will, during the life of Mary Scott, and the interest thereof, when so laid out and invested, paid to her during her life."

Barber for the plaintiffs, in support of the exceptions.
Pemberton for the defendants.

Aug. 19, 1824. **LORD GIFFORD, M.R.** One principle of the court is that, where a testator gives a residue to a person for life, with remainders over, property comprised in that residue, being of a perishable nature, so that the corpus is becoming of less value from year to year, must be converted. Another principle is, that, if the residue comprises property of a reversionary nature, that too must be converted. The one rule protects the remainderman; the other protects the tenant for life. But this is the first case, where the corpus, remaining imperishable, has produced, for a limited time, a larger interest than it would have yielded, had it been laid out in England. Here the principal was secure; but it was lent out in a foreign country at a higher rate of interest than could have been obtained at home. The question is: Should the excess of interest thus obtained be applied to increase the corpus of the fund?

By the terms of the decennial loan the securities are transferable, so that it was competent to the executors at any time to have converted it into money. At first I was struck with the difficulty and harshness of compelling executors, who find property of their testator lent out at a higher rate of interest than could be obtained here, to invest it in the 3 per cents. But, on looking at *Fearns* v. *Young* (1) and *Howe* v. *Earl of Dartmouth* (2), and the strong language used by the Lord Chancellor in deciding them, I think myself bound, though the present case is a very hard one, to apply to it the rule which he has laid down. I must say, that these payments to the tenant for life were an improper application of the trust moneys.

It was argued, that, whatever might have been the rule, if the legatee in remainder had applied immediately, what the executors had done could not be considered as a breach of trust, which ought to affect them at this distance of time. But the language of this will is imperative. The executors are expressly directed to convert the personal estate into money, which they are to invest in government or real securities. It is not left to their discretion how they are to act. There is a positive injunction given to them to realize the property. It was the duty of the executors to have sold this debt due from the East India Co., and to have invested the money in the 3 per cents.; then the tenant for life would have received only the dividends which the stock so purchased would have produced; and I must,

therefore, disallow (though reluctantly) these payments to her, so far as they exceeded the dividends on that amount of 3 per cent. stock.

The order made was as follows:—"His Lordship held the plaintiff's said exception to be good and sufficient, and doth, therefore, order the same to stand and be allowed: and his Lordship doth order that the said Master do review his said report, as to the said decennial loan. And his Lordship doth declare, that the testator John Wintersgill Piercy's subscription of £2,000 to the decennial loan, raised at Calcutta, ought to have been sold upon the decease of the testator: and it is ordered that it be referred to the said Master to inquire what sum the said £2,000, subscribed by the testator to the decennial loan, would have sold for, one year after the testator's death, and what sum of Bank £3 per cent. annuities the money, which the said Master shall find the said £2,000 subscribed to the said decennial loan would have sold for, would have purchased, if the same had been sold by John Corderoy, the executor of the said testator, one year after the said testator's death: and it is ordered that the said Master do inquire, how much would have arisen from dividends of such Bank 3 per cent. annuities, in case the same had been purchased as aforesaid, to the time the said testator's subscription to the said decennial loan was paid off: and his Lordship doth declare, that the defendants, Thomas James, John Stanbank, and William Green, the executors of John Corderoy, the executor of the testator, are entitled to be allowed such sum as the Master shall find would have arisen from dividends of the said Bank £3 per cent. annuities, as payments on account."

In fact, the £2,000, when paid off by the East India Co. in 1813, had been invested in the purchase of £3,375 10s. 6d. 3 per cent. stock, which exceeded by £826 17s. 1d. the sum which would have been produced, if the conversion had been made at the end of a year from the testator's death. The defendants, therefore, insisted before the Master, that, inasmuch as the order of the Master of the Rolls had declared that the subscription to the decennial loan ought to have been sold one year after the decease of the testator, they ought to be charged, in their account of the moneys come to the hands of Corderoy, only with the stock, and the dividends on the stock, which would have been produced, if the conversion had been then made. The Master was of opinion, that, under the terms of the order of Aug. 19, it was not open to him to vary the sums with which he had charged them in his former report; and he certified, that the testator's subscription in the decennial loan, if it had been sold on January 31, 1803, and the proceeds had been invested in the £3 per cents., would have produced £2,548 13s. 5d. stock, which, down to April, 1813 (when the subscription was actually sold and the money invested), would have yielded dividends amounting in all to £761 11s. 8d. The Master, therefore, allowed to the executors of Corderoy this sum of £764 11s. 8d., and deducted, from what he had before allowed them, £1,800, which was the amount of the interest on the decennial loan, which had become due after the death of the testator, and been paid to the widow.

The representatives of Corderoy then presented a petition of appeal from the order of Aug. 19, 1824, praying a declaration, that, in taking the accounts of the assets of the testator, they ought to be charged with such sums only, in respect of the subscription to the decennial loan, as it would have sold for at the end of a year from the testator's death, and as would have accrued for dividends on the amount of £3 per cent. stock, which the money, arising from the sale, if immediately invested, would have produced.

Sugden and *Pemberton* for the appellants.
Horne and *Barber* for the respondents.

Dec. 7, 1827. **LORD LYNDHURST, L.C.** The case made by the appeal is that the plaintiffs seek to charge the executor for a neglect of duty; that, supposing him to have been negligent, he is bound to indemnify the remainderman against the loss; but that, in consequence of his alleged negligence, the trust fund has

A increased in value; and though the executor would not be entitled to any advantage from such an increase of the fund, yet that, to the extent of that increase, he would be entitled to indemnify himself for the liability which the suit seeks to throw upon him.

The plaintiffs present the case to the court in a very different light. They say that the £10 per cent. interest on the decennial loan was actually received by the B executor; that he is chargeable with all the sums which he has received; and that, on the other hand, he is entitled to be allowed in his discharge only such sums as he paid away properly. The question, therefore, is whether there is a fixed rule in this court which defines the amount of the payments which ought to have been made to the tenant for life, and whether that rule be such as the plaintiffs C allege. When a residue is given, as in this will, and a part of it has not been actually converted, are you to consider what the effect would have been, if the fund had been converted? and is the executor to be allowed, in respect of payments to the tenant for life, not the actual income yielded by the property, and paid by him to her, but only such sums as she would have been entitled to receive, if the conversion had taken place in due time? Here, if the fund had been converted, D the tenant for life would have received only the dividends of so much £3 per cent. stock as would have been purchased with the proceeds of the testator's share in the decennial loan: the executor has, in truth, paid to her a much larger sum, out of increased profits which were produced by allowing the money to remain in an Indian investment. He has made these payments, it is said, in his own wrong, and cannot be allowed them in his discharge; though, on the other E hand, he must be charged with all sums which he actually received. In that view of the matter, the judgment of the Master of the Rolls would be right; and my present impression is, that I must affirm it.

I shall, however, take time to consider, whether, in such a case, when the fund has not been actually converted, and has in consequence of that circumstance yielded a larger annual income, the executor is to be charged with all the sums F actually received by him, while the allowances to him, in respect of payments to the tenant for life, are to be measured by the consideration of what she would have received, if the conversion had taken place within a year after the testator's death.

April 15, 1828. **LORD LYNDHURST, L.C.**—This testator left his property to G trustees, who were directed to convert it into money, and to invest the proceeds in government or real securities; and he gave the interest of the money so to be invested to his widow for life, with remainder to the lady who is one of the present plaintiffs. Part of his property consisted of a sum which he had subscribed to what is called the decennial loan. The trustees did not convert his share of this loan into money; but, suffering it to remain as they found it, paid the interest, H which was £10 per cent., to the tenant for life. Was that a proper performance of their duty?

The directions of the will were most distinct; and, according to *Howe* v. *Earl of Dartmouth* (2), and the principles of this court, it was the duty of the trustees to have sold the property within the usual period after the testator's death. If they I neglected to sell it, still, so far as regarded the tenant for life, the property was to be considered as if it had been duly converted. Had the conversion taken place, and the proceeds been invested in that which is considered in this court as the fit and proper security, namely, £3 per cent. stock, the tenant for life would not have been entitled to more than the interest which would have resulted from such stock. The executor is, therefore, chargeable with the difference between the interest which the fund, if so converted, would have yielded, and the £10 per cent. which was actually produced by the fund, and was paid over by him to the tenant for life.

It is said that, if the subscription to the decennial loan had been sold, and the produce invested in stock at the end of a year from the testator's death, the sale would have been much less advantageous to the estate than the course which has been actually followed; and that, if the executor is to be charged for not having made the conversion at the proper time, he ought, on the other hand, to have the benefit of the advantage which has accrued from his course of conduct. The answer is this. With respect to the principal sum, at whatever period the subscription to the decennial loan was sold, the estate must have the whole amount of the stock that was bought; and if it was sold at a later period than the rules of the court require, the executor is not entitled to any accidental advantage thence arising. As to the payments to the tenant for life, the executors are entitled to have credit only for the sums I have adverted to, namely, the dividends on so much £3 per cent. stock as would have been purchased with the proceeds of the subscription to the decennial loan, if the conversion had taken place at the proper time. On the other hand, he is chargeable with the whole of the difference between the amount of those dividends and the amount of the sums which have been received in respect of interest on the money which was continued in the decennial loan. I think, therefore, that the judgment of the Master of the Rolls must be affirmed.

Sugden submitted that the tenant for life was entitled to the actual interest produced by the investment in the decennial loan till the time when it was the duty of the executors to have converted it, namely, till the end of the first year from the testator's death, and, therefore, that the executors ought to be allowed, in their accounts, the extra interest received in respect of that year.

LORD LYNDHURST, L.C.—During the first year after the testator's death the tenant for life is entitled, not to the interest on the decennial loan, but to the dividends on so much £3 per cent. stock as would have been produced by the conversion of the property at the end of that year.

R. *v.* INHABITANTS OF LEAKE

[Court of King's Bench (Denman, C.J., Littledale and Parke, JJ.), Michaelmas Term, 1833]

[Reported 5 B. & Ad. 469; 2 Nev. & M.K.B. 583; 1 Nev. & M.M.C. 544; 110 E.R. 863]

Highway -Dedication -Capacity -Land held for statutory purposes Drainage commissioners.

Where land is vested by Act of Parliament in trustees so that they are bound to use it for some special purpose incompatible with its public use as a highway, the trustees are incapable in point of law of making a dedication of it, but if use by the public would not be incompatible with the objects prescribed by the Act, the trustees have that power.

Accordingly, drainage commissioners can make such a dedication if it would not be incompatible with the statutory objects for which they acquired the land in question.

Notes. As to the capacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway, see s. 34 (8) of the Highways Act, 1959, replacing in the same terms a corresponding provision (namely, s. 1 (7)) of the Rights of Way Act, 1932. This provision confirms the law as laid down in this case: see per Viscount Simonds in *British Transport Commission* v. *Westmorland County Council*, [1957] 2 All E.R. 353 at pp. 360, 361.

The duty of the inhabitants of an area for the maintenance of highways has been abolished by s. 38 (1) of the Highways Act, 1959.

For the methods by which highways may become maintainable at public expense, see the Highways Act, 1959, ss. 39–43.

Applied: *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q.B.D. 273; *Arnold* v. *Morgan*, [1908-10] All E.R. Rep. 392; *South Eastern Rail. Co.* v. *Cooper*, [1923] All E.R. Rep. 111. Considered: *Southport Corpn.* v. *Birkdale District Electric Supply Co.*, [1925] Ch. 794; *British Transport Commission* v. *Westmorland County Council*, [1957] 2 All E.R. 353. Referred to: *Grand Surrey Canal Co.* v. *Hall* (1840), 1 Man. & G. 392; *R.* v. *Lordsmere* (1850), 15 Q.B. 689; *Le Neve* v. *Mile End Old Town Vestry* (1858), 8 E. & B. 1054; *Wallington* v. *White* (1861), 10 C.B.N.S. 128; *R.* v. *Horley* (1863), 8 L.T. 382; *Robbins* v. *Jones* (1863), 15 C.B.N.S. 221; *R.* v. *Newbold* (1868), 19 L.T. 656; *Greenwich Board of Works* v. *Maudsley* (1870), 39 L.J.Q.B. 205; *R.* v. *Bradfield* (1874), 30 L.T. 700; *R.* v. *French* (1879), 4 Q.B.D. 507; *Foster* v. *London, Chatham and Dover Rail. Co.* (1894), 10 T.L.R. 566; *Foster* v. *London, Chatham and Dover Rail. Co.*, [1895] 1 Q.B. 711; *Re An Arbitration between Gouly and Manchester and Lincolnshire Rail. Co.*, [1895-9] All E.R. Rep. 651; *Tyne Improvement Comrs.* v. *Imrie*, *A.-G.* v. *Tyne Improvement Comrs.* (1899), 81 L.T. 174; *Great Western Rail. Co.* v. *Solihull R.D.C.* (1902), 86 L.T. 852; *A.-G.* v. *London and South Western Rail. Co.* (1905), 69 J.P. 110; *Taff Vale Rail. Co.* v. *Pontypridd U.D.C.* (1905), 93 L.T. 126; *Lancashire and Yorkshire Rail. Co.* v. *Davenport* (1906), 70 J.P. 129; *County Hotel and Wine Co.* v. *London and North Western Rail. Co.*, [1918] 2 K.B. 251; *Thames Conservators* v. *Kent*, [1918] 2 K.B. 272; *Hunwick* v. *Essex Rivers Catchment Board*, [1952] 1 All E.R. 765.

As to capacity to dedicate highways, see 19 Halsbury's Laws (3rd Edn.) 44–49; and for cases see 26 Digest (Repl.) 298–301. For the Highways Act, 1959, ss. 34, 38 and 39, see 39 Halsbury's Statutes (2nd Edn.) 450, 453 and 455, respectively.

Cases referred to in argument:

Rugby Charity Trustees v. *Merryweather* (1790), 11 East, 375, n.; 103 E.R. 1049; 26 Digest (Repl.) 305, *253*.

R. v. *Edmonton (Inhabitants)* (1831), 1 Mood. & R. 21, N.P.; 26 Digest (Repl.) 322, *412*.

R. v. *Wright* (1832), 3 B. & Ad. 681; 1 L.J.M.C. 74; 110 E.R. 248; 26 Digest (Repl.) 291, *158*.

R. v. *Mellor* (1830), 1 Law. C.C. 158; 1 B. & Ad. 32; 8 L.J.O.S.M.C. 109; 109 E.R. 699; 26 Digest (Repl.) 396, *1028*.

R. v. *St. Benedict, Cambridge (Inhabitants)* (1821), 4 B. & Ald. 447; 106 E.R. 1001; 26 Digest (Repl.) 314, *309*.

R. v. *Cumberworth (Inhabitants)* (1832), 3 B. & Ad. 108; 1 L.J.M.C. 86; 110 E.R. 40; 26 Digest (Repl.) 325, *431*.

Indictment for the non-repair of a road lying on the east side of Hobhole Drain, in the parish of Leake, in the county of Lincoln, beginning at a certain bridge called or known by the name of Simon's House Bridge, situate in the parish of Leake, and continuing from thence in a northwardly direction towards and unto a certain other bridge, situate at Lade Bank, in the county aforesaid, containing in length 1,160 yards, and in breadth eleven yards.

By an Act passed in 1801, 41 Geo. 3, c. 155 [a public local Act], for the more effectually draining certain tracts of land called Wildmore Fen, and West and East Fens, and other lands in the county of Lincoln, certain commissioners were appointed for the purpose of such drainage, and by s. 11 they were authorised to make the drains and other works therein prescribed; and, among other things, they were authorised and required to make a new cut or main drain from Hobhole Gowt, in the river Witham, in a northward direction to a place called Bennington Bridge, and thence in continuation to a place called Simon's House Bridge, and from thence across the Lade Bank, and thence to the lands of Toynton St. Peter's, which said main drain at Bennington Bridge was to be made of a certain width and slope described in the Act. They were, by s. 12, further authorised and required to dispose of all the earth and soil arising from the several cuts and drains thereinbefore directed to be made, in forming banks on each side thereof respectively, at least six feet distant, at an average, from the verge of the slopes or batters: and they were to make, erect, alter, etc., such other cuts, drains, and banks as they should think necessary in the East Fen, etc. By s. 14 it was further enacted that the several cuts, drains, banks, etc., and other works thereinbefore directed to be executed by the said special commissioners, should be executed under the direction and control, and to the satisfaction of certain commissioners in the said Act mentioned, called general commissioners; and should, from and after the completion thereof, be vested in, and for ever afterwards remain, continue, and be subject and liable to the power, jurisdiction, and sole control of the said general commissioners, or any five or more of them, in such and the like manner as if the same had been made, done, and executed under the authority of an Act therein recited, passed in 1761 (2 Geo. 3, c. 32), for draining and preserving certain lands therein mentioned, and other purposes; by which Act the said general commissioners had the same powers of purchasing lands, or making compensation, for the purposes of such drainage, as are contained in the Act of 1801; which lands, when so purchased, were to be conveyed to the said general commissioners, and entirely divested from the vendors (as in this Act of 1801) and vested in the said commissioners for the purposes of that Act of 1761. By the Act of 1801, it was further enacted (s. 19) that the said special commissioners should have full power and authority to agree with the proprietors of, and persons interested in, any lands or tenements which the said commissioners should judge necessary or expedient to be cut, dug, or otherwise made use of for the purposes of the Act, for the purchase of the same, or for allowing compensation for an injury that might be done thereto: and that, in case of purchase, all such contracts, agreements, sales, conveyances, etc., should be valid and effectual in

law to all intents and purposes whatsoever, to convey all estate and interest of the person conveying, and all right, title, estate, interest, trust, or claim of any person whatsoever to the said commissioners.

The commissioners under the above Act forthwith made a drain, called Hobhole Drain, as directed by the Act, in a straight line from Hobhole in the river Witham to Toynton St. Peter's. The length of this drain from Hobhole to Bennington Bridge was about six miles; from Bennington Bridge to Simon's House Bridge about 814 yards; from Simon's House Bridge to Lade Bank 1,160 yards; and from Lade Bank to its termination in the lands in Toynton St. Peter's, about four miles. The commissioners made a bank on the east side of the drain, with the earth taken from it, in the manner directed by the Act, and of the average breadth of forty feet. The drain and bank from Bennington Bridge northward to Lade Bank was never part of the fen, but was old inclosed land, and was bounded by old inclosures on both sides; and the land upon which the drain and bank were respectively made was purchased by the commissioners for the purposes of the Act. The said bank has been used by all persons for about twenty-five years as a public highway for horses, carts, and carriages, without intermission, and is a very convenient and useful road for the public. About two miles of this road, commencing at Bennington Bridge, and extending northwards towards Toynton St. Peter's, was in the parish of Leake. The part indicted was that part of these two miles (in length 1,160 yards) between Simon's House Bridge and Lade Bank. It was in the parish of Leake, and out of repair as charged in the indictment. There was a road, joining the road in question, leading from Simon's House Bridge to Leake town.

By virtue of another Act of Parliament, passed in 1807, certain commissioners for draining the east and west fens, set out, and, in September, 1820, awarded, a public carriage road of the width of fifty feet, beginning at Lade Bank at the northern termination of the part of the road now indicted, and forming a continuous and straight line therewith, and proceeding along the said east bank to the northernmost extremity thereof, where it joined another public highway.

The parish of Leake had always repaired the part of the said road on the east bank from Bennington Bridge to Simon's House Bridge, and from Lade Bank northward as far as the parish of Leake extended; and it was proved that about ten years ago that parish repaired the part of the road now indicted.

At the trial before TINDAL, C.J., at the Lincoln Summer Assizes, 1831, a verdict of Guilty was entered subject to the opinion of the court on a Case which stated the facts set out above. If the court should be of opinion that the parish of Leake was liable to repair the part of the road indicted, then the verdict of Guilty was to stand; if not, then a verdict of Not Guilty to be entered.

Whitehurst for the Crown.

Waddington for the defendants.

Cur. adv. vult.

There being a difference of opinion on the Bench, the judges delivered their opinions seriatim.

PARKE, J.—The questions raised on the argument of this case were three: (i) Whether it was competent for the persons in whom the soil was vested, to dedicate the use of part of it, to the public, as a highway; it not being disputed but that if they had the power, such dedication had taken place; (ii) whether it is necessary in order to charge the parish, that it should have adopted the highway; and if it was, (iii) whether the parish had in fact adopted it.

I have never entertained the least doubt upon any of these questions, except the first; upon that I have felt some difficulty; but after much consideration, my opinion is, upon the statements in this Case, that the commissioners in whom the property was vested might dedicate part of it to this special use.

If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public

use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power. The mere circumstance of their not being beneficial owners, cannot preclude them from giving the public this right.

Let us consider, then, whether the special purposes, indicated by the Act of Parliament, are inconsistent with the use of the bank as a highway. The land over which the alleged road passes was purchased by the special commissioners appointed under s. 19 of the Act of 1801 (41 Geo. 3, c. 135): whether it was conveyed to them or their appointees, under s. 19, on a voluntary purchase; or, under ss. 26 and 27, after an assessment by a jury, to the special commissioners in trust for the general commissioners, does not appear: but, in whomsoever the title was vested, it must have been held in trust for the special purposes of the Act. What, then, were these special purposes? The Case does not state whether the powers given by the Act of 1801, to the special commissioners appointed under that Act have terminated or not.

By s. 11 they are authorised, empowered, and required to make certain new gowts and drains: and by s. 12 to dispose of the earth arising from making the drains six feet from the verge of the slopes or batters at an average, or otherwise, as they shall think necessary: they are also required to make and maintain such other cuts, drains, outlets, sluices, gowts, tunnels, and other works as they shall think necessary, in the grounds in the East Fen, etc. (comprising the lands adjoining to this cut). By s. 14 the several cuts, works, etc., before directed to be executed by the special commissioners, shall be done under the direction and control of the general commissioners; and shall, after the completion thereof, be vested in, and for ever afterwards remain, continue, and be subject to the power, jurisdiction, and sole control of the general commissioners, as if made, done, and executed under the authority of the former Act of 1761 (2 Geo. 3, c. 32). By s. 39 the special commissioners are to make an award, with a true plan annexed, of the grounds to be drained. Section 41 gives the general commissioners the power to tax for the purposes of general drainage.

From these clauses it appears that the special commissioners have special powers, which seem not to have been of a permanent nature, and which would be determined after the works were completed and the award made: and then the authority of the general commissioners of drainage, under the Act of 1761, would alone be in force. But, as the Case does not enable us to say whether the powers of the special commissioners, if any, which remained after the drain was made, are yet in force, we must treat the question as if they were; though, probably, the general commissioners, by virtue of the Act of 1761, enabling them to make works for the general purpose of drainage, would have the same power of making cuts, drains, and other works, as is given to the special commissioners under the latter part of s. 12. The general commissioners would unquestionably be entitled, and indeed bound, to cleanse the Hobhole drain when required, and remove mud from it. The special commissioners, and probably the general commissioners also, would have the power, if necessary for the purposes of the general drainage, to make smaller cuts communicating with this: and drains, gowts, tunnels, or other works; and might use the soil on which the bank is placed for this purpose.

The question then is reduced to this: whether, upon the finding of the jury in this case, the public use of the bank as a road would interfere with the exercise of these powers?

The Case might and ought to have stated whether the operation of cleansing the drain would or would not have been impeded by the use of this road; but as it does find that the drain was constructed in the manner directed by the Act, and the Act requires six feet to be left between the verge of the slope and the bank, which must have been for the purpose of allowing sufficient space for cleansing the drain, I think we may reasonably conclude that the use of the top of the

bank itself, for the purpose of cleansing the drain or depositing the mud there, was unnecessary.

With respect to the exercise of the other powers, of making cuts communicating with this drain through the bank in question, or other works necessary to the drainage, it is impossible not to see that such powers could no longer be exercised upon the space occupied by the road, if the public had an unqualified right of road there; and unless they had, this indictment cannot be supported. But I think, that if it is quite clear that such works would never be required, the commissioners, whether special or general, might give the right to the public. The special commissioners certainly might have sold the land, or let, or disposed of it for money, under s. 35, if it was not necessary to be made use of for the purposes of this Act; and I do not see why they might not also, in the like case, have given it up to the public as a public highway: inasmuch as it is by no means impossible, that the general works of the drainage might receive a benefit equal to the pecuniary advantage from a sale, by facilitating the carriage of materials, and the transport of workmen, necessary for the purposes of the drainage.

As the public have enjoyed the road without interruption for twenty years and upwards, we must infer that no purpose of the drainage has yet required the construction of cuts or other works upon the part of the bank in question; and if in that time the ordinary purposes of the drainage have not required them, it is not too much to say, that such works will not be required, and that the space is not now wanted for any purposes of this Act.

If this were a special verdict, I should have thought that both these facts should have been found by the jury, and that a venire de novo would have been necessary: but upon a Special Case, we are not so strictly bound; and I do not think we ought to put the parties to the expense of a new trial on that account.

I am of opinion, therefore, upon this Case, that we may come to the conclusion, that the dedication of this part of the bank to the use of the public, as a road, was not inconsistent with the purposes to which the commissioners, whether special or general, were bound by the Act of Parliament to apply it.

[Upon the other two questions, his Lordship held that, in order to charge the parish, it was not necessary that it should have adopted the highway: and in any event the highway had been adopted.]

Upon the whole, therefore, I am of opinion that the Crown is entitled to our judgment.

LITTLEDALE, J.—A great number of cases have been cited as to what shall be taken to be a dedication of land to the public, so as to establish a highway. I need not advert to these, because I agree in their authority; and I think if this land was not in the peculiar circumstances in which it is placed, there would be a sufficient dedication to make it a public highway.

But the difficulty I have is, that the land over which the road lies has been appropriated by the Act of 1801 for the purposes of drainage; and by that Act certain powers are given to the commissioners to deal with the land mentioned in the Act in the manner there prescribed; and under their powers they have made a bank which is subservient to the purposes of the drainage. Over a part of this bank the road in question extends.

It is true that the bank has not, for a great number of years, been practically used to give any further protection or support of the works than it did when first made, and very probably it never may be wanted in any other state than that in which it now is. But I cannot take judicial notice of that, and I cannot say but at some future time it may be wanted for the works of the drainage, in such a manner as that it could not be used beneficially for these purposes if there was a common highway over it. I think the commissioners had no power to dedicate to the use of the public as a highway, land which they were entrusted with the ownership of, for a special purpose, and for which special purpose this land may

at some future period be required; and as all the king's subjects are presumed to know Acts of Parliament, they, when they used the road, must be presumed to have known that in point of law it could not be so dedicated, and that it could only be used as a way of permission and sufferance; and they cannot be considered as having acquired a right by adverse enjoyment, but only by usurpation on rights which were designated by Parliament, and which, therefore, could not be infringed upon.

The adoption of the parish, by repairing part of it, does not vary the case: the adoption of a parish is no more than the use of it by the public; the parish are merely a part of the public.

If a road has been used by people in the parish, it furnishes evidence pro tanto of its being a way for the rest of the public; and if the parish have repaired it, it furnishes a strong inference that it is a public highway, or else they would not have been at that expense: but it only raises a strong presumption, and there is no estoppel against a parish in such a case. The adoption by the parish does not necessarily, as a matter of law, make a road public; nor does their refusal to adopt it, prevent its being so. If the general rule were so, still it would not be the case here, as Parliament has already directed it to be under the control of commissioners for Parliamentary purposes. A public road has been made by legal authority, in continuation of what is now contended to be a road; but that can make no difference as to the legality of this road. If the use of this as a public road be an object of great importance, the only way to have it made a legal road is by an application to Parliament, who will exercise their discretion on the subject.

On the whole of the case, I am of opinion that judgment should be entered for the defendants.

DENMAN, C.J.—The question raised by this Case was whether the parish of Leake is bound to repair a road which runs along the top of a bank forty feet wide; in other words, whether this, which is unquestionably a road de facto, is also a road de jure. The bank was made in execution of certain works of drainage done under an Act of 1761 and another Act of 1801; and it is stated as a fact that "the said bank has been used by all persons for about twenty-five years as a public carriage-road without intermission, and is a very useful and convenient road to the public." It is further stated, that part of the indicted portion of the road was repaired by the parish of Leake ten years ago.

All the terms in the definition of a public road are found in this statement. But it was argued that the bank in question cannot be a public road, because that would be inconsistent with the purposes of drainage for which it was raised, and with the superintending power vested in the commissioners for drainage purposes. The words relied on are, that "all banks made (as this was) under the Act of 1801, as well as the cuts, drains, dams, forelands, and other works," should be made, done, and executed under the direction and control, and to the satisfaction, of such general commissioners, and should, after the completion thereof, be vested in, and for ever afterwards remain, continue, and be subject to the power, jurisdiction, and sole control of the said general commissioners, or any five or more of them, in such and the like manner as if the same had been made, done, and executed under the authority of the former Act above mentioned [i.e., Act of 1761].

We must, therefore, refer to the provisions of the Act of 1761, to see if it directs the banks to be maintained or regulated in any manner inconsistent with a right of passage over them. That Act gives power to the general commissioners to purchase lands for the purposes of the drainage, the purchased lands to be divested from the vendors and vested in the general commissioners. It appears that the general commissioners, by virtue of this power, purchased certain inclosed land, and the special commissioners cut a drain through it, and, with the soil cast out, made the bank (forty feet wide) over which the indicted road runs. The argument for the defendants at the Bar proceeded on the assumption that the bank of a

A drain must, of necessity, be subject to obstruction from laying upon it soil out of the ditches, and from other obvious causes, so as to render the constant user of it as a public road impossible. But I think that we cannot draw such an inference judicially from the Act; and the Case does not allege the fact to be so.

The words which place these banks under the control of the general commissioners are not of a very clear import; but their primary object seems to be to exclude B them from the control of the special commissioners appointed by the subsequent Act of 1801, who, after making them to the satisfaction of the general commissioners, were to have no more concern with them. The words of the clause referred to in the earlier Act of 1761, and above stated, seem rather applicable to a property in the banks than to any mode of managing them. The words are certainly very extensive; sufficiently so, indeed, to enable the commissioners to C devote the surface of the banks to any purpose whatever not inconsistent with the trust of draining the district. It can hardly be but that good roads should be extremely useful for the general purposes of the drainage, by facilitating the conveyance of persons and property; and such roads may be more easily procured and maintained by giving a right of passage to the public and casting the repair upon parishes, than by any other means enjoyed by the commissioners. The Case D states that a part of this very bank, being a continuation of the indicted road, was set out as a road in 1820 by virtue of an Inclosure Act; and it does not appear that the general commissioners saw any reason to complain. I think, therefore, it is reasonable to infer that they, like the rest of the public, acquiesced in this use of the soil, from finding that their duties as commissioners might be perfectly E discharged notwithstanding. This appears by no means improbable in point of fact, when the width of the bank is remembered.

[HIS LORDSHIP added that in order to make a parish liable for repair, it was not necessary that there should be any distinct act of adoption.]

Judgment for Crown.

ATTORNEY-GENERAL *v.* EARL OF LONSDALE

[VICE-CHANCELLOR'S COURT (Sir John Leach, V.-C.), January 25, 1827]

[Reported 1 Sim. 105; 5 L.J.O.S.Ch. 99; 57 E.R. 518]

Charity—Education—School for sons of gentlemen.

Although the institution of a school "for the sons of gentlemen" is not in popular language a charity, in view of the statute 43 Eliz. 1, c. 4, all schools for learning are so to be considered.

Charity—Charitable gift—Failure—No power in donor to dispose of land on which premises for charity to be built—Scheme to carry out testator's wishes—Benefit to county and parish.

The trusts contained in a deed and will provided that a school for the sons of gentlemen be established in a house built by the founder, and that, if the school was not established, the funds should be applied, at the discretion of the trustees, to some other purpose conducing to the good of the county and parish in which the house was situated. The house had been built on land which comprised part of the founder's family estate of which he was only tenant for life.

Held: the gift failed as the founder had no power to dispose of the land on which the school was built.

The court ordered that a scheme be settled by the Master to carry out the wishes of the testator.

Notes. Considered: *Nightingale* v. *Goulbourn* (1847), 5 Hare, 484; *Re Smith, Public Trustee* v. *Smith*, [1931] All E.R. Rep. 617; *The Abbey, Malvern Wells, Ltd.* v. *Minister of Town and Country Planning*, [1951] 2 All E.R. 154. Referred to: *Nightingale* v. *Goulbourn*, [1843–60] All E.R. Rep. 420; *Stewart* v. *Greene* (1871), 19 W.R. 396; *Brighton College* v. *Marriott*, [1926] A.C. 192; *Re Ashton's Estate, Westminster Bank, Ltd.* v. *Farley*, [1937] 3 All E.R. 279; *Re Baynes, Public Trustee* v. *Leven Corpn.*, [1944] 2 All E.R. 597; *Re Strakosch, Temperley* v. *A.-G.*, [1949] 2 All E.R. 6.

As to gifts for education and general benefit to the community, see 4 HALSBURY'S LAWS (3rd Edn.) 218, 227; and for cases see 8 DIGEST (Repl.) 326 et seq., 342 et seq. As to the failure of a gift given for a specific object, see 4 HALSBURY'S LAWS (3rd Edn.) 285; and for cases see 8 DIGEST (Repl.) 421.

Case referred to:

Bor v. *Bor* (1756), 3 Bro. Parl. Cas. 167; 1 E.R. 1247, H.L.; 20 Digest (Repl.) 457, *1684*.

Information praying that a school might be endowed and established pursuant to the trusts declared by John Viscount Lonsdale, by certain indentures dated May 4 and 5, 1697, and by his will. The defendants were the present Earl of Lonsdale, and several members of his family, who claimed to be entitled, in remainder, under the family settlements, to the estates in question.

By the indentures of May, 1697, after reciting that John Viscount Lonsdale designed to found and settle, at Lowther in the county of Westmorland, a school of learning for the education of gentlemen's sons there; and, to that purpose, in the town of Lowther had erected and built from the ground a large and fair house, wherein the said school should be kept, and they taught and educated accordingly; and, for continuance and support thereof, had resolved to settle a competent revenue, whereby and out of which, such masters, and other persons there to be placed, or employed to keep, teach, and manage the school, might have proper salaries for their labour and maintenance, and that the school might be continued

A and kept, and gentlemen's sons therein educated and taught, from thenceforth for ever thereafter, John Viscount Lonsdale conveyed to thirteen trustees, the manor of Darnbrooke in the county of York, and all his lands and hereditaments in Darnbrooke, and the impropriate rectory of Hale, in Cumberland, and a farm called Armstrong's Tenement, in the parish of Kirklevington, in Cumberland, and all that the school-house lately erected by him at or in the town of Lowther, with B the soil and ground whereon the same stood, to hold the same unto the trustees, their heirs and assigns for ever, upon trust to permit him to make leases, for twenty-one years, or any other term, of the manor and premises, and to receive the rents and profits thereof for the good of the school, for his natural life, and, after his decease, out of the rents and profits to pay, yearly, for ever, such salaries or sums of money, to such masters, and other persons there to be placed, or employed to C keep, teach, and manage the school, in such proportions, at such times, in such manner, and under such conditions and terms as he should at any time thereafter, by any writing under his hand and seal, to be attested by three or more credible witnesses, appoint or declare, and to employ and bestow the residue of the rents and profits from time to time in and about the necessary repairs of the school-house, and other incidental charges.

D John Viscount Lonsdale afterwards made his will, dated Sept. 16, 1698, and thereby gave to his executors, their heirs or assigns, the manor of Darnbrooke, and all his messuages, lands, tenements, and hereditaments in Darnbrooke (excepting the mines of lead, coal, and all other minerals, royalties, and franchises within the manor), and also his rectory and parsonage of the parish of Hale in Cumberland, E and his proportional part or share of the tithes of the territories, village, or hamlet of Brisco, in the parish of Saint John in Cumberland, theretofore had and enjoyed, together with the rectory of Hale, in trust to be a fund, or to employ and dispose of the rents and profits thereof for the maintenance and salary of the schoolmasters of the free-school for which he had erected a house in Lowther, and for the management of the same, and upon such trust and for such purpose to settle F the manor and premises upon trustees, in such manner, and under such laws, statutes and constitutions, as to his executors should seem meet and expedient: or otherwise upon such trusts, and for such other purposes as his executors should think most conducing to the good of the county of Westmorland, and, especially of the parish of Lowther, and he devised divers manors and estates to such persons of his name and blood as would become entitled, under the settlement, to the estates G therein mentioned. He appointed three of the thirteen trustees and two other persons his executors.

Although John Viscount Lonsdale had power to dispose of the manor and other premises with which the school was meant to be endowed, the school-house was built on part of the family estate of which he was tenant for life only. The school H was, nevertheless, established therein in his life-time, and was continued for about forty years, when the first tenant in tail under the family settlement coming into possession of the estate, suffered a recovery, and thereupon, discontinued the school, and it has ever since ceased, and the rents and profits of the premises with which it was intended to be endowed, have been enjoyed by the Lowther family, and, when the information was filed, were received by the defendant, the Earl of I Lonsdale.

The Attorney-General (*Sir Charles Wetherell*) and *Pemberton*, for the information, insisted that the trusts of the deed of May, 1697, ought to be established; or if they had failed because John Viscount Lonsdale had no power to dispose of the school-house, then that the trusts of the will ought to be carried into execution: that, as the will gave large benefits to the defendants who now claimed the school-house under the family settlement, they were bound, on the principle of election, either to renounce those benefits, or to confirm the intention of John Viscount

Lonsdale as to the school-house: that there was, at any rate, a clear, general devise for charitable purposes; as schools of learning were expressly mentioned in the statute of charitable uses, 43 Eliz. I, c. 4.

Hart, *Shadwell* and *Wray* for the defendants.—It is clear that the trusts of the deed of 1697 cannot be established: (i) because the school, being for the education of gentlemen's sons, is not a charity; (ii) because the purpose was to found the particular school in the parish of Lowther; and, as that cannot be carried into effect, because John Viscount Lonsdale had no power to dispose of the school-house, the gift must wholly fail. The charity intended by the will, must also fail, for the same reasons. Those who claim under the family settlement, are not bound, by way of election, to devote the school-house according to the intention of John Viscount Lonsdale, because there is not, in the will, any gift of the school-house to the trustees of the school. The words of gift for general charitable purposes are too vague to have effect as a good devise for a charity. But, even if it were not so, effect could not be given to them on this information, which does not extend to establish the trusts of the will. This is one of those cases in which, on the principles stated by LORD HARDWICKE, in *Bor* v. *Bor* (1) (3 Bro. Parl. Cas. at p. 178) the doctrine of election does not at all apply.

SIR JOHN LEACH, V.-C.—The institution of a school for the sons of gentlemen, is not, in popular language, a charity, but, in the view of the statute of Elizabeth (43 Eliz. 1, c. 4), all schools for learning are so to be considered, and on that ground no objection can be made to the trusts of the deed of 1697. But, the purpose of that deed being to found the school in the particular school-house in the parish of Lowther, which cannot be effected because John Viscount Lonsdale had no power to dispose of that school-house, it appears to me that the trusts of that deed must altogether fail.

I think the trusts of the will as to that school must fail for the same reason, there being no gift of the school-house to the trustees of the charity so as to bind those who claim under the family settlement, by way of election. It may be collected from the will that he had an intention to give the school-house to the trustees of the charity. But there is no authority for stating that a party is put to his election under a will, unless in the will there be the form of a gift as to the property which is to pass by election. The will, after directing the rents and profits of the manor, lands and rectory in question to be applied, for the purposes of the school, as to his executors shall seem meet and expedient, adds the words following:

> "or otherwise upon such other trusts or for such other purposes as my said executors shall think most conducing to the good of the county of Westmorland, and especially of the parish of Lowther."

This amounts to a clear direction that, if, for any reason, the testator's intention as to the school should fail, the manor, lands and rectory intended for the endowment of the school, should be applied to other charitable purposes, and the court is bound to carry this intention into effect.

THE VICE-CHANCELLOR made a declaration that the trust created by John Viscount Lonsdale as to the school at Lowther, had failed by reason that he had not power to dispose of the school-house, but that the manor and lands of Darnbrooke, and the rectory and parsonage of Hale, with the glebe lands and tithes thereunto belonging, and the proportional part or share of the testator in the tithes or tenths of Brisco, within the parish of Saint John, in the county of Cumberland, heretofore had and enjoyed with the rectory of Hale, were well given, by the will of the said John Viscount Lonsdale, to charitable uses, and it should be referred to the Master to inquire of what particulars the property now consisted and in whose occupation and possession the same were, and under what circumstances, and what was now the rent or annual value thereof and of every part thereof, and in whom the legal estate was vested. He declared that the defendant, the Earl of Lonsdale, was so

account for the amount of the rents and profits of the said several premises which had been received by him, or to his use, from the commencement of the term of six years before the filing of this information, and let the Master take such account accordingly and settle a scheme for the application of the rents and profits of the said several premises to some charitable purpose or purposes conducing to the good of the county of Westmorland, and, especially, of the parish of Lowther, and for the future trusts and management thereof.

CRISP *v.* BUNBURY AND OTHERS

[Court of Common Pleas (Tindal, C.J., and other judges), May 11, 1832]

[Reported 8 Bing. 394; 1 Moo. & S. 646; 1 L.J.C.P. 112; 131 E.R. 445]

Statute—Construction—Ouster of court's jurisdiction—Need for express words or necessary implication.

Although the jurisdiction of the court is not to be ousted except by express words or necessary implication, where the objects and intention of a statute so require it words that appear to be permissive will be construed as being obligatory.

Notes. Section 45 of the Savings Bank Act, 1828, was repealed by the Statute Law Revision Act, 1873, and is now replaced by s. 20 (1), (2) and (3) of the Trustee Savings Banks Act, 1954 (34 Halsbury's Statutes (2nd Edn.) 797).

Approved: *R.* v. *Mildenhall Savings Bank* (1837), 6 Ad. & El. 952. Distinguished: *Morrison* v. *Glover* (1849), 4 Exch. 430. Applied: *Ex parte* (1849), 18 L.J.Q.B. 197. Distinguished: *Rochdale Canal Co.* v. *King* (1849), 18 L.J.Q.B. 197. Applied: *Reeves* v. *White* (1852), 17 Q.B. 995. Distinguished: *Prentice* v. *London* (1875), L.R. 10 C.P. 679. Considered: *Municipal Building Society* v. *Kent* (1884), 9 App. Cas. 260; *Bailey* v. *Bailey*, [1926] Ch. 758. Referred to: *R.* v. *Cheadle Savings Bank* (1834), 3 Nev. & M.K.B. 418, n.; *Tims* v. *Williams* (1842), 3 Q.B. 413; *Scott* v. *Avery* (1856), 5 H.L. Cas. 811; *Callaghan* v. *Dolwin* (1869), L.R. 4 C.P. 288; *Huckle* v. *Wilson* (1877), 2 C.P.D. 410; *Western Suburban and Notting Hill Permanent Building Society* v. *Martin* (1886), 17 Q.B.D. 66; *Davies* v. *Second Chatham Permanent Building Society*, *Mackenzie* v. *Everton and West Derby Building Society* (1889), 61 L.T. 680; *Crosfield* v. *Manchester Ship Canal Co.*, [1904] 2 Ch. 123; *Winter* v. *Winter*, [1946] 1 All E.R. 686.

As to the cases where a statutory remedy excludes the jurisdiction of the courts, see 36 Halsbury's Laws (3rd Edn.) 442, 443; and for cases see 16 Digest (Repl.) 131 et seq. As to the settlement of disputes relating to savings banks, see 2 Halsbury's Laws (3rd Edn.) 163; and for cases see 3 Digest (Repl.) 142 et seq.

Case referred to:

(1) *Cates* v. *Knight* (1789), 3 Term Rep. 442; 100 E.R. 667; 16 Digest (Repl.) 131, *148*.

Action of assumpsit against the defendants, as trustees of the Mildenhall savings bank for money had and received by them to the use of the plaintiff.

In April, 1818, a savings bank was established at Mildenhall, in the county of Suffolk, under the provisions of the statute 57 Geo. 3, c. 130 [Savings Bank Act, 1817]. Rules were drawn up which, in the same year, were duly enrolled with the Clerk of the Peace, and afterwards acted upon. The defendants, with others since dead, were duly appointed trustees, and acted as such; but William Newton, who is still living, though not made a defendant, was also a trustee, and so acted: Sir

Henry Edward Bunbury, one of the defendants, who resided at Mildenhall, was also duly appointed, and acted as treasurer, and W. Bassett another of the defendants as manager. One William Gill was duly appointed clerk in 1818, and continued to act in that capacity until 1825 when it was discovered that he had embezzled a considerable sum of money, the amount of deposits which had been received by him. He absconded, and was prosecuted by the trustees, convicted and transported.

Bassett from time to time received deposits of the plaintiff, and duly signed his book in which such deposits were regularly entered, but he never saw Crisp's account in the possession of the clerk, or attended at the clerk's office after March, 1819; the clerk having told him that he would give him notice when it was necessary for him to attend. On Gill's absconding, Bassett went to his house, and there found two cash account books, one a false and the other a true one; in each of which the plaintiff's account with the bank was entered, from which it appeared, that on the balance in the hands of the clerk, the plaintiff's claim in June, 1824, was £35 8s. 3¼d. The entry of the account in both books was precisely similar, except that in the false book the word "paid" was added at the end of the account, importing that the whole balance had been paid to the depositor. It was admitted that the receipts and payments on account of deposits were as appeared by the account; and that the plaintiff had not received the balance of the account.

A letter was, on June, 27, 1829, sent by the plaintiff's attorney to the defendants, to W. Newton, and various others, which, after alluding to the embezzlement and conviction of the clerk, and expressing a hope that an amicable adjustment of the claims of the several depositors might be effected, gave notice to the defendants and others, that the plaintiff had appointed Mr. C. Austin, of the Temple, barrister, to be his referee, and called on the defendants, within a month to appoint a referee on their behalf, both in the matter of Crisp, and the other depositors. Sir H. Bunbury was then abroad, and did not return to England till after the action was brought.

No arbitrator had ever been appointed by the managers or trustees, they altogether denying their liability, and it being admitted that they had no funds in hand to satisfy the plaintiff's claim. It was admitted that general meetings to receive the reports, and to examine and audit all the accounts of the establishment, were not held pursuant to the first rule of the institution. The plaintiff went, about the time Gill absconded, to his house, for the purpose of making a formal demand, but he found the premises shut up, and that Gill had absconded.

At the trial before TINDAL, C.J., in 1830, a verdict was found for the plaintiff for £44 subject to the opinion of the court on a Case which stated the facts set out above.

Among the rules of the society were the following:

"Rule 1. The affairs of the bank shall be conducted by not less than six trustees, twenty managers, and a treasurer; none of whom shall derive any benefit from the deposits, or receive any remuneration for services. Every trustee will be considered as an honorary manager. General meetings shall be held on the first Friday in October, January, April, and July, to receive the reports, and to examine and audit all accounts of the establishment. The managers shall also have the power of filling up vacancies, and of adding to the numbers of trustees, and of their own body. Upon the requisition of three managers, a special meeting may be called, upon giving fourteen days' previous notice. At every general meeting, one trustee and four managers shall be competent to act."

Rule 17. "Any matter in dispute between the institution and any person acting under the same, and any depositor therein, or any executor, administrator, or next of kin of any deceased depositor, or any person claiming to be such executor, administrator, or next of kin, shall be referred to the arbitration of two persons; one to be named by the managers, and the other by the claimant; and in case the two persons so named shall not agree, they shall forthwith nominate an umpire, and the decision and award of such referees and umpire shall be final and binding upon both parties."

By the Savings Bank Act, 1828, s. 45, it is enacted:

"That in case any dispute shall arise between any such institution or any person or persons acting under them, or any individual depositor therein, the matter so in dispute shall be referred to the arbitration of two indifferent persons to be chosen and appointed in the manner therein pointed out: and, in case of their not agreeing, then to the barrister at law to be appointed by the commissioners, as directed by the Act; and whatever award shall be made by the said arbitrators, or the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal."

Serjeant Storks for the plaintiff; and *Serjeant Taddy* for the defendants, who took several objections to the plaintiff's recovery, in particular, that the defendants, as honorary trustees, were not responsible for embezzlement by the clerk of the society: and that, at all events, the plaintiff's remedy was not by action, but by arbitration. The decision of the court turns on the latter ground alone. It was contended on this point on the part of the plaintiff that the Savings Bank Act, 1828, s. 45, is directory only with respect to arbitration, not imperative; that parties cannot, by agreement, oust the courts of law of their jurisdiction; nor can a statute effect this, except by express words or necessary implication: *Cates* v. *Knight*: and that, at all events, the defendants having refused to proceed to arbitration, could not now object that the plaintiff had proceeded at law. On the part of the defendants it was argued, that though parties cannot, by agreement, oust the jurisdiction of the courts of law, it may be ousted by statute: and that the Savings Bank Act, 1828, s. 45, is imperative in this respect, the object of the legislature being to protect the funds of poor contributors from more expensive litigation.

Cur. adv. vult.

May 11, 1832. **TINDAL, C.J.,** delivered the following judgment of the court.—This is an action of assumpsit against the defendants, as trustees of the Mildenhall savings bank, and is brought for money had and received by them to the use of the plaintiff. This bank was established in 1818, under the rules and regulations set out in the Case, and from that time, until the passing of the Savings Bank Act, 1828, was governed by the various provisions contained in the Savings Bank Act, 1817. But that statute, with certain other Acts which had been passed for amending it, was repealed by the Act of 1828, with an exception, that nothing in that Act contained should invalidate or annul any payments, agreements, or appointments made, or proceedings had, or any instruments executed under the authority of any of the repealed Acts; and by the last section of the Act of 1828 (s. 62) [see now s. 85 of the Trustee Savings Banks Act, 1954], that statute is declared to extend "to all savings banks established, and hereafter to be established, in England and Ireland." It appears, therefore, to us, that the only law which governed and regulated the rights of the parties to this action at the time the action was brought, is to be derived from the only statute then in existence in relation to the subject-matter of the action, namely, the Savings Bank Act, 1828.

Among the objections that have been urged by the defendants against the right to maintain this action one is that by s. 45 of the Act of 1828, the legislature provided:

"That in case any dispute shall arise between any such institution, or any person or persons acting under them, and any individual depositor therein, the matter so in dispute shall be referred to the arbitration of two indifferent persons, to be chosen and appointed in the manner therein pointed out: and, in case of their not agreeing, then to the barrister at law to be appointed by the commissioners, as directed by the Act; and whatever award shall be made by the said arbitrators, or the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes without any appeal."

It is contended, on the part of the defendants that this enactment is imperative upon the plaintiff, taking away the jurisdiction of the courts of common law, and

leaving the party who complains no other mode of determining his claim than that which is pointed out and provided by the Act. It is not denied, on the part of the plaintiff, that the present case falls within the description of those contained in s. 45; indeed, it would be impossible to argue that the present case is not a dispute between persons acting under the institution and an individual depositor, but it is contended by the plaintiff that the jurisdiction of the courts of common law is not ousted by any words to be found in this section, and that the utmost which the section contemplates is to create a concurrent, and not an exclusive, jurisdiction in the arbitrators or barrister.

We are of opinion, both with reference to the words of the statute, and the object which it had in view, that the plaintiff is barred from maintaining the present action in a court of law and must pursue the remedy provided by the statute. It is undoubtedly true that the jurisdiction of the superior courts of Westminster is not to be ousted, except by express words, or by necessary implication: *Cates* v. *Knight* (1); yet, where the object and intent of the statute manifestly requires it, words that appear to be permissive only, shall be construed as obligatory, and shall have the effect of ousting the courts of their jurisdiction, as in the case last referred to, where a clause enacted that it

> "shall and may be lawful for a Justice of Peace to hear and determine offences against the Act that subject the offender to penalties, not amounting to £50."

with a power to the justices to mitigate the penalties; while the same Act directed that all penalties which amounted to £50 or more, shall be sued for in His Majesty's courts at Westminster; it was held, that by necessary implication the courts above were ousted of their jurisdiction in the case of penalties not amounting to £50. In this case the legislature has enacted that disputes of the description of the present "shall be referred"—words which, in their natural force, denote an obligation, not a permission only; and unless these words are construed to be compulsory on the plaintiff, they mean nothing. If they are not compulsory on the plaintiff, neither can they be so, upon any principle of fair construction, upon the defendant. If recourse to arbitration is not intended except both parties choose to adopt it, then indeed the Act is made a dead letter; for it would be competent for both parties to refer the dispute to arbitration, if they both agreed upon it, without the intervention of the statute. In order, therefore, to give these words of the statute any force or operation, the word "shall" must be construed as obligatory, that is, that the matter in dispute shall of necessity be referred to arbitration, and not be determined in any of the courts of Westminster Hall. But looking at the object and intention of the legislature, we think it clear that the remedy by action is taken away, and that by arbitration substituted in its place.

These institutions were intended to comprehend a very large number of depositors, chiefly from the lower walks of life; many of them contributing very small sums, and claiming very small profits by the addition of interest. On the other hand, the trustees and managers are uncertain in point of number. To allow, therefore, actions at law to be maintainable by each depositor against the trustees, upon the occasion of every dispute with the institution, either as to the amount of the balance due, or the interest claimed by him, would be, in effect, to cause the ruin both of the depositors and the institution, by casting the costs of an action in the superior courts at Westminster upon the losing party. No person would fill the gratuitous office of a trustee or a manager, if he was exposed to the hazard of suits at law at once so expensive and so numerous; no depositor would be able to enforce his just rights, if he must sue in the superior courts, at the hazard of being defeated with heavy costs if he sued more of the trustees than he might be able to prove liable; or subject to have his suit abated if he sued too few. It is evident, therefore, that the legislature contemplated the cheap, simple, speedy, and equitable adjustment of all disputes by a reference in the mode pointed out in the Act, instead of a more expensive, dilatory, and uncertain remedy by action at law; and we think we should

defeat that very serviceable object—serviceable alike to the depositors and to the institution—unless we construe the words used, as words which import an obligation to refer, and which take away the right to sue in the superior courts.

In this view of the case, it would be improper to give an opinion on the other points which were made in argument, as we have no jurisdiction: and we can only express our surprise and regret that the defendants, who set up this as a ground of defence, did not act upon it when the plaintiff appointed an arbitrator on his part. At present, however, there must be judgment for the defendants.

Judgment for defendants.

COUNTESS OF PORTSMOUTH *v.* EARL OF PORTSMOUTH

[COURT OF ARCHES (Sir John Nicholl), Easter Term, 1828]

[Reported 1 Hag. Ecc. 355; 162 E.R. 611]

Marriage—Nullity—Validity—Unsoundness of mind—Marriage to person of unsound mind procured by fraud.

A ceremony of marriage took place between a man of unsound mind and the daughter of his solicitor and trustee. The ceremony was procured and accompanied by clandestinity and other marks of fraud on the part of the solicitor.

Held: when a marriage has been regularly solemnised the presumption is in favour of its validity, but a marriage, to be valid, must be solemnised between parties competent to contract; without soundness of mind there could be no legal consent; and therefore, the marriage would be declared null.

Per SIR JOHN NICHOLL: Even if no actual unsoundness of mind existed, strictly so called—if no insane derangement had existed—if only weakness of mind [existed] . . . yet considering the passivity and timidity of [the husband's] character, on the one hand, the influence and relation of the trustee on the other, and the clandestinity and other marks of fraud which accompanied the whole transaction—I am by no means prepared to say that, without actual derangement in the strict sense, the marriage would not be invalid.

Notes. Applied: *Wilkinson* v. *Wilkinson* (1845), 4 Notes of Cases, 295; *Harrod* v. *Harrod* (1854), 1 K. & J. 4. Considered: *Mordaunt* v. *Moncreiffe*, [1874-80] All E.R. Rep. 288. Referred to: *Hall* v. *Wright* (1859), E.B. & E. 765; *Baker* v. *Baker* (1880), 5 P.D. 142; *Moss* v. *Moss*, [1897] P. 263; *In the Estate of Park, Park* v. *Park*, [1953] 2 All E.R. 408.

As to mistake fraud and duress vitiating marriage, see 19 HALSBURY'S LAWS (3rd Edn.) 775, 776; and to marriage by persons of unsound mind, see ibid., 779–781; and for cases see 27 DIGEST (Repl.) 39.

Case referred to:

(1) *Harford* v. *Morris* (1776), 2 Hag. Con. 423; 161 E.R. 792; 27 Digest (Repl.) 38, *150*.

Appeal from the Consistory Court of London in a suit of nullity of marriage instituted on the part of the Earl of Portsmouth, acting by his committee.

The ceremony of marriage took place on Mar. 7, 1814, between the Earl of Portsmouth and Miss Mary Ann Hanson, who was a daughter of Mr. John Hanson, Mr. Hanson being the solicitor of the Earl of Portsmouth's family, and a trustee of a marriage settlement made by the earl on the occasion of an earlier marriage. At the time of the marriage to Miss Hanson, the earl was of unsound mind; the facts on which this conclusion was based being fully referred to in the judgment. The celebration of the marriage was also effected by fraud on the part of the Hansons, who concealed it from the earl's friends. In 1823, a commission found that the earl was of unsound mind so that he was not sufficient for the government of himself and his property, and had been in the same state of unsound mind since 1809.

Lushington and *Pickard* for the Earl of Portsmouth.
The King's Advocate and *Dodson* contra.

SIR JOHN NICHOLL. This suit is described as brought by the Earl of Portsmouth, acting by his committee, against Mary Ann Hanson, falsely calling herself Countess of Portsmouth, to have a marriage, in fact solemnised between them, declared to be null and void in law. The proceedings originated in the following circumstances. In January, 1823, a commission issued to inquire into the alleged lunacy of Lord Portsmouth. The inquisition was executed -very long proceedings took place -the matter was strenuously contested -a great number of witnesses was examined—and the finding of the jury was,

> "that Lord Portsmouth is of unsound mind, so that he is not sufficient for the government of himself and his property, and has been in the same state of unsound mind from the first of January, 1809."

In consequence of this finding, Mr. Henry Fellowes, a distant relation, was appointed committee; and, by an order made in the Court of Chancery, the committee was directed to institute proceedings in the ecclesiastical court "for the purpose of annulling and declaring void the marriage of John Charles Earl of Portsmouth with Miss Mary Ann Hanson, now Countess of Portsmouth."

Thus the proceedings commenced in the ecclesiastical court. The verdict would not of itself affect the validity of the marriage, de facto solemnised—though solemnised within the time of the finding by the jury. The finding is a circumstance and a part of the evidence in support of the unsoundness of mind at the time of the marriage, but no more; for this court must be satisfied by evidence of its own, that grounds of nullity existed. Accordingly a long libel was given in, setting forth in detail the mental condition and unsound conduct of Lord Portsmouth, and the measures pursued to effect the marriage: his birth in December, 1767; the death of his father in 1797; the great weakness of his mind from the earliest period; his marriage with Grace Norton in November, 1799; the settlement on that marriage, and the names of the trustees—Mr. John Hanson, the solicitor of the family, being one of those trustees. The libel goes on, that after that marriage his mental weakness increased until at length he became of unsound mind, that he so continued and still continues of unsound mind: averring, therefore, that he was from his birth and before his first marriage, not of "unsound," but only of "weak mind," which afterwards "became unsound." The libel then proceeds to allege a variety of facts from that marriage till the death of Grace Lady Portsmouth, as indicating unsoundness of mind, and proving that he was treated as a person incapable of managing his own property, and was always kept under a certain degree of superintendence and restraint. It further recounts Lord Portsmouth's conduct on the death of Grace Lady Portsmouth in November, 1813, and the circumstances attending the second marriage to Miss Hanson on Mar. 7 following, to show that that marriage was not the act of a person of sound mind, but was effected by fraud and circumvention. It then details the subsequent conduct of Lord Portsmouth and the treatment he experienced, in continuation and confirmation of his former unsoundness. It mentions the birth of a female child at Edinburgh, in July, 1822; his removal from thence just before that event by some of his family, and the subsequent proceedings under the inquisition already mentioned.

This is the general substance of the libel. The prayer of it is, "that the marriage may be declared null, by reason of the earl being at the time of unsound mind and incapable of forming such a contract; and also by reason of the fraud and circumvention practised on him upon that occasion; and that Mary Ann Hanson may be condemned in the costs of suit." It consists of forty-nine articles, and on it sixty-seven witnesses have been examined.

On the part of Lady Portsmouth, an allegation in reply was given, setting forth that Lord Portsmouth was possessed of a capacity and understanding fully equal to

A the ordinary transactions of life and was so considered and treated by all persons, till removed from Edinburgh on July 2, 1822. That he corresponded with his friends, mixed in society like other noblemen and gentlemen, and in 1790, on coming of age, suffered recoveries with his father, and made a new settlement of his family property. It explained the arrangements on his first marriage, and detailed his observations upon it. It alleged that he settled accounts with his B agents; attended public meetings and committees; prosecuted an offender and was examined as a witness in 1802; was much affected at the death of his wife; that the second marriage was freely entered into—was his own act, and the result of no fraud, that his family wrote letters and congratulation on that marriage; that in 1814, Mr. Newton Fellowes, his brother, applied for a commission of lunacy, which was refused; that subsequently, in 1815, Lord Portsmouth executed a will C and codicil, exercised his functions as a peer, and cohabited with Lady Portsmouth till removed by force from Edinburgh; and it exhibited many of his letters. This allegation consisted of above thirty articles, and fifty-seven witnesses were examined in support of it.

Upon the result of this mass of evidence, given by one hundred and twenty-four witnesses, on pleas consisting nearly of eighty articles—depositions more in bulk D than in any cause within memory before these tribunals—the court has to decide whether the marriage is null and void.

The law of the case admits of no controversy, and none has been attempted to be raised upon it. When a fact of marriage has been regularly solemnised, the presumption is in its favour; but then it must be solemnised between parties competent to contract—capable of entering into that most important engagement, the E very essence of which is consent. Without soundness of mind there can be no legal consent—none binding in law: insanity vitiates all acts. Nor am I prepared to doubt, but that considerable weakness of mind circumvented by proportionate fraud, will vitiate the fact of marriage—whether the fraud is practised on his ward by a party who stands in the relation of guardian, as in *Harford* v. *Morris* (1), which was decided principally on the ground of fraud—or whether it is effected by F a trustee procuring the solemnisation of the marriage of his own daughter with a person of very weak mind, over whom he has acquired a great ascendancy. A person, incapable from weakness of detecting the fraud, and of resisting the ascendancy practised in obtaining his consent to the contract, can hardly be considered as binding himself in point of law by such an act. At all events, the G circumstances preceding and attending the marriage itself may materially tend to show the contracting party was of unsound mind, and was so considered and treated by the parties engaged in fraudulently effecting the marriage.

In respect to Lord Portsmouth's unsoundness of mind, the case set up is of a mixed nature—not absolute idiotcy, but weakness of understanding—not continued insanity, but delusions and irrationality on particular subjects. Absolute idiotcy, H or constant insanity, would have carried with them their own security and protection; for in either case the forms preceding, and the ceremony itself, could not have been gone through without exposure and detection. But here a mixture of both, by no means uncommon, is set up: considerable natural weakness, growing at length, from being left to itself and uncontrolled, into practices so irrational and unnatural as in some instances to be bordering upon idiotcy, and in others to be attended with I actual delusion—a perversion of mind—a deranged imagination—a fancy and belief of the existence of things which no rational being, no person possessed of the powers of reason and judgment, could possibly believe to exist.

Such being the species of case alleged, what is the sort of proofs of its reality which are laid before the court? The case is of that importance that I should have been disposed, for the satisfaction of the parties and the relief of my own mind, to have entered into the circumstances minutely, and to have quoted the depositions supporting the several circumstances; but the facts are so extremely numerous, and if detailed at all, require to be detailed with all the accompanying incident, in order

to see their just effect, while the evidence is so very voluminous, that the attempt would be almost endless and impracticable.

To several of the most important articles of the libel, those which set forth the general state of Lord Portsmouth, and his conduct before the death of the first Lady Portsmouth, there are above twenty witnesses examined; so that the existence of the facts generally cannot be doubted, and the shades of difference become immaterial: to select the depositions of particular witnesses would not be satisfactory, as the individual depositions selected might state too much or too little—more or less than the fair general result of all the testimony.

The facts themselves in point of time happened, some before the marriage in question, others after. Those before the marriage are the most important, especially those nearly approaching it, and they are also the most numerously deposed to; but those after the marriage are not immaterial as corroborative and confirmatory, and strengthening the presumption and the proof, of unsoundness existing at the marriage. Even the evidence as to the state of Lord Portsmouth at the time of taking the inquisition, and the verdict itself, are not without weight; though nine years after the marriage. Applying to that time several medical gentlemen have been examined -persons particularly skilled in mental disorders—who had various interviews with the noble earl, and they give a decided opinion that he was of unsound mind. Upon their opinion, and also upon the circumstances which they mention, it seems hardly denied that in 1823 Lord Portsmouth was unsound: and the explanation attempted is, that he might be in a state of excitement by being hurried down from Scotland (but that was six months before), or from knowing that the inquiry was then going on. However from the facts detailed by the medical witnesses—from their opinions as men of skill, confirmed by the finding of the jury—I am satisfied that at the time of the inquisition Lord Portsmouth was of unsound mind: so far the court can have no difficulty at once in declaring its deliberate conviction. But some of the medical gentlemen read the affidavits, and they also (as I understand them) heard the witnesses examined at the inquisition, and upon that evidence, as well as upon their own observation and judgment, they carry back their opinions to an earlier period than the time of taking the inquisition. This testimony, therefore, is not without its weight and effect, even retrospectively; but the court must principally rely upon the circumstances preceding the marriage in question, as spoken to by the witnesses produced on both sides in this suit.

Of the facts bespeaking unsoundness of mind, the persons examined to their belief that Lord Portsmouth was of "sound mind and capable of conducting the ordinary transactions of life," were for the most part wholly ignorant. They themselves admit weakness of intellect. They almost universally designate his lordship as a weak man. Imbecility is a matter of degree, and the degree of weakness differs in the same individual under different circumstances, and according to the different habits existing, and the different situations in which he is placed, at one time or another of his life. When the medical men give their opinion that the mental deficiency was connate, I do not understand them to mean that he was born either an idiot or a lunatic; but that his mind was naturally and constitutionally defective, and that its defect was not occasioned by any accident or supervening disease. At most, whatever may be meant by that expression, its connate is only matter of opinion; it is not the case set up in the libel. Their opinion, however, if understood in the manner the court has explained it, is confirmed by facts, and by the history of Lord Portsmouth. At school he was deficient, and not like other boys; he had especially that character of mind which afterwards accompanied him through life—timidity; he was easily intimidated and cowed; yet he was not incapable of instruction and of improvement; but the capacity of instruction and improvement is a quality possessed by a child at a very early age; it is possessed even by the brute creation; they can be taught and can acquire things by habit and practice to a certain extent. Lord Portsmouth had a

A very good memory, and that in a great degree accounts for his receiving instruction, and also accounts for the wrong opinion formed by many witnesses; he could learn arithmetic and languages; but children of eight or ten years old are often perfect in the first rules of arithmetic and make considerable progress in acquiring languages: it is principally an effort of memory. Lord Portsmouth then was capable of improvement, and no doubt all possible pains were taken to improve him and B to qualify him to fill the high station in society to which he was born. He was sent abroad, and had the benefit of foreign travel; he certainly, therefore, was not considered an idiot, whose mind could in no degree be informed by education, or enlarged by observation.

In 1790, soon after coming of age, he joined his father in suffering a recovery, and in making a new settlement of the family estates, in order to provide for C younger children. Here again he was not esteemed nor treated as an idiot; but an act of that sort, proper in itself, and done in concurrence with his family and natural guardian, is no great proof that he did not labour under considerable weakness of mind.

In 1797 his father dies, and though he is then thirty years of age, he remains under the care and superintendence of his mother, who is described as a very D clever woman; and is managed by her.

In 1799 he marries Miss Grace Norton. Looking at the circumstances of that marriage—he 32 years of age, Miss Norton 47—and at the settlement then made, by which his property is placed in the hands of trustees; it is hardly possible not to be impressed that this was a piece of family arrangement, for the purpose of E protecting a person, incapable of taking care of himself, and liable to be imposed upon, and to be entrapped into some improper connection. With the propriety of that arrangement, this court has nothing to do. The unsoundness of his mind might not at that time have grown to the extent which would render such a marriage, had under the protection and with the concurrence of his family, invalid; nor is it in question, so as to call for the expression of any opinion by the court, either as to the propriety or the validity of that marriage. Under the maternal care of F a wife nearly 50, a kind, prudent, discreet lady, Lord Portsmouth might still further acquire the habit of conducting himself in society in the manner described; his property, put out of his own power, was in the hands of trustees; he had by this settlement constituted them, as it were, the committees of his estates; his domestic concerns were all in the management of his wife; she took not only G the superintendence, but the entire control of everything domestic; she acted as the committee of his person.

That in 1802, upon receiving a threatening letter of a most infamous kind, from a person of the name of Seilaz, whom it was judged necessary to prosecute, he should be able to give evidence in a court of justice, is no conclusive proof of any great extent of capacity, even at that time; it was a simple fact he had to prove, H requiring little, if anything, more than memory; nor does it appear that his cross-examination could require more than recollection of facts—not any considerable exercise of the understanding, and of the reasoning powers of the mind. Yet even so early as that—in 1802—it was a matter of surprise and of subsequent talk, that he did so well; so that the previous impressions and public notoriety were very unfavourable to his understanding.

I This examination is perhaps the strongest fact in support of his capacity: for his behaviour at parties, his receiving and paying visits, his making a few observations on the state of the weather, or on horses or farming, his going to public meetings, races, and country balls, are not incompatible with great imbecility of mind; still less are they incompatible with the existence of certain mental delusions and irrational fancies and practices when freed from observation and control. Under the restraint produced by the presence of formal company—under a sense of being observed—a person labouring under considerable imbecility, and some delusions, will pass as possessing a certain degree of understanding; much more than the

individuals of the company would give Lord Portsmouth credit for, if they knew his condition when not so restrained: it is just in the same manner that a child in the presence of company will appear very different from his character when at play and unrestrained; but the conduct of such a person will more especially show itself to advantage when the superintendent is present to watch and to manage him, and by a nod or a look keep him within proper bounds, and prevent his exposing himself and his infirmities of mind.

Under these considerations, the great mass of evidence produced to the general conduct and deportment of Lord Portsmouth, and the opinion of his capacity formed by the witnesses, weigh but little against the facts proved as to his behaviour when under no restraint. It should, indeed, seem, that the more properly Lord Portsmouth was able to conduct himself under restraints and checks, the more strongly do the acts of which he was guilty at other times, when left to follow his own inclinations, wear the aspect of derangement, rather than of imbecility. Unsoundness of mind does not show itself upon all occasions; nay, it can often only be discovered by probing and close examination—sometimes even requiring the clue or key that will lead to its detection. He knew he was a peer of the realm, and had learnt some of the rights and duties that belong to that high station; but he either was so weak or so deranged, that he was wholly ignorant of what he owed to himself and to his rank; as will appear by the facts to which the court will very briefly refer.

What are some of the facts proved? I forbear, for reasons already assigned, to enumerate them with the details connected with them, as that would lead to much length, and they have been in a considerable degree stated by counsel. Grace Lady Portsmouth treated him with great kindness and indulgence, and it is not improbable that such indulgence might lead to the more complete perversion of his mind. If he had been kept under more restraint, he might have continued only a weak man, instead of becoming deluded and unsound. But what is his conduct? His servants were his playfellows in town and country; he played all sorts of tricks with them: more particularly in the country, where he was less under observation, where he found additional playmates in his farm servants and labourers, and where he was less liable to notice. He was fond of driving a team, and Lady Portsmouth so far indulged him as to have a team of horses kept for his amusement as a toy and a plaything, with which he carted dung and timber and hay; yet he used to flog these horses most unmercifully, and often in such a manner as to produce danger to his own person. As further proofs of his unsoundness of mind may be added his propensity for bell-ringing, not as sometimes young men will do for exercise, but to share the money; this too by a nobleman of 40, at his own parish church, and near his own residence: his fancy respecting funerals, and his conduct and all the circumstances connected with that fancy: the slaughtering of cattle and the incidents attending that whim. Another trait is his pleasure in malicious cruelty to man and beast, never expressing any regret—but "serves him right," was his usual remark upon his own acts of cruelty. I allude only to these facts very generally, but to state them with the force and effect they have upon my judgment, would require a detail of the minuter circumstances connected with each of them.

A still more decided delusion of mind is that relating to lancets, and tapes, and basins in women's pockets; the particulars of which, for the same, and even for additional reasons, I do not enumerate. The fact is proved beyond all question; it was a delusion that continued even to the time of the inquisition. Dr. Alston admits that "such a propensity is not consistent with a perfectly sound mind." What the distinction is between a mind not perfectly sound, and an unsound mind, is not explained by the witness; nor what is the state of the capacity of a man who, when between 40 and 50, twice married, and living in society, supposes that the gestation of a woman could be fifteen months; nor of one who admits that he knew another man was in bed with his wife—that he remonstrated, but "they never took any notice of me"—and who does not resent this, nor take any steps for

relief, because the man was "too strong" for him. These and other circumstances, admitted on the interrogatories by this witness, occasion his evidence to produce no alteration in my opinion, respecting the bearing of the facts before the marriage spoken to by the other witnesses; and the evidence of Swait, the bailiff, who is brought forward to contradict the facts, and to prove the correctness and propriety of Lord Portsmouth's conduct is equally nugatory: for this witness, on the interrogatories, admits: "That he did sometimes control the noble earl," that "when he was running a little contrary, he threatened to tell Dr. Garnet of him." "Respondent has sometimes wrested a whip out of Lord Portsmouth's hand, when my Lord in play has cut him across the legs."

What a picture is this of the noble earl, from a witness produced to prove his capacity and soundness of mind! A nobleman of 40, flogging an old bailiff of 60 for his amusement, and in play cutting him across the legs! the bailiff not submitting nor quitting his service, but by force wresting the whip out of his hands! and the nobleman in his turn submitting to this indignity and forcible control!

I dwell too long on these circumstances. In 1808—whether Lord Portsmouth, perhaps from over indulgence and loose given to his fancies, became less manageable, as a froward boy does, or whether Lady Portsmouth, from her advanced time of life, approaching 60, grew less equal to the task—Mr. Coombe, a medical gentleman, was taken into the family to assist in superintending the noble earl. That gentleman soon acquired an ascendancy, by pretending to quarrel with him, and threatening to demand satisfaction as a gentleman. This of course had the effect of reducing Lord Portsmouth to passive obedience; generally at least, for on two or three occasions passion got the better of timidity. From that time Coombe's presence alone was sufficient to check him, whether at play with the labourers, or whatever irrational fancy he might be pursuing. Mr. Coombe's attendance continued three years, till 1811, when he left, not because Lord Portsmouth had recovered, but because Coombe's private concerns required his attention. It may be proper to repeat that a feature in the character of Lord Portsmouth, which accompanied him all through life was, that he was easily intimidated and controlled. This character usually marks and accompanies unsoundness of mind, whether it be imbecility or derangement, or a mixture of both: if a servant resisted him, he submitted and desisted; if a threat was held out to tell Lady Portsmouth, or Dr. Garnet, or Mr. Coombe, it produced the same effect, and among others (it is not immaterial) the threat to tell Mr. Hanson occasioned the same result. Mr. Hanson's influence and ascendancy over him, as one of the trustees—the acting trustee indeed—is fully established.

In November, 1813, Lady Portsmouth died. Lord Portsmouth's conduct was of that inconsistent character which distinguishes persons of such a mind: at the funeral he behaved as at other "black jobs," as he termed them—one moment overcome with grief, the next, merry again. He talked of a Miss De Visme as the object he was very anxious to engage. Miss Hudson, he said, was also suggested to him, but she was too old. The trustees thought it prudent to send him down to Hurtsbourne, attended by Coombe. Another wife was the string of his disorder, but Miss Hanson was never proposed by him as the object of his choice.

On Feb. 28, 1814, Coombe thought it prudent to bring him to London, and to deliver him up to his trustees, Hanson being one, and then in town. That day week he was married to the daughter of Mr. Hanson!—Hanson—the confidential solicitor of the family, one of the trustees who had a great ascendancy over him, who owed him every possible protection—married him to one of his daughters! It is unnecessary to state the jealousy with which the law looks at all transactions between parties standing in these relations to each other.

I will not enter into the particulars of the transaction, the whole of it will bear but one interpretation! Every part is the act of the Hansons! Lord Portsmouth

is a mere instrument in their hands to go through the necessary forms! The settlement is begun in forty-eight hours after Lord Portsmouth's arrival in London! The contents of that settlement—the mode in which it is prepared—the concealment of the whole from his friends and the other trustees who were in town, some in the same house with Lord Portsmouth—all these particulars bear the same character. The necessary forms are gone through, but in support of these mere forms, not a witness is produced to show that this nobleman was conducting himself as a man, understanding what he was doing, or capable of judging, or acting as a free and intelligent agent: nothing tending to show that he was a person of sound mind—nothing in his conduct inconsistent with unsoundness of mind—every circumstance conspires to prove that he was the mere puppet of the Hanson family, and that the celebration of this marriage was brought about by a conspiracy among them, to circumvent Lord Portsmouth over whom they, and particularly the father, had a complete ascendancy and control, so as to destroy all free agency and rational consent on his Lordship's part to this marriage.

A marriage so had wants the essential ingredient to render the contract valid—the consent of a free and rational agent. The marriage itself and the circumstances immediately connected with it do not tend to establish restored sanity; it was neither "a rational act," nor was it "rationally done"—the whole "sounds to folly" and negatives sanity of mind. The Hansons, in the mode of planning and conducting the transaction, show that they treated and considered Lord Portsmouth, as a person of unsound mind—and Lord Portsmouth, in submitting, acquiescing, and not resisting, confirms his own incompetency. Even if no actual unsoundness of mind, strictly so called—if no insane derangement had existed—if only weakness of mind—and all admit he was weak—yet considering the passiveness and timidity of his character on the one hand—the influence and relation of Hanson, his trustee, on the other—and the clandestinity and other marks of fraud, which accompanied the whole transaction—I am by no means prepared to say, that, without actual derangement in the strict sense, the marriage would not be invalid—but, in my judgment, Lord Portsmouth was of unsound mind, as well as circumvented by fraud.

As this is the great fact which the court has to decide, it seems unnecessary to pursue the subsequent history. The court gladly relieves itself from going through the disgusting particulars of the treatment which this unfortunate nobleman afterwards experienced from the pretended wife, and her family and associates—forbearance, in this respect, is for their advantage; yet the subsequent treatment corroborates, and is confirmatory of, the former condition of Lord Portsmouth—no change in his mind and character is suggested to have taken place after the marriage—no supervening malady producing derangement of mind—he continued just the same man as before the marriage in mental condition, though treated in a manner very different from the kindness of the first wife.

Upon the whole the court pronounces, that the marriage in fact, solemnised between the Earl of Portsmouth and Mary Ann Hanson, is in law null and void, he being at that time not of sound mind, sufficient to enter into such a contract; and that the celebration of such marriage was effected by fraud and circumvention; and pronouncing, as the court feels bound to do, that latter part of its sentence. It feels also bound to grant the prayer for costs.

Order accordingly.

A

CASAMAJOR *v.* STRODE

[Lord Chancellor's Court (Lord Brougham, L.C.), February 21, 22, March 4, 1834]

[Reported 2 My. & K. 706; Coop. temp. Brough. 510; 47 E.R. 181]

B *Sale of Land—Contract—Release—Purchase at sale of two lots—No title made as to one lot—Release of purchaser from purchase of other lot—Purchase of one lot with reference to other—Examination of all the circumstances.*

In determining whether a purchaser at a sale by auction of real property who fails to obtain a good title to one lot, and is, accordingly, released from his contract for that lot, shall be let off from his contract relating to another lot C the whole circumstances may be examined in order to ascertain whether the two contracts are one by it appearing that the two parcels are complicated together, and on the whole transaction the court will determine, as a jury would, the questions: Did or did not the purchaser purchase the one with reference to the other? Would he or would he not have taken the one had D he not reckoned on also having the other?

Notes. Explained: *Holliday* v. *Lockwood*, [1916-17] All E.R. Rep. 252. Referred to: *McConnel* v. *Murphy* (1873), L.R. 5 P.C. 203; *A.-G.* v. *Cohen*, [1936] 1 All E.R. 583.

As to avoidance of a contract for the sale of land, see 34 Halsbury's Laws (3rd Edn.) 210; and for cases see 40 Digest (Repl.) 235 et seq.

E

Cases referred to:

(1) *Chambers* v. *Griffiths* (1794), 1 Esp. 149; 170 E.R. 309, N.P.; 40 Digest (Repl.) 277, *2312*.

(2) *Drewe* v. *Hanson* (1802), 6 Ves. 675; 31 E.R. 1253, L.C.; 11 Digest (Repl.) 158, *1377*.

F (3) *Boyer* v. *Blackwell* (1796), 3 Anst. 656.

(4) *James* v. *Shore* (1816), 1 Stark. 426; 3 Digest (Repl.) 17, *127*.

(5) *Roots* v. *Lord Dormer* (1832), 4 B. & Ad. 77; 1 Nev. & M.K.B. 667; 100 E.R. 384; 39 Digest (Repl.) 302, *473*.

(6) *Poole* v. *Shergold* (1786), 2 Bro. C.C. 118; 1 Cox, Eq. Cas. 273; 29 E.R. 68; 44 Digest (Repl.) 78, *637*.

G (7) *Roffey* v. *Shallcross* (1819), 4 Madd. 227; 56 E.R. 690; 40 Digest (Repl.) 148, *1132*.

(8) *Ex parte Tilsley* (1819), cited in 4 Madd. 227, n.; 56 E.R. 690; 40 Digest (Repl.) 148, *1133*.

(9) *Price* v. *Price* (1823), 1 Sim. & St. 386.

(10) *Knatchbull* v. *Grueber* (1815), 1 Madd. 153; 56 E.R. 58; affirmed (1817), H 3 Mer. 124, L.C.; 40 Digest (Repl.) 185, *1477*.

(11) *Dalby* v. *Pullen* (1829), 3 Sim. 29; affirmed (1830), 1 Russ & M. 296; 8 L.J.O.S.Ch. 74; 39 E.R. 114, L.C.; 40 Digest (Repl.) 275, *2293*.

Application by a purchaser to be discharged from his contract to purchase certain real property.

I In October, 1811, real estates situate at Northaw, formerly the property of William Strode, deceased, were put up to sale in lots, and W. W. Drake became the purchaser of lots 25 and 30. An abstract of title was delivered soon afterwards, but various difficulties were raised with respect to the title, and after negotiation between the solicitors of the parties a reference was made on Nov. 16, 1815, directing an inquiry upon that subject. On behalf of the purchaser objections were carried in to the Master's office, some of which were removed or abandoned and others persisted in. Eventually the Master overruled them all, and, on June 23, 1831, reported that a good title could be made to both lots. The purchaser took a

general exception to the report. The vice-chancellor, before whom the exception was originally argued, overruled the several grounds taken in support of it, and the purchaser appealed. In February, 1831, LORD BROUGHAM, L.C., allowed the appeal as respected lot 25, and the purchaser was, accordingly, released from his purchase of that lot.

In February, 1831, the purchaser moved that he might also be released from his contract as to lot 30.

Sir Edward Sugden for the purchaser.
Pepys and *Knight* for the vendor.

March 4, 1834. **LORD BROUGHAM, L.C.** This is an application by Mr. Drake to be discharged from his contract for the purchase of lot 30, not upon the ground of any of the various objections already discussed and disposed of, but simply on the ground that, inasmuch as lot 25 is gone and lot 30 was purchased subsequently to lot 25, and has not, like the latter, any mansion or buildings upon it, but consists merely of fifty eight acres of land, the one cannot be conveniently occupied and enjoyed without the other, the argument being that, as the purchaser never would have bought lot 30 but for his having bought and expected to possess lot 25, he should, therefore, also be released from his contract as to lot 30. The objections hitherto urged against the title to lot 30 were primary objections, not depending at all on the having or not having lot 25. A secondary and derivative objection is now made that the two lots were connected, and that, the contract for lot 30 depending on the contract for lot 25, both contracts must be taken as one, and held to be now at an end.

No such objection to the completion of the contract was urged before the Master. It may be observed in passing that the present objection might have been taken prospectively, and, as it were, contingently, for it might have been urged, first, that the title was liable to the primary objections and independently of the title to lot 25 being found good or bad, and, next, that, at all events, if no title to lot 25 could be made, lot 30 was so complicated with it as to be untenable if lot 25 was not obtained. For the present purpose, however, it is enough that this objection has never been made the subject of regular investigation. It has not been taken by way of answer to a bill calling for a specific performance so as to be put in issue, which is one mode of raising the question, nor has it been made the ground of objection before the Master upon a reference of title. It is only suggested by arguments and observations arising upon affidavits in the cause, and I am of opinion that it cannot in this form be successfully used by a purchaser seeking to be let off from his contract.

Although this is enough to dispose of the present motion, yet the importance of the question which it raises, in a country where so many sales in lots, by auction and otherwise, are continually taking place, and the conflicting doctrines which have been sometimes ventilated upon the subject, induce me to enter a little further into the discussion. LORD KENYON is reported to have held at nisi prius that where a party purchases several distinct lots at a sale (in the case before him it was houses), and a title to one of the lots cannot be made, the purchaser is at liberty to repudiate the whole, so that he shall be loose as to the other lots while the seller is fast, and this upon the supposition that the whole contract is necessarily entire: *Chambers* v. *Griffiths* (1). That this is not a sound doctrine at law any more than in equity, I hold to be very clear. LORD ELDON is said to have expressed a similar opinion in *Drewe* v. *Hanson* (2), but, if so, it has escaped the reporter. The proposition is, indeed, in some measure sanctioned by a faint dictum, for it is nothing more, in *Boyer* v. *Blackwell* (3), where, upon a suggestion at the Bar that, as the purchaser had taken contiguous lots in confidence of having both, he ought to have an option of opening the biddings as to the one if the other were taken from him, the reporter says: "The court inclined to think this reasonable, but the purchaser chose to keep the other lots." This clearly proves nothing [illegible]

A v. *Shore* (4), before LORD ELLENBOROUGH, is distinctly contrary to *Chambers* v. *Griffiths* (1), which was also plainly overruled in a recent case in the King's Bench, *Keets* v. *Lord Dormer* (5). It is to be observed that, in neither of these cases, was *Chambers* v. *Griffiths* (1) cited, a circumstance strongly confirming a suspicion suggested by the very inaccurate reference to *Poole* v. *Shergold* (6) that the report of *Chambers* v. *Griffiths* is not to be relied upon.

B If LORD KENYON'S reported opinion, which he probably never held, carried the rule so much too far in favour of the purchaser, perhaps an opinion ascribed to LORD ELDON, and mentioned in SIR EDWARD SUGDEN'S TREATISE ON VENDORS AND PURCHASERS, and in the note to *Roffey* v. *Shallcross* (7) carries the rule almost as far the other way—that the purchasers of different lots are not to be connected together, unless there has been an understanding that the buyer should not C take any if he could not have all. Clearly such an understanding will suffice to blend the whole into one contract, but it seems equally clear that the same complication may be effected, or rather evidenced, without any such understanding, that is, without any express agreement to this effect. It is a question of circumstances; the lots may be connected from their nature; it may be shown that the D purchase of the one was made with reference to the other. A mere suggestion of the party, a mere statement of his inclination, or fancy, will not be sufficient; nor may the proof of anything of a private nature, not known to the vendor, suffice, but where, upon matters known to both parties, he can ground his proof that the one transaction was dependent on the other, he complicates the two, so as to make the contract one, although there may have been no express statement that he was E to take none if he might not have all. It is further to be observed that LORD ELDON decided contrary to the opinion referred to in *Ex parte* Tilsley (8).

An examination of the authorities will lead to the conclusion that this is the sound principle—placed in the mean between the two extreme opinions ascribed to the learned judges whose names have been mentioned, and will confirm the grounds upon which I have stated it as my opinion that the derivative objection F now taken cannot be allowed to prevail without a more full inquiry.

Upon the greater number of the cases cited in support of the motion, Mr. Pepys observed that, as they related to the question of opening biddings, they had no application. In that observation I do not agree. If the decisions are founded upon similar objections to the one raised here, if they show that the purchaser of a lot on which the buildings are not opened is let off because, having but one, he G needs not take the other on account of certain circumstances connecting the two together, undoubtedly those decisions are strictly in point, for the purchaser, but for the order releasing him, would be bound to take the lot on which the biddings had not been opened.

Roffey v. *Shallcross* (7) is not at all decisive of a question like the present. The purchase there was of two sevenths of an estate, in one lot; if a title could only H be made to one seventh, the purchaser had clearly not got that which he desired to have, viz., two sevenths; and no proof was requisite to show that the part with and the part without title were complicated together so as to make the purchase joint (for the parts were undivided parts, and were in one lot), even more than if a title could only have been made to half the number of acres in one lot. Accordingly the decree sets forth their lying in one lot as the ground of the decision. I The principle adverted to, rather than laid down, in *Price* v. *Price* (9), cannot certainly be assumed as furnishing an inflexible rule, namely, that where one lot has been bought before another and the title to the first fails, the purchaser shall be let off from the second purchase, upon the ground that it must be concluded he would not have bought the second had he not reckoned on having the first. This circumstance of the one purchase by the same party being subsequent to the other, may often, no doubt, be the ground of a very strong presumption, but many cases may be figured in which it would prove nothing at all. The court can only have treated it as a circumstance tending to show the connection of the two contracts.

The application, there, was not on the motion of the purchaser, but in consequence of the court being moved to open the biddings.

Poole v. *Shergold* (6) was decided by LORD KENYON, whose judgment is best reported at 1 Cox, Eq. Cas. 273. To two lots no title could be made; the purchaser was, of course, let off as to those; and then he insisted on being also released from his purchase of the others as to which the Master had only reported that the case was one for compensation. LORD KENYON, however, decreed him to take all but the two to which the title was defective, observing, at the same time, that the court had gone great lengths in compelling parties to proceed with their purchases, but that he clearly thought a case might be made where want of title to a part might be sufficient reason for putting an end to the whole contract, and he mentioned, in terms of strong reprobation, the case before SIR THOMAS SEWELL where, although no title could be made to that part of the estate which was the principal object in making the agreement, the purchaser was forced to complete his contract as to the rest. His Lordship added, however, that in the case before him he was bound to suppose there was no such connection or complication between the lots, plainly because, as the plaintiff's counsel had argued, the report was silent upon the subject.

In *Knatchbull* v. *Grueber* (10), where the want of title to twelve acres in a purchase of 700 was held enough to set the buyer free, those twelve acres were so near the mansion house, being opposite the park gate, that they were essential to the enjoyment of the estate, and besides, as they contained brick earth, they were not unlikely to be built upon. The evidence in the cause, it must be observed, had here been taken expressly as to the point whether or not the possession of that piece of land was essential to the enjoyment of the rest, and, therefore, there was no occasion to direct an inquiry before the Master. From the report of LORD ELDON's judgment when the case came before him upon appeal it is clear that, though he affirmed the decree upon another ground, he inclined to think the twelve acres material, but it is important to remark that his Lordship dwells upon the fact of this materiality having been put in issue. He says, indeed, that he "apprehends the court is not always bound to send this point to the Master, but may decide for itself if the evidence before it is sufficient to enable it to do so." In another part of the judgment he says that "the nature of the land is not so put in issue as to enable the court to determine as to its materiality." No one can read that judgment and think that LORD ELDON would have disposed of the question of letting off a purchaser on account of matters not put in issue (and consequently not investigated) either by the answer or by the depositions, and on which there had been no reference to the Master.

In *Dalby* v. *Pullen* (11) the question of title arose in a suit to establish a will, and as to one of the points there discussed -the letting off a purchaser of a lot to one undivided seventh of which a title could not be made—it is only a repetition of *Roffey* v. *Shallcross* (7). The rest of the case shows strongly that the present application cannot be granted without further inquiry. In that case the Master having upon a reference reported in favour of the title, and the money being directed to be paid into court, all necessary parties were ordered to join in the conveyance. The title, however, was complicated, and a considerable time elapsed before the conveyance could be completed, and on the eve of the deeds being executed, a claim adverse to the testator's title was set up, and on the ground of this claim a motion was made to discharge the purchaser. The affidavits stated the nature of the claim, and nothing certainly could be more clear if the facts were true, for the testator's title was only as heir-at-law of his brother, five years older than himself, and the new claimant was stated to be the son of an intermediate brother. It was further sworn on the purchaser's part that the plaintiff had stated his having been informed ten years ago by his solicitor of an heir-at-law other than the testator being in existence. In answer to these affidavits the plaintiff's solicitor only swore that at the time of preparing the abstracts he

believed the testator to be the heir-at-law of his elder brother and that he had at that time never heard it questioned, and he added circumstances which had confirmed him in that belief. A case more clear than this, as it stood upon the affidavits, is hardly to be conceived. In fact, the purchaser's affidavits were wholly uncontradicted, and yet the court referred it back to the Master, with a direction to receive such further evidence as the parties might think fit to adduce, although, with the exception that a good title had been reported before the discovery of the adverse claim, *Dalby* v. *Pullen* was a stronger case than the present for calling upon the court to decide without a further reference. It was a case too into which fraud entered somewhat largely.

It may, therefore, be concluded that in determining whether a purchaser who fails to obtain a good title to one lot shall be let off from his contract for another the whole circumstances may be examined in order to prove that the two contracts are one by showing that the two parcels are complicated together, and that upon the whole transaction the court will determine, as a jury would, the questions: Did or did not the party purchase the one with reference to the other? Would he or would he not have taken the one had he not reckoned upon also having the other? Mr. Drake cannot, therefore, have his present application granted, but he may carry in his new and secondary objection to the Master.

Order accordingly.

[The reference to the Master was not prosecuted, the parties having come to an arrangement, by which the purchaser was released from his contract as to lot 30.]

R. *v.* FLINTAN

[COURT OF KING'S BENCH (Bayley, Littledale and Parke, JJ.), Trinity Term, 1830]

[Reported 1 B. & Ad. 227; 9 L.J.O.S.M.C. 33; 109 E.R. 771]

Husband and Wife—Maintenance of wife—Liability of husband—Desertion and adultery of wife.

By s. 3 of the Vagrancy Act, 1824: "Every person being able wholly or in part to maintain himself . . . or his . . . family by work or other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he . . . or any of his . . . family whom he . . . may be legally bound to maintain shall be chargeable to any parish . . . shall be deemed an idle and disorderly person within the true intent and meaning of this Act", and shall be punishable with imprisonment and hard labour.

A man **held** not to be liable to be convicted under this enactment of neglecting and refusing to maintain his wife who had left him and had committed adultery, notwithstanding that he himself had been guilty of adultery after her departure.

Notes. At common law it is the duty of a husband to maintain his wife according to his means of supporting her and if he fails to perform this duty the wife has implied authority to pledge his credit for necessaries suitable to his station in life. This implied authority becomes an authority of necessity if a husband is guilty of desertion and has left his wife without means of support. Unjustifiable desertion by a wife suspends the implied authority so long as she wilfully absents herself but if she commits adultery the husband's obligation ceases altogether notwithstanding that he has been guilty of cruelty or other misconduct unless he has connived at or condoned her offence or he continues to hold her out as the apparent mistress of his establishment. At common law a wife is under no duty to support her husband.

The relevant part of s. 3 of the Vagrancy Act, 1824, has been repealed by the National Assistance Act, 1948. See ss. 42, 43 and 51 of that Act: 16 HALSBURY'S STATUTES, 2nd Edn.) 968, 969 and 976.

Followed: *Culley* v. *Charman* (1881), 7 Q.B.D. 89. Considered: *Mitchell* v. *Torrington Union* (1897), 76 L.T. 724. Applied: *Selby* v. *Atkins* (1926), 135 L.T. 45. Considered: *National Assistance Board* v. *Wilkinson*, [1952] 2 All E.R. 255; *National Assistance Board* v. *Prisk*, [1954] 1 All E.R. 400. Referred to: *Thomas* v. *Alsop* (1870), 21 L.T. 715; *Jones* v. *Newtown and Llanidloes Union* 1920 3 K.B. 381; *Jones* v. *Evans*, [1945] 1 All E.R. 19; *Stopher* v. *National Assistance Board*, *National Assistance Board* v. *Parkes*, [1955] 1 All E.R. 700.

As to the court's consideration of matrimonial offences on making orders against a person under the National Assistance Act, 1948, for failure to maintain a spouse, see 19 HALSBURY'S LAWS (3rd Edn.) 818; and for cases see 27 DIGEST (Repl.) 80 et seq.

Cases referred to:

(1) *Govier* v. *Hancock* (1796), 6 Term Rep. 603; 2 C. & P. 25, n.; 101 E.R. 726; 27 Digest (Repl.) 82, *624*.
(2) *Lewis* v. *Lee* (1824), 3 B. & C. 291.
(3) *Proctor* v. *Proctor* (1819), 2 Hag. Con. 292; 161 E.R. 747; 27 Digest (Repl.) 440, *3699*.
(4) *R.* v. *Dempson* (1733), 2 Stra. 955; 93 E.R. 964; sub nom. *R.* v. *Kempson*, 2 Barn. K.B. 364; Kel. W. 288; 1 Sess. Cas. K.B. 230; 1 Bott. 405.
(5) *Hunt* v. *De Blaquiere* (1829), 5 Bing. 550; 3 Moo. & P. 108; 7 L.J.O.S.C.P. 198; 130 E.R. 1174; 27 Digest (Repl.) 195, *1542*.

Appeal by the defendant against conviction under s. 3 of the Vagrancy Act, 1824, for failure to maintain his wife.

The defendant was convicted by Sir P. Lawrie, alderman, and a justice of the peace for the city of London, as an idle and disorderly person, within the meaning of s. 3 of the Vagrancy Act, 1824, for refusing to maintain his wife, Elizabeth Flintan although able to maintain her, by reason of which she became chargeable to the parish. The sessions confirmed the conviction, subject to the opinion of this court on the following Case.

Elizabeth Flintan, the wife of William Houghton Flintan, became chargeable to the parish of St. Andrew by the Wardrobe, in the city of London, on Feb. 20, 1829, and received from that time to the time of the conviction four shillings a week from the said parish. W. H. Flintan was then able wholly to maintain his wife. He and his wife cohabited together for some years previously to and until Nov. 26, 1826, when they quarrelled on account of her having pawned some of their plate: and on the following day she quitted his house in his absence and without his knowledge, and had not resided with him since.

Elizabeth Flintan subsequently sued her husband for alimony in the Consistory Court of the Bishop of London, by reason of adultery committed by the husband, who produced, in his defence, evidence of adultery by his said wife; and the court, by interlocutory decree having the force and effect of a definitive sentence, pronounced that the allegations given in this cause on behalf of E. Flintan had been proved, and that W. H. Flintan had been guilty of adultery as therein charged; and the court further pronounced that the recriminatory allegation on behalf of W. H. Flintan had also been proved, and that the said Elizabeth Flintan had been guilty of adultery as therein pleaded, and, therefore, dismissed W. H. Flintan from the citation issued against him in this suit, and all further observance of justice therein.

The adultery which was proved upon the wife had been committed while she lived with her husband, and without his knowledge or subsequent condonation; the adultery proved upon him did not take place till after that time, and after she had left him. The question for the opinion of this court was whether W. H.

A Flintan was in these circumstances legally bound to maintain his wife, within the meaning of s. 3 of the Vagrancy Act, 1824.

Mirehouse and *Patteson*, in support of the conviction.—It cannot be contended, against the authority of *Govier* v. *Hancock* (1), that the defendant would have been liable in an action for necessaries supplied to his wife living apart from him after
B the adultery committed by her. But the question is whether or not under this statute he is still bound to maintain her. [BAYLEY, J.: You are to make him a criminal for not doing so.] For the purpose of the statute she still continued a part of "his family." Even a divorce a mensâ et toro for adultery does not place a woman in the situation of a feme sole: *Lewis* v. *Lee* (2). The husband in this case would not have been entitled to a divorce, being himself guilty of adultery: *Proctor* v. *Proctor* (3). In *R.* v. *Kempson* (4) an order had been made upon a man
C to maintain his son's wife, the son having run away; and it was objected that the wife had committed adultery, that the son himself, therefore, would not have been liable to maintain her, and consequently the father was not. But it was said on the other side, that "whatever effect this act of the wife might have upon the husband it could not have any upon the parish"; and the objection was held to
D be answered. A tradesman supplying her would be a volunteer, and would act at his peril, but the parish must support her; and they may insist that the husband shall provide for her to the extent at least of sustaining life, so that she may not become burdensome to them. In *Hunt* v. *Blaquiere* (5), the Court of Common Pleas appears to have considered necessity as a ground on which a husband might be held liable for the support of his wife, independent of any implied authority
E in her to bind him by her contract. [PARKE, J.: Is he then bound to support her wherever she may choose to go?] If the husband is exonerated in this case, the question arises whether the father, or other relation of the wife, will be bound to maintain her, under the statutes 43 Eliz., c. 2, s. 7, and 59 Geo. 3, c. 12, s. 26? There is nothing in these Acts to show that such a case was ever contemplated. [BAYLEY, J.: If the husband were dead, she must be supported by those relations:
F may it not be said that her misconduct shall have the same effect? LITTLEDALE, J.: Having rendered herself unworthy of her husband's protection, she returns to the same state as if she were not married.]

Heaton for the defendant, was stopped by the court.

BAYLEY, J.—This case is very clear. By the Vagrancy Act, 1824, s. 3, a man
G is criminally answerable for refusing to maintain any of his family whom he is legally bound to maintain. That obligation must be made out; and it is not established in the case of a wife who has left her husband and lives in adultery.

LITTLEDALE, J. I do not see the distinction attempted between the parish and the individual supplying necessaries. If the husband is not obliged to answer
H for the wife's contracts, or to receive her into his house, it cannot be said that he is "legally bound to maintain her."

PARKE, J. It would be strange if the court could hold that a man was not civilly liable for the supply of necessaries to his wife, and yet that not supplying them rendered him a vagrant.

Conviction quashed.

I

FREEMAN *v.* TAYLOR

[COURT OF COMMON PLEAS (Tindal, C.J., and other judges), November 25, 1831]

[Reported 8 Bing. 124; 1 Moo. & S. 182; 1 L.J.C.P. 26; 131 E.R. 348]

Shipping—Carriage of goods—Deviation—Long and unreasonable—Object of charter destroyed—Termination of contract.

If the deviation of a ship from its chartered voyage is so long and unreasonable that in the ordinary course of mercantile concerns it can be said to have put an end to the whole object which the charterer had in view in chartering the ship the contract may be considered at an end and both parties are discharged from it. But a deviation of lesser effect does not go to the root of the contract and will only entitle the charterer to recover in respect of such damage as he may have sustained as a result of it.

Notes. Considered: *Tarrabochia* v. *Hickie* (1856), 1 H. & N. 183; *MacAndrew* v. *Chapple* (1866), L.R. 1 C.P. 643. Referred to: *M'Andrew* v. *Adams* (1834), 1 Bing. N.C. 29; *Behn* v. *Burness* (1863), 2 New Rep. 184; *Stanton* v. *Richardson*, *Richardson* v. *Stanton* (1872), L.R. 7 C.P. 421; *Jackson* v. *Union Marine Insurance Co.*, [1874-80] All E.R. Rep. 317; *Universal Cargo Carriers Corpn.* v. *Citati*, [1957] 2 All E.R. 70; *Hong Kong Fir Shipping Co., Ltd.* v. *Kawasaki Kisen Kaisha, Ltd.*, [1962] 1 All E.R. 474.

As to deviation, see 35 HALSBURY'S LAWS (3rd Edn.) 269 273; and for cases see 41 DIGEST (Repl.) 378–386.

Cases referred to:

(1) *Bornmann* v. *Tooke* (1808), 1 Camp. 377; 170 E.R. 991, N.P.; 41 Digest (Repl.) 192, *277*.

(2) *Havelock* v. *Geddes* (1809), 10 East, 555; 103 E.R. 886; 41 Digest (Repl.) 180, *214*.

(3) *Davidson* v. *Gwynne* (1810), 12 East, 381; 104 E.R. 149; 41 Digest (Repl.) 192, *278*.

(4) *Boone* v. *Eyre* (1779), 1 Hy. Bl. 273, n.; 1 Wms. Saund. 320 *c*; 2 Wm. Bl. 1312; 126 E.R. 160; 12 Digest (Repl.) 472, *3526*.

(5) *Duke of St. Alban's* v. *Shore* (1789), 1 Hy. Bl. 270; 126 E.R. 158; 12 Digest (Repl.) 489, *3673*.

(6) *Soames* v. *Lonergan* (1824), 2 B. & C. 564; 4 Dow. & Ry. K.B. 74; 2 L.J.K.B. 106.

(7) *Toutong* v. *Hubbard* (1802), 3 Bos. & P. 291; 127 E.R. 161.; 41 Digest (Repl.) 565, *3435*.

(8) *Shadforth* v. *Higgin* (1813), 3 Camp. 385; 170 E.R. 1419, N.P.; 41 Digest (Repl.) 186, *243*.

(9) *Ritchie* v. *Atkinson* (1808), 10 East, 295; 103 E.R. 787; 41 Digest (Repl.) 569, *3473*.

(10) *Thomas* v. *Cadwallader* (1744), Willes, 496; 125 E.R. 1286; 31 Digest (Repl.) 352, *4827*.

(11) *Goodisson* v. *Nunn* (1792), 4 Term Rep. 761; 100 E.R. 1288; 40 Digest (Repl.) 292, *2444*.

(12) *Porter* v. *Shephard* (1796), 6 Term Rep. 665; 101 E.R. 761; 12 Digest (Repl.) 484, *3605*.

(13) *Campbell* v. *Jones* (1796), 6 Term Rep. 570; 101 E.R. 708; 12 Digest (Repl.) 482, *3589*.

(14) *Cook* v. *Jennings* (1797), 7 Term Rep. 381; 101 E.R. 1032; 41 Digest (Repl.) 563, *3412*.

(15) *Glazebrook* v. *Woodrow* (1799), 8 Term Rep. 366; 101 E.R. 1436; 12 Digest (Repl.) 472, *3521*.

(16) *Smith* v. *Wilson* (1807), 8 East, 437; 103 E.R. 410; 41 Digest (Repl.) 223, 494.

(17) *Storer* v. *Gordon* (1814), 3 M. & S. 308; 105 E.R. 627; 41 Digest (Repl.) 559, *3363*.

(18) *Fothergill* v. *Walton* (1818), 8 Taunt. 576; 2 Moore, C.P. 630; 129 E.R. 508; 41 Digest (Repl.) 347, *1417*.

(19) *Constable* v. *Cloberie* (1625), Palm. 397; Poph. 161; Lat. 49; 81 E.R. 1141; sub nom. *Conustable* v. *Clowbury*, Noy, 75; 41 Digest (Repl.) 157, *37*.

(20) *Anon.* (1773), Lofft, 194; 98 E.R. 606; sub nom. *Kingston* v. *Preston*, cited in 2 Doug. K.B. at p. 689; 12 Digest (Repl.) 471, *3518*.

(21) *Mount* v. *Larkins* (1831), 8 Bing. 108; 1 Moo. & S. 165; 1 L.J.C.P. 20; 131 E.R. 342; 29 Digest (Repl.) 171, *1075*.

Rule Nisi obtained by the plaintiff to set aside the verdict of a jury in an action in which the plaintiff, a shipowner, claimed from the defendant, the charterer of the vessel, damages for breach of the charterparty in the failure of the charterer to provide a cargo for the homeward voyage of the vessel.

The plaintiff, who was owner and captain of the *Edward Lombe*, a ship of 347 tons, stated in his declaration that he chartered the vessel to the defendant under a charterparty which provided that she would proceed to Madeira and the Cape of Good Hope and there discharge cargo, and would proceed from the Cape with all convenient speed to Bombay and there load a cargo of cotton to be carried to England. The cabins and between decks of the vessel were reserved for the benefit of the plaintiff.

The plaintiff alleged that, having discharged the cargo which was to be unloaded at the Cape, he proceeded to Bombay, but the charterer refused to load the cargo of cotton for London provided for by the charterparty and the cargo which he (the plaintiff) obtained in its place did not produce the freight which he would have received for carrying the cargo of cotton. He, therefore, claimed the difference between those two sums. The defendant denied liability.

At the trial before TINDAL, C.J., in 1830, it appeared that the ship sailed from London on May 20, 1828, with a cargo shipped by the defendant for Bombay, and arrived at the Cape of Good Hope on Sept. 28 following. She might have proceeded on her voyage on Sept. 30, but the captain detained her till Oct. 8, being occupied in stowing the between decks, on his own account, with a cargo of mules and cattle for Mauritius. On Oct. 4 the defendant's agents at the Cape protested against the delay and against the ship's going to Mauritius on the ground that it was out of her course. The captain, however, insisted that it was not out of the course, nor any violation of the terms of the charterparty. He proceeded accordingly, arrived at Mauritius on Nov. 10, and remained there till Nov. 19, discharging his mules and cattle. On Nov. 19 he sailed for Bombay, where he arrived on January 9, 1829, six or seven weeks later than he would have arrived, if, on Sept. 28, he had sailed direct from the Cape of Good Hope to Bombay. In the meantime several ships had arrived at Bombay which had left England after the *Edward Lombe*, and the defendant's agents refused to procure a cargo of cotton to freight back the latter ship. The captain remained at Bombay till Mar. 17 during which time he took on board, on his own account, whatever goods he could procure, and then proceeded to Ceylon for further cargo with which he returned to London. The plaintiff by this action sought to recover the difference in value between the freight so earned and that which would have accrued from the defendant's cargo of cotton. The freight for the voyage out had been paid, partly in advance.

The CHIEF JUSTICE told the jury that inasmuch as the freighter might bring his action against the owner and recover damages for any ordinary deviation, he could not, for such a deviation, put an end to the contract, but, if the deviation was so long and unreasonable that, in the ordinary course of mercantile concerns, it might be said to have put an end to the whole object the freighter had in view

in chartering the ship, in that case the contract might be considered at an end. He left it to the jury to decide, whether the delay here was of such a nature as to have put an end to the ordinary objects the freighter might have had in view when he entered into the contract. The jury found for the defendant.

Serjeant Taddy, on behalf of the plaintiff, obtained a rule nisi to set aside the verdict, on the ground that the defendant's remedy for the alleged deviation, if he had been injured by it, was by cross-action, and that he was not at liberty, in the exercise of his own discretion to put an end to the contract between him and the plaintiff. The learned counsel argued that the engagement to sail from the Cape with all reasonable speed was, not a condition precedent, but an independent covenant for the breach of which the defendant might be entitled to sue, but it did not go to the whole of the consideration for the defendant's contract as was manifest from the circumstance that the defendant had not shown that his object in hiring the ship had been defeated by the plaintiff's delay. Unless it went to the whole consideration, it was not a condition precedent, the neglect of which would entitle the defendant to determine the contract.

In *Bornmann* v. *Tooke* (1), by a charterparty between the plaintiff, the captain of a ship, and the defendant's agent abroad for the carriage of timber from Riga to Portsmouth at a stipulated rate per load, the plaintiff bound himself, after receiving his cargo on board, to sail with the first favourable wind direct to the port of Portsmouth. The ship, however, unnecessarily entered the harbour of Copenhagen, where she was detained several weeks, by means whereof the defendant was put to considerable expense in having fresh insurances done upon her cargo. In an action of indebitatus assumpsit for the freight, it was held that the plaintiff's covenant to sail direct to Portsmouth was not a condition precedent, and that the deviation could not be given in evidence either as a bar to the action or to diminish the damages. So, in *Havelock* v. *Geddes* (2), it was held that a covenant in a charterparty of affreightment that the owner should at his expense forthwith make the ship tight and strong, etc., for a voyage for twelve months, and keep her so, was not a condition precedent to the recovery of the freight after the freighter had taken the ship into his service and used her for a certain period, but, if the freighter should be afterwards delayed or injured by the necessity of repairing her, he would have his remedy in damages.

In *Davidson* v. *Gwynne* (3), the master of a vessel covenanted with the freighter that the vessel should proceed with the first convoy from England for Spain and Portugal, or either, as he should be directed by the freighter or his agents, and there make a right and true delivery of the cargo agreeably to the bills of lading signed for the same, and then take in a home cargo, and return and make a right and true delivery thereof at London, in consideration whereof and of everything above mentioned the freighter covenanted to load the vessel out and home and pay certain freight per ton per month, part before, and the remainder on the right and true delivery of the homeward cargo at London. It was held, that the master, having proceeded with the outward cargo to Lisbon and brought home a return cargo and delivered it to the freighter at London, was entitled to his freight for the voyage, though he had not sailed with the first convoy, the sailing with the first convoy not being a condition precedent to his recovering freight for the voyage actually performed, but a distinct covenant for the breach of which he was liable in damages.

Serjeant Wilde and *Serjeant Bompas*, for the defendant, showing cause against the rule: The verdict of the jury, coupled with the previous direction, amounts to a finding that the object of the charterer's contract was entirely defeated by the unjustifiable delay of the plaintiff. It follows, therefore, that the engagement to proceed from the Cape with all reasonable speed was a condition precedent going to the entire consideration for the contract; and, as such, while the contract remained executory, the breach of it was an answer to the plaintiff's demand. *Bourne*

A v. *Eyre* (4), *Duke of St. Alban's* v. *Shore* (5). The plaintiff, having by his wilful act defeated the object of the defendant, has no longer any claim against him.

In *Soames* v. *Lonergan* (6), where the charterers of a ship for a voyage from Cadiz to St. Blas and thence to Guayaquil to take in a homeward cargo caused another ship to be chartered on their account to go out in ballast and bring home a cargo from Guayaquil with a proviso that in the event of the non-arrival of the B first-mentioned ship at Guayaquil, then the second charter should be void, it was held that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship, and that, the first ship not having arrived in time to answer those purposes and the delay not having been attributable to the charterers, the charter of the second ship was void and the charterers were not bound to provide a homeward cargo for her. In *Touteng* v. *Hubbard* (7), where C a British merchant chartered a Swedish ship on a voyage to St. Michael's for a cargo of fruit and the charterparty contained the usual exception against the restraint of princes, the ship having been prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British government, it was held the Swedish owner could not, by proceeding on the voyage D after the embargo was taken off, entitle himself to recover the freight against the British merchant. In *Shadforth* v. *Higgin* (8), where a ship was freighted to go in ballast to Jamaica and bring home a cargo thence and the freighter undertook to provide a full cargo for her in time for the July convoy, provided she arrived out and was ready by June 25, it was held that, as she did not arrive out till after July 25, the freighter was entirely discharged from his contract to furnish a cargo.

E In the cases relied on for the plaintiff, either the stipulation was no condition precedent or it did not appear, as in the present case, that the party had been deprived of the benefit of the contract. Thus, in *Bornmann* v. *Tooke* (1), there was no finding that the object of the defendant had been defeated. In *Havelock* v. *Geddes* (2) the defendant made use of the ship, and thereby waived the right F of insisting on seaworthiness as a condition precedent. In *Davidson* v. *Gwynne* (3) the benefit of the voyage was obtained although the ship did not sail according to agreement with the first convoy. Whether or not a stipulation shall operate as a condition precedent and goes to the entire consideration, depends, says Lord Ellenborough, not on any formal arrangement of the words, but on the sense and reason of the thing as it is to be collected from the whole contract: *Ritchie* G v. *Atkinson* (9): and on that principle all the cases may be reconciled: *Thomas* v. *Cadwallader* (10), *Goodisson* v. *Nunn* (11), *Porter* v. *Shephard* (12), *Campbell* v. *Jones* (13), *Cook* v. *Jennings* (14), *Glazebrook* v. *Woodrow* (15), *Smith* v. *Wilson* (16), *Storer* v. *Gordon* (17), *Fothergill* v. *Walton* (18) Comyns' Digest Condition Precedent (G 5) is express that it ought to be performed within a reasonable time.

H *Serjeant Taddy*, in support of the rule: The defendant having had the benefit of the outward voyage and having adduced no proof of loss occasioned by the late arrival of the ship at Bombay, it was not competent to the jury to find that the whole object of the contract was defeated. In *Touteng* v. *Hubbard* (7), *Soames* v. *Lonergan* (6), and *Shadforth* v. *Higgin* (8), nothing was done for the benefit of the charterer on the outward voyage; the ships went out in ballast. In *Havelock* v. I *Geddes* (2) Lord Ellenborough said (10 East, at p. 564):

> "Had the plaintiff's neglect here precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar, because the consideration for the defendants' covenant to pay the freight would then have failed in toto; but as the defendants have had some use of the vessel, notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a part only; the consideration has not wholly failed, and the covenant cannot

be looked upon as having raised a condition precedent, but merely gives the defendants a right under a counter-action to such damages as they can prove they have sustained from this neglect."

Bornmann v. *Tooke* (1) and *Constable* v. *Cloberie* (19) are express authorities to show that the stipulation here as to proceeding direct to Bombay was not a condition precedent. *Goodisson* v. *Nunn* (11), *Glazebrook* v. *Woodrow* (15), and *Kingston* v. *Preston* (20), there cited, were all cases of sale and purchase involving concurrent conditions which could not be pleaded one against the other, and are inapplicable to the present case, but *Campbell* v. *Jones* (13) is in point for the plaintiff. There A., in consideration of £250 paid by B. and of the further sum of £250 to be paid, covenanted that he would, with all possible expedition, instruct B. in a certain mode of bleaching linen (for which he had obtained a patent), and B. covenanted that he would, on or before Feb. 25, 1794, or sooner if A. should before that time have instructed him, pay the further sum of £250, it was held that the covenants of A. and B. were independent covenants, and that A. might sue B for the £250, without averring that he had taught B. the mode of bleaching linen.

Cur. adv. vult.

Nov. 25, 1831. **TINDAL, C.J.,** delivered the following judgment of the court.—This was an action of assumpsit upon a charter by the plaintiff to the defendant of the ship *Edward Lombe* from London to Madeira and the Cape of Good Hope, and thence to Bombay and back, the plaintiff claiming a compensation in damages against the defendant for not loading the ship with a cargo of cotton at Bombay. At the trial it appeared in evidence that, instead of proceeding by the direct and usual course from the Cape of Good Hope to Bombay, the captain made a deviation to the island of Mauritius, and that the defendant's agents at Bombay, in consequence of such deviation, refused to find a cargo.

The point left to the jury at the trial was whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered, the jury being told that, if such was their opinion, the defendant was excused, by the act of the plaintiff's captain, from furnishing a cargo. The jury having determined that question in the affirmative, and having found a verdict for the defendant, a motion was made to set the verdict aside, and for a new trial, on the ground of misdirection.

After hearing the arguments against and in support of the rule, we are of opinion, upon the same principle as that which was laid down in *Mount* v. *Larkins* (21), and which we think it is unnecessary to repeat, the direction was right, and we, therefore, think the rule for a new trial must be discharged.

Rule discharged.

WRIGHT *v.* COURT AND OTHERS

[COURT OF KING'S BENCH (Bayley, Holroyd and Littledale, JJ.), Trinity Term, 1825]

[Reported 4 B. & C. 596; 6 Dow. & Ry. K.B. 623; 3 Dow. & Ry. M.C. 299; 4 L.J.O.S.K.B. 17; 107 E.R. 1182]

Arrest—Arrest without warrant—Constable—Constable's duty to take arrested person before justice.

Arrest—Constable—Handcuffs—Right to handcuff arrested person.

A constable arresting a man on suspicion of felony must take him before a justice to be examined as soon as he reasonably can and a delay of three days for the owner of stolen goods to collect evidence against the prisoner is not justifiable. A constable has no right to handcuff a prisoner unless he has attempted to escape, or unless it is necessary in order to prevent his escaping.

Notes. For the powers of the police to allow bail on arrest without a warrant, see s. 38 of the Magistrates' Courts Act, 1952 (32 HALSBURY'S STATUTES (2nd Edn.) 453). Section 31 of the Game Act, 1831 (10 HALSBURY'S STATUTES (2nd Edn.) 697), as amended by s. 1 (2) of the Game Laws (Amendment) Act, 1960 (40 HALSBURY'S STATUTES (2nd Edn.) 324), provides that a person arrested under the provisions of that section cannot be detained for a longer period than 12 hours from the time of his apprehension until he shall be brought before some justice of the peace but that if he cannot be brought before a justice for some reasonable cause he shall be discharged but may nevertheless be proceeded against for the offence by summons or warrant as if no apprehension had taken place.

Applied: *Tims* v. *John Lewis & Co.*, [1951] 1 All E.R. 814. Considered: *John Lewis & Co.* v. *Tims*, [1952] 1 All E.R. 1203. Referred to: *Dallison* v. *Caffery* [1964] 2 All E.R. 610.

As to the handing over of an arrested person to a constable or justice, see 10 HALSBURY'S LAWS (3rd Edn.) 352, 353, and as to handcuffing, see ibid., p. 356; and for cases see 14 DIGEST (Repl.) 191.

Action in trespass for false imprisonment.

The plaintiff alleged that on Nov. 3, 1824, the defendants assaulted and imprisoned him on an unfounded charge of felony and kept him imprisoned until Nov. 6, when they handcuffed him and took him before a justice and there again imprisoned him for 12 hours. The defendants pleaded that a felony had been committed in the warehouse of one Clarke; and that they suspected that the plaintiff was concerned in it. Therefore, Court as a constable and the others as his assistants had taken and imprisoned the plaintiff for a reasonable length of time in order to take him before a justice and to enable Clarke to collect his witnesses. The defendants pleaded that they had handcuffed the plaintiff in order to prevent his escape and that the justice had directed him to be detained for further examination.

Curwood for the plaintiff.

Oldnall Russell for the defendants.

BAYLEY, J.—The plaintiff alleges that he was imprisoned for three days and the first special plea admits that he was imprisoned for that space of time before he was taken to the magistrate for examination and avers that it was a reasonable time for that purpose, and for enabling Clarke to collect and bring his witnesses to prove the felony. But it is the duty of a person arresting anyone on suspicion of felony to take him before a justice as soon as he reasonably can: COMYNS'S DIGEST, Imprisonment, H. 4; and the law gives no authority even to a justice, to detain a person suspected but for a reasonable time till he may be examined: COMYNS'S DIGEST, Imprisonment, H. 5. The justice might have been justified in ordering this plaintiff to be detained until Clarke could bring his witnesses, but it is clear that the

defendants had no authority to detain him without such order. The defendants have also justified handcuffing the plaintiff in order to prevent his escape, but they do not aver that it was necessary for that purpose or that he had attempted to escape. For these reasons the special plea is insufficient and judgment must be given in favour of the plaintiff.

HOLROYD and **LITTLEDALE, JJ.,** concurred.

Judgment for plaintiff.

DUFFIELD AND ANOTHER *v.* DUFFIELD AND OTHERS

[HOUSE OF LORDS (Lord Eldon), April, 1828, March 2, May, June 23, 1829]

[Reported 3 Bli. N.S. 260; 1 Dow. & Cl. 268, 395; 4 E.R. 1334]

Will—Vesting—Presumption in favour—Contingent estates—Exact satisfaction of condition—Descent to heir—Intermediate rents and profits.

All estates are to be held to be vested except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the court cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt, and what seems to make a condition is held to have only the effect of postponing the right of possession.

Estates must remain contingent until there be a person having all the qualifications that the testator requires and completely answering the description given of the object of his bounty in the will.

While estates remain contingent those in whom they are at a future time to be vested have no interest in them or in their rents and profits. Such estates must descend to the heir if they are not given to any person to hold until the events happen on which they are to become vested.

Will—Construction—Equivocal and ambiguous language—Resort to probability and conjecture.

Observations on the meaning of a will, such as that a direction in the will would be so strange that the testator could not have intended it, are but a feeble obstacle to the necessary effect of clear words. They merit attention only when the words are equivocal and ambiguous and where, from the indistinctness of the language used, the court must, to give it any meaning, from necessity resort to probability and conjecture (p. 703 post).

Will—Codicil—Republication of will—Will to have effect as if made on date of codicil.

A codicil confirming a will brings the will down to the date of the codicil, and, therefore, the will has the effect which it would have had if it had been made at the date of the codicil, e.g., of disposing by an appropriate direction of property acquired by the testator between the date of the will and that of the codicil (p. 704 post).

Notes. Considered: *Festing* v. *Allen* (1843), 12 M. & W. 279; *Doe d. Evers* v. *Ward* (1852), 18 Q.B. 197. Distinguished *Browne* v. *Browne* (1857), 3 Sm. & G. 568. Considered: *Hodgson* v. *Earl of Beetive* (1863), 1 Hem. & M. 376; *Holmes* v. *Prescott* (1864), 3 New Rep. 559; *Re Wrightson, Battie-Wrightson* v. *Thomas*, [1904] 2 Ch. 95. Applied: *Re Astor, Astor* v. *Astor*, [1922] 1 Ch. 364. Considered: *Bickersteth* v. *Shann*, [1936] 1 All E.R. 227. Referred to: *Cleobury* v. *Beckett*, *Cleobury* v. *Turner* (1851), 14 Beav. 583; *Perceval* v. *Perceval* (1870), L.R. 9 Eq. 386; *Re Love, Green* v. *Tribe* (1878), 47 L.J.Ch. 783.

As to vesting of gifts under a will, see 39 HALSBURY'S LAWS (3rd Edn.) 1119 et seq.; and for cases see 44 DIGEST 1031 et seq.

A Cases referred to:

(1) *Stephens* v. *Stephens* (1736), Cas. temp. Talb. 228; 2 Barn. K.B. 375; 25 E.R. 751, L.C.; 37 Digest (Repl.) 55, *1.*

(2) *Driver d. Frank* v. *Frank* (1818), 8 Taunt. 468; 6 Price, 41; 2 Moore C.P. 519; 129 E.R. 465, Ex. Ch.; 44 Digest 1053, *9054.*

(3) *Countess of Strathmore* v. *Bowes* (1798), 7 Term Rep. 482; sub nom. *Bowes* B v. *Bowes* (1801), 2 Bos. & P. 500, H.L.

Also referred to in argument:

Johnson v. Gabriel and Bellamy (1588), Cro. Eliz. 122; 78 E.R. 380; *sub nom. Johnson and Bellamy's Case*, 2 Leon. 36; sub nom. *Grant's Case*, cited in 10 Co. Rep. at p. 50a; 44 Digest 1037, *8949.*

C *Spring* v. *Cæsar*, 1 Roll. Abr. 415, *Bromfield* v. *Crowder* (1805), 1 Bos. & P. N.R. 313; 127 E.R. 483; affirmed (1811), cited in 14 East, at p. 604; 44 Digest 1042, *8986.*

Boraston's Case (1587), 3 Co. Rep. 16a; 76 E.R. 664; 44 Digest 1041, *8972.*

Doe d. Hunt v. *Moore* (1811), 14 East, 601; 104 E.R. 732; 44 Digest 1043, *8988.*

Bullock v. *Stones* (1754), 2 Ves. Sen. 521.

D *Pulsford* v. *Hunter* (1792), 3 Bro. C.C. 416; 29 E.R. 618, L.C.; 44 Digest 1091, *9416.*

Strong v. *Teatt* (1760), 1 Wm. Bl. 200; 2 Burr. 912; 96 E.R. 109; affirmed sub nom. *Teatt* v. *Strong*, 3 Bro. Parl. Cas. 219; 1 E.R. 1280, H.L.; 44 Digest 546, *3637.*

Roe d. Helling v. *Yeud* (1806), 2 Bos. & P. N.R. 214; 127 E.R. 607; 44 Digest E 748, *6061.*

Roe d. James v. *Avis* (1792), 4 Term Rep. 605; 100 E.R. 1200; 44 Digest 936, *7918.*

Goodtitle d. Daniel v. *Miles* (1805), 6 East, 494; 2 Smith, K.B. 467; 102 E.R. 1377; 44 Digest 658, *4977.*

Edwards v. *Hammond* (1684), 3 Lev. 132; 1 Bos. & P. 324, n.; 83 E.R. 614; sub F nom. *Stocker* v. *Edwards*, 2 Show. 398; 44 Digest 1037, *8950.*

Doe d. Roake v. *Nowell* (1813), 1 M. & S. 327; affirmed sub nom. *Randoll* v. *Doe d. Roake* (1817), 5 Dow. 202; 3 E.R. 1302, H.L.; 44 Digest 1043, *8989.*

Doe d. Wheedon v. *Lea* (1789), 3 Term Rep. 41; 100 E.R. 445; 44 Digest 1037, *8952.*

Warter v. *Hutchinson* (1823), 1 B. & C. 721; 3 Dow. & Ry. K.B. 58; 107 E.R. G 265; 44 Digest 1048, *9019.*

Crosbie v. *Macdoual* (1799), 4 Ves. 610; 31 E.R. 314; 44 Digest 366, *2001.*

Holder v. *Howell* (1803), 8 Ves. 97; 32 E.R. 289; 44 Digest 326, *1575.*

Snow v. *Tucker* (1663), 1 Sid. 153; 82 E.R. 1027; 44 Digest 834, *6858.*

Atkins v. *Hiccocks* (1737), West temp. Hard. 114; 1 Atk. 500; 25 E.R. 849, L.C.; H 44 Digest 1062, *9152.*

Jennings v. *Gower* (1591), Cro. Eliz. 219; 1 Leon. 229; 78 E.R. 475; 23 Digest (Repl.) 35, *199.*

Trafford v. *Ashton* (1710), 2 Vern. 660; 1 Eq. Cas. Abr. 213, pl. 8; 23 E.R. 1029, L.C.; 44 Digest 849, *7027.*

Goodtitle d. Woodhouse v. *Meredith* (1813), 2 M. & S. 5; 105 E.R. 284; 44 Digest I 374, *2087.*

Hulme v. *Heygate* (1816), 1 Mer. 285; 35 E.R. 680; 44 Digest 371, *2055.*

Appeal from an order of the Vice-Chancellor on a bill raising questions relating to the will of George Elwes deceased.

The testator, George Elwes, by his will dated Mar. 1, 1811, devised to trustees and their heirs, all of his freehold and copyhold land at Southwood and also his freehold land at Haverhill in case there should be but one son of his daughter Emily Frances who should attain the age of twenty-one years, upon trust for such

son and his heirs, and in case there should be two or more sons of Emily Frances who should attain the age of twenty-one years, then in trust for the second of such sons and his heirs, and, in case there should be no son of Emily Frances, upon trust for such of her daughters (if any) as should first attain the age of twenty-one years. After certain bequests of stock in trust to pay the dividends by way of life annuities, the testator devised and bequeathed all the residue of his property, whether freehold, copyhold, or for years, money in the funds, upon mortgage or otherwise, upon security or at interest, debts of whatever other nature or kind, to the same trustees upon trust to sell, get in, and apply the proceeds in payment of debts and legacies, and, as to the residue of the moneys to arise by such sales, to invest the same in the public funds or real securities, and, if there should be only one child of Emily Frances, upon trust to transfer or assure the funds and the dividends, interest, and annual proceeds thereof, to such only child at or on his attaining the age of twenty-one years, and, if there should be two or three children of Emily Frances, in trust, for such two or three children, equally to be divided between them, the shares of sons to be transferred on their attaining the age of twenty-one years. The testator afterwards made a codicil, dated Mar. 3, 1821, to his will in these words, to the effect following:

> "Having some short time back drawn my pen through the first fifteen lines of the sixth sheet of my will and being apprehensive that such rasure not being witnessed, might lead to litigation, I declare that the sole intention of such rasure is to revoke that part of the will, whereby I direct the sale of my freehold property, and I hereby direct that the son of my daughter Emily Frances who shall first attain the age of twenty-one years shall on attaining that age change his name to Elwes, and I give and devise to [him] on his attaining the age of twenty-one years and changing his name to Elwes all my freehold property, lands, tenements, and hereditaments, to hold to my said grandson, his heirs, and assigns, and I do hereby ratify and confirm the said will, except as before is excepted."

On Sept. 2, 1821, George Elwes died, without having revoked or altered his will, save as the same was altered by the codicil, and without having altered or revoked the codicil. George Elwes on his death, left the respondent Amelia Maria Elwes his widow, and the appellant Emily Frances Duffield his daughter, and only child and heir-at-law, and also his sole next of kin. The appellants, Emily Frances Duffield and her husband, Thomas Duffield, had then five children, namely, the respondent George Thomas Warren Hastings Duffield, their then only son, an infant of the age of nine and upwards, and four infant daughters, namely, the respondents Caroline Duffield, Maria Duffield, Anna Duffield, and Susan Eliza Duffield, younger than their brother.

After the death of George Elwes, the respondent Abraham Henry Chambers, the executor named and appointed by his will, and the respondent William Hicks, appointed executor by the codicil, duly proved the will and codicil in the Prerogative Court of the Archbishop of Canterbury, and received and got in some parts of his personal estate, and of the profits and produce thereof, and thereout paid his funeral expenses, and all or most of his debts, the whole amount whereof was inconsiderable. In 1821 a bill was filed, contending, among other points, that the devises of the lands at Southwood and Haverhill and the residuary freehold lands were not vested under the will and codicil, but were future and executory, and that until the events happened on which the vesting should take place, the appellant Emily Frances Duffield, as heir-at-law, was entitled to the rents and profits of the lands, subject to application of such as might be necessary for the maintenance of the presumptive devisee under the will. The bill prayed a declaration in this respect accordingly.

The cause was heard before the vice-chancellor on Feb. 22, 24, and 28, Mar. 1, and April 9, 1823, and on April 17, 1823, the court by decree

of that date, declared that the will of the testator George Elwes, bearing date Mar. 1, 1811, and the codicil thereto, were well proved, and that the same ought to be established and the trusts thereof performed and carried into execution. It was ordered that a case should be made for the opinion of the judges of the Court of King's Bench; and that the questions in such case should be (i) whether the devise of the freehold part of the estate at Southwood Park and of the freehold farm and estate at Haverhill, contained in the will, was revoked by the codicil. (ii) Did the manor of Marcham pass under the residuary devise contained in the testator's will, and, if it did, was that devise revoked by the codicil? (iii) Did the manor of Marcham pass under the codicil to the first son of Emily Frances Duffield who shall attain twenty-one years and change his name to Elwes, or to whom did the same belong? (iv) Did the estate at Withersfield and Haverhill, purchased after the testator made his will, pass under the devise in the codicil to the first son of Emily Frances Duffield who shall attain the age of twenty-one years and change his name to Elwes, or did it go to the residuary devisee, under the joint operation of the will and codicil, or did it descend to the testator's heir-at-law? (v) to whom belonged the surplus rents and profits of the copyhold estate at Southwood Park, and of the freehold estate at the same place, and of the freehold farm and estate at Haverhill (if the devise of such estates contained in the will was not revoked by the codicil) after providing for the maintenance of the devisee thereof, until a first son of Emily Frances Duffield shall attain twenty-one years, or, in failure of such son, till a daughter should attain that age, or be married without consent according to the will? (vi) to whom did the intermediate rents and profits of such of the testator's freehold estates as were effectually devised by his codicil, to the son of Emily Frances Duffield, should first attain twenty-one years and change his name to Elwes, until such events take place, belong?

The respondent Amelia Maria, the widow of George Elwes, on July 3, 1824, married the respondent William Hicks. On July 14, 1825, the respondent Henry Duffield was born, who, being the second living son of the appellants, was the presumptive devisee of the Southwood Park and Haverhill estates devised by the testator's will, and also, as a child of the appellants, entitled to a share of the testator's residuary personal estate, and to have maintenance allowed him out of his expectant property.

In the sittings after Easter Term, 1824, the case was argued before three of the judges of the Court of King's Bench (i.e., Bayley, Holroyd and Littledale, JJ.) who certified their opinion thereon to the Court of Chancery, as follows:

"(i). That the devise of the freehold part of the estate at Southwood Park, and of the freehold farm and estate at Haverhill, contained in the will, is not revoked by the codicil. (ii). That the manor of Marcham did pass under the residuary devise contained in the testator's will, and that such devise was revoked by the codicil. (iii). That the manor of Marcham did pass under the codicil to the first son of the plaintiff Emily Frances Duffield, who shall attain twenty-one years and change his name to Elwes. (iv). That the estate at Withersfield and Haverhill, purchased after the testator made his will, passed under the devise in the codicil to the first son of the plaintiff Emily Frances Duffield, who shall attain twenty-one years and change his name to Elwes. (v). That the surplus rents and profits of the said copyhold estate at Southwood Park, and of the said freehold estate at the same place, and of the said freehold farm and estate at Haverhill, after providing for the maintenance of the devisee thereof, belong to Abraham Henry Chambers, the surviving trustee under the will of the said testator, until a first son of the plaintiff Emily Frances Duffield shall attain twenty-one years, or in failure of such son, till a daughter shall attain that age, or be married with consent according to the will. (vi). That the intermediate rents and profits of such of the testator's freehold estates, as are effectually devised by his codicil to the son of the plaintiff Emily Frances Duffield, who

shall first attain twenty-one years and change his name to Elwes, until such events take place, belong to Abraham Henry Chambers, the surviving trustee under the will of the testator."

Upon the return of this certificate, the causes came on to be heard on April 26, 1826, before the vice-chancellor, upon further directions, and on April 29, 1826, a decretal order was pronounced, of which the declaratory and mandatory part was as follows:

"This court doth declare that under and by virtue of the will of the testator George Elwes, the defendant George Thomas Warren Hastings Duffield, as the only son of Emily Frances Duffield, living at the testator's death, took upon the testator's death a presently vested equitable estate in fee in the testator's freehold and copyhold farm and estate in Southwood Park, and freehold farm and estate at Haverhill, specifically devised by his will, subject to be divested by the death of the said George Thomas Warren Hastings Duffield under the age of twenty-one years or by the birth of a second son of the plaintiffs: And this court doth declare, that upon the birth of Henry Duffield, the second son of the [appellants], the equitable estate of the said George Thomas Warren Hastings Duffield was divested, and the said Henry Duffield took a vested equitable estate in fee in the said Southwood Park and Haverhill estates, subject to be divested, in the event of the said Henry Duffield dying, or becoming neither the second nor only son of the plaintiffs, before he attains the age of twenty-one years. . . . And this court doth declare that such of the said rents and profits as accrued before the birth of the said Henry Duffield, belong to the said George Thomas Warren Hastings Duffield, subject only to the allowance for his maintenance directed by the said will, and that such of the said rents as accrued since the birth of the said Henry Duffield, belong to the said Henry Duffield, subject only to the allowance for his maintenance directed by the said will. . . . And this court doth declare, that under and by virtue of the said codicil, George Thomas Warren Hastings Duffield, the eldest son of Emily Frances Duffield, upon the testator's death took a presently vested legal estate in fee, in all the testator's freehold property, lands, tenements, and hereditaments (except only the said Southwood Park and Haverhill estates, specifically devised by his said will) subject to be divested in case of the death of the said George Thomas Warren Hastings Duffield under the age of twenty-one years, but without prejudice to the question, how far such estate may be affected in case the said George Thomas Warren Hastings Duffield should not, on attaining his age of twenty-one years, change his name for that of Elwes. And this court doth declare that the rents and profits of the freehold property devised by the codicil accrued since the testator's death, belong to the said George Thomas Warren Hastings Duffield."

From this decretal order the appellants appealed to the House of Lords.

Sugden and Longley for the appellants.
Horne and *Pemberton* for the elder son of the appellants.
Rose and *West* for the younger children.

BEST, C.J., stated the opinion of the judges on questions as to the construction of the will and codicil, and continued: The estates in the Southwood park and Haverhill farm given to the second son, and if there be only one son, to the eldest, and if there be no son, to a daughter, do not vest until a second or only son attains twenty-one, or in the case of a failure of male issue, until a daughter attains twenty-one, or marries with the consent of the trustees appointed by the will. The testator's other freehold estates do not vest until some son of the testator's daughter shall attain the age of twenty-one years and take the name of Elwes. Until these estates become vested, the estates, and the rents and profits derived from them, pass to the heir-at-law of the testator as estates not disposed of by the will.

A While estates remain contingent those in whom they are at a future time to be vested have no interest in the estates or the rents and profits of such estates. Such estates must descend to the heir if they are not given to any person to hold until the events happen on which they are to become vested. The point is too clear to require any observation; indeed, it was not disputed at the Bar. Testators who create contingent estates often forget to make any provision for the preserva-
B tion of their estates and for the disposition of the rents and profits in the intermediate period between their deaths and the vesting of their estates. In such cases the estates descend to the heirs, who, knowing that they are to enjoy them only for a short period and that they have obtained the possession of them from the inattention, and not from the bounty, of the testator, or from the mistake of the professional man who drew the will, will make the most they can of them
C during the time that they remain theirs regardless of any injury that the estates may suffer from their conduct. The rights of the different members of families not being ascertained while estates remain contingent, such families continue in an unsettled state which is often productive of inconvenience and sometimes of injury to them. If the parents attaining a certain age be a condition precedent to
D the vesting estates by the death of their parents before they are of that age, children lose estates which were intended for them and which their relation to the testators may give them the strongest claim to.

In consideration of these circumstances judges from the earliest times were always inclined to decide that estates devised were vested, and it has long been an established rule for the guidance of the courts of Westminster in construing
E devises that all estates are to be holden to be vested except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the court cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt, and what seems to make a condition is holden to have only the effect of postponing the right of possession. To accomplish this purpose, a
F distinction has been made between the adverbs "if" and "when," to which the learned in our language, not of the profession of the law, would perhaps not agree. On this distinction, however, many equitable arrangements of property have been made; on this distinction the titles of many estates depend, and it will, therefore, be the duty of the judges to observe it.

The condition precedent to the vesting of these estates is so apparent—it is
G declared in such express terms by the will—that no ingenuity can explain it away; no refinement can get rid of it; and by holding that these estates are vested, we must overthrow *Stephens* v. *Stephens* (1), which is directly in point to the questions submitted to us, the authority of which was never questioned. The state of the affairs of this family will not be sooner settled by the artificial contrivance of vesting and divesting the estates than by keeping them contingent
H until a final vesting of them can take place agreeable to the disposition made by the testator. How can it be said that the affairs of a family are settled by vesting an estate in an eldest son and divesting when a second son is born; then vesting it in the second, and divesting on the birth of a third son, and death of the eldest; and by again vesting it in a daughter when there are no sons and divesting it again on the birth of a son. The only effect of vesting these estates would be to
I preserve them for the children of sons that die before they attain the ages at which the estates would vest.

But is it wise to encourage the marriage of infants by making a provision for the children, however imprudently and however much in opposition to the wishes of their guardians such marriages may be contracted? The uncertainty of a provision for a family may occasion a pause before the most important step in life be taken, which cannot be attended with lasting inconvenience and may prevent lasting misery. Children will seldom suffer from estates remaining contingent until their parents attain the age of twenty-one, as few, to whom such estates are given, will

have legitimate children before they are of age. This objection, if of any weight, will only partially apply to this case, for provision is made for daughters who may marry with the consent of their guardians and die before they are of age leaving issue. As the testator has not made the same provision in favour of the children of those sons who are to succeed to his estates, as he has made for the children of his daughters and the younger sons, who are to divide with his daughters the residue of his property, it is to be supposed that he did not intend that the families of the first or second sons should inherit if their parents did not live until their estates became vested. Knowing how difficult it is to get at the intent of parties when all possible care is taken to express their intent with the greatest precision in the instruments made by them, and what different interpretations from the different constitutions of men's minds and from their different habits and education are put on the same words, I do not much rely on the intent of the testator. I take for my guide what I think is a sounder principle of decision in a case where a testator has expressly secured what he has given to some of his grandchildren to their issue, and has not expressly secured the freehold estates to the families of those children to whom he has devised them, namely, whatever his intention may be, that intention is not sufficiently expressed for any court to act upon it when by so doing we must get rid of a condition clearly expressed in the other parts of the will.

It is impossible to say that the words of this will do not import conditions precedent to the vesting these estates. The estates are not given to any particular children by name, but to such children as shall attain the age of twenty-one years. Until they have attained that age no one completely answers the description which the testator has given of those who are to be devisees under his will, and, therefore, there is no person in whom the estates can vest. It is an established principle of law recognised by all the cases that are in the books and founded on the nature of things, that estates must remain contingent until there be a person having all the qualifications that the testator requires and completely answering the description given of the object of his bounty in his will. In *Driver d. Frank* v. *Frank* (2), it is said (8 Taunt. at p. 485):

> "to make an estate contingent we must have such words as these, I give the estate to such persons who shall at the death of B. F. be the second, third or fourth sons."

The present will has the substance of these words, for the devises are to such only son as shall first attain the age of twenty-one; in case there shall be two or more sons who shall attain the age of twenty-one, then in trust for the second of such sons; then in trust for such daughters as shall first attain the age of twenty-one years. The codicil gives the estates to that son who shall first attain the age of twenty-one, and change his name to Elwes. In *Driver d. Frank* v. *Frank* (2), GIBBS, C.J., says (ibid. at pp. 486, 487):

> "there was a son in esse who answered the description in the will. . . . A contingent remainder devised to a first, second or other son would vest absolutely as soon as such son should come into being, unless there was a clear intent expressed or implied that it should remain contingent until some later specified time."

In the case submitted to us by your Lordships, there is a clear intent expressed that these estates shall remain contingent until it be seen whether one or more sons would attain the age of twenty-one years, and, if there be no sons, whether any daughter would live to that age or be married with the consent of the trustees.

The testator has given us an explanation of the terms of the devises of his real estates. In the clause of maintenance he directs his trustees to provide maintenance for the children of his daughter out of the estates or property to which any child shall be presumptively entitled.

A presumptive title is only a possibility, a presumptive heir is one who will be the heir if no one having a preferable claim be in existence at the time of the death of the person to whom the presumptive heir stands in that relation. When the testator speaks of his grandchildren as presumptively entitled, he must be understood to say that they have no absolute or vested interest. In *Stephens* v. *Stephens* (1), the testator after giving estates to his grandson William and Thomas devised the same property

> "to such other son of the body of his daughter Mary Stephens as should happen to attain the age of twenty-one years."

There is scarcely any difference in the terms of the devise in that case and in those in the devises under consideration. The meaning of each is precisely the same. In the case referred to the judges of the King's Bench (LORD HARDWICKE being then at the head of that court) certified that the vesting of the estate was suspended until a son unborn should attain the age of twenty-one years. LORD TALBOT OF HENSOL, L.C., made a decree according to this certificate and said that it agreed with his own sentiments and he hoped it would be for the future a leading case in the determination of questions of this kind. I believe that his Lordship's hopes have been realised—it has been considered as a leading case—and the impugning its authority would shake a principle of law on which the titles of many estates depend.

HIS LORDSHIP then dealt with the effect of a clause in the will which gave to the trustees the power to provide a maintenance for the testator's grandchildren.

LORD ELDON.—This was an appeal from a decision made by the vice-chancellor. From the first moment I read this will I entertained considerable doubt whether, notwithstanding all the attention which had been paid to it in the court below by a most able judge, the decree which he had delivered was correct. When the matter was argued at the Bar of this House it occurred to me, notwithstanding what LORD HARDWICKE had said in *Stephens* v. *Stephens* (1) and what LORD TALBOT had said in consequence of that determination, that the decision which had been made with the subsequent decisions formed upon it left the matter in such a state that it was of great importance to have the question settled in the most solemn manner, and looking to those decisions which have taken place between the decision in *Stephens* v. *Stephens* (1) and the present case, I found it one of the most difficult tasks that I ever have had to execute, to draw out the proper questions for the opinions of the learned judges. I think they will do me the justice to say that I exhausted the merits of the case by the questions which I addressed to them, and I should not satisfy myself if I did not say that the learned judges have given a most attentive consideration to this case and have most plainly stated by the Lord Chief Justice their reasons for the opinion they have given. That opinion must necessarily lead to the reversal of the decree pronounced by the vice-chancellor, and I conclude the little with which I have to trouble your Lordships by stating that, having in view all the doctrines which have been stated in the answers to the questions addressed to the learned judges, I do hope that this at least will be a leading case, not affecting so much the distinctions in the earlier case as those which appear to me to exist in the cases between the decision in *Stephens* v. *Stephens* (1) and this case.

The answers of the learned judges will necessarily lead to a reversal of this decree. The reversal of the decree will create the necessity of great care in forming the decree now to be made arising out of a will and codicil so singularly expressed as this is. It is impossible without taking these papers and going through them with great attention to draw that which must be the judgment of the House. That may be done in one or other of two courses. The one is to state the law as it has been delivered by the judges and to remit the case to the Court of Chancery to apply that law; the other is to pronounce a decree, and, having had the assistance of the learned judges, I think it my duty to propose a decree in the very form in which

it ought to be sent to the Court of Chancery by this House, thus, endeavouring to save that court the trouble which must belong to the drawing out a decree in a case so difficult as this is. I think that is the more wholesome way of proceeding, and I conceive my time will be thought by your Lordships not ill bestowed if I can accomplish the purpose of drawing out such a decree as I think ought to be made and ought to regulate subsequent cases, carrying with it the authority which belongs to a decree pronounced in the terms in which this decree should be.

In May, 1829, further questions were put to the judges as follows: (i) Upon its being assumed that the decree, or decretal order, ought to be reversed, so far as the same declares that any son of the daughter of the testator would have a present vested interest in or be entitled to the estates at Southwood and Haverhill in the will mentioned, or the rents and profits thereof, before he attains the age of twenty-one years, or have a present vested interest in or be entitled to the freehold estates devised by the codicil or the rents and profits thereof until he attains the age of twenty-one years and takes upon himself the name of Elwes according to the testator's direction, and assuming that some son of the testator's daughter will hereafter acquire a vested interest therein, to whom do the rents and profits of the freehold and copyhold estates of the testator at Southwood and Haverhill in the will mentioned, and the rents and profits of the freehold estate in the codicil mentioned, go and belong respectively, until some son of the testator's daughter shall acquire a vested interest therein respectively, having regard to the whole words, contents and effect of the testator's will and codicil? (ii) Assuming that the testator purchased copyhold estates after the date of the will, are such copyhold estates having such regard as aforesaid, to be considered as devised by the testator?

June 23, 1829. **ALEXANDER, C.B.,** after stating the provisions of the will and codicil on which the questions arose, delivered the unanimous opinion of the judges as follows: The first question respects the rents and profits of the freehold and copyhold estates at Southwood and Haverhill. We are to assume that the specific devise of these estates is not immediate and vested, but future and contingent, and that it does not draw along with it the rents and profits intermediate between the death of the testator and the happening of the contingency, and we are desired to testify our opinion to whom, upon the whole frame of these testamentary dispositions, these intermediate profits go and belong. We are of opinion that they go and belong to the surviving trustee of the testator's will, by force of the residuary clause in the will. This clause is as comprehensive as can be imagined. It extends in express words to

> "the residue of all the property to which he should be entitled at his decease, or over which he had a disposing power, to the residue of his estate of freehold, copyhold, or for years."

Then, after some further enumeration and lest something should escape, he adds: "of whatever other nature or kind the same or any part thereof may be."

There can be no doubt that these would pass the intermediate rents not specifically disposed of. It is not essential to the effect of a residuary clause that the testator should have had in his immediate contemplation the property to which his expression applies. Its very nature and object is to envelop everything, whether present at the moment to the mind of the testator or not. In *Stephens* v. *Stephens* (1), a leading case on the subject of executory devises, of the same description with this, a residuary clause was held by the Court of King's Bench, with Lord HARDWICKE at its head, to pass the intermediate rents and profits. Many other cases, if necessary, might be cited to the same effect.

It would not have been safe to have come to the conclusion I have intimated without examining whether there is any other provision in the will, to narrow and limit the residuary clause, so as to exclude these intermediate rents. Only one passage

A has been mentioned the direction for sale. It is said that the testator could not mean an interest such as this to be sold—that it would be a strange direction to be applied to property of this description, and, therefore, that he could not intend to include it in his residuary bequest. Observations of this sort oppose but a feeble obstacle to the necessary effect of clear words. They merit attention when the words are equivocal and ambiguous, and where, from the indistinctness of the B language used, you must, to give it any meaning, from necessity resort to probability and conjecture: but here the language is plain and explicit, and if upon any such reasoning, this interest were withdrawn from the residuary clause, the testator's language would not be construed but contradicted.

I feel that these observations may be deemed unnecessary, because in truth, the fact in which this doubt originates fails almost entirely. The will, though it did C originally, does not now direct any part of the freehold to be sold. The codicil revokes the power of sale, as to the freehold, and confirms the will. The will, therefore, must be read as if there was no such direction to sell, and, therefore, that circumstance at this day interposes no obstacle to the true construction of the words used in the residuary clause. We are of opinion, that by force of the residuary clause, the legal interest in the intermediate rents and profits of the D Southwood and Haverhill estates, belongs to the surviving trustee of the testator's residuary estate.

The second question respects the intermediate rents of the freehold estates, devised by the codicil to the son of Mrs. Duffield, who shall first attain twenty-one, on his attaining that age. The judges are also of opinion that these rents and E profits belong to the surviving trustee by force of the same residuary clause, bound, as the former was, by the trusts declared in the will. It is without question, that the legal fee simple of the estate, out of which these rents and profits are to arise, was devised, by the residuary clause in the will, to the trustees. That devise must remain at this day in full force, except in so far as it is altered by the codicil. We must look, therefore, at the codicil in order to ascertain how far it has altered F the devise of these freehold estates, and to what extent it leaves them vested in the original devisees undisturbed.

There are only two provisions in the codicil, which touch the freehold in question. The first is the revocation of the direction to sell this estate; the second is the contingent and executory devise to the first son of Mrs. Duffield attaining twenty-one, when that event shall happen. How far do either of these curtail or G limit the absolute gift in fee simple of the estate itself, contained in the previous will, to the trustee, upon the general trust reposed in him by the testator? It is obvious that the revocation of the direction to sell has no effect whatever of this nature. It left the legal estate in fee, as well as the beneficial trusts, absolutely untouched, and amounts only to an arrangement respecting the mode in which the trusts are to be executed. The contingent and executory devise in the codicil is H a revocation pro tanto of the devise in the will of the same estates; it is an indirect revocation. The last revokes the first because they are inconsistent, and for that reason only. It revokes, therefore, to the extent in which they are inconsistent, and no further. How far are they inconsistent? The gift is "of his freehold estates to the son of his daughter, who shall first attain twenty-one." We are to assume that this devise is contingent and executory; that nothing vests till the event I happens; that no estate or interest, either legal or equitable, passes, until a son attains twenty-one. What becomes of it in the meantime? The prior devise found in the will remains unrevoked. The estate or interest continues where the will had placed it, that is, in the trustees.

We are of opinion, therefore, that until the contingency shall happen which is to vest the freehold estate in a devisee by force of the codicil the rents and profits of that estate go and belong to the surviving devisee in trust of the residue named in the will.

As to the last question put by your Lordships, we are of opinion, that any copyhold purchased by the testator mesne between the will and the codicil passes by the will. The will has the effect upon this subject which it would have had if it had been made at the date of the codicil. For many years this has been the rule. The cases are too numerous to require that any of them should be mentioned. A codicil confirming a will brings the will down to the date of the codicil. As the codicil bears date on Mar. 3, 1821, so in effect does the will. As the residuary clause devises all the testator's copyhold estates, the estates supposed in the question, being at that time his copyhold estates, must pass by it. There have been some cases in which the republication of a will by a codicil, has not had this effect. *Countess of Strathmore* v. *Bowes* (3) is one. In those cases it was manifest from the language of the codicil that the testator did not intend to pass his lands purchased after the will. Nothing of that kind is to be found in this codicil. It must, therefore, have the usual effect, and the will must pass these copyholds.

LORD ELDON.—The judges having given their opinions, in answer to the questions put to them, on this and the former occasion, it is sufficient for me to say, that I concur in all those opinions.

Order accordingly.

ALIVON AND ANOTHER *v.* FURNIVAL

[Court of Exchequer (Parke, B., and other judges), Trinity Term, 1834]

[Reported 1 Cr. M. & R. 277; 4 Tyr. 751; 3 L.J.Ex. 241; 149 E.R. 1084]

Conflict of Laws—Foreign judgment—Validity—Presumption—Award of damages.

The judgment of a foreign court must be assumed to be in accordance with the law of the foreign country in which the court has jurisdiction until the contrary is distinctly shown.

An award of damages by a foreign court cannot be impugned unless it is shown that it is contrary to natural justice or not conformable to the law of the foreign country.

Evidence—Document—Secondary evidence as to effect—More than one original—Inability of party to produce all originals—Original deposited for safe custody.

Where there is more than one original of a document it must be shown that it is out of the power of a party to produce any one of the originals before that party can be allowed to give secondary evidence of the contents of the document.

In an action brought by the syndics of a French bankrupt upon an arbitral sentence and ordonnance whereby the defendant was adjudged to pay the bankrupt a sum of money,

Held: the agreement of reference (made in France) was sufficiently proved by an examined copy and the evidence of the attesting witness, it appearing that the original was deposited with a notary at Paris for safe custody, and that it was the established usage in France not to allow the removal of a document so deposited.

Notes. Distinguished: *R.* v. *Douglas* (1845), 1 Car. & Kir. 670. Referred to: *Boyle* v. *Wiseman* (1855), 10 Exch. 647; *In the Goods of Holl* (1858), 1 Sw. & Tr. 136, n.; *Ingate* v. *Austrian Lloyd's Co.* (1858), 6 W.R. 659; *Dedisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 16; *Macaulay* v. *Guaranty Trust Co. of New York* (1927), 44 T.L.R. 99.

As to the enforcement of foreign judgments, see 7 Halsbury's Laws (3rd Edn.) 140 et. seq., and as to secondary evidence of documents see ibid., vol. 15, pp. 358-366. For cases see 11 Digest (Repl.) 501 et seq., and 22 Digest (Repl.) 203 et seq.

Cases referred to:

(1) *Becquet* v. *MacCarthy* (1831), 2 B. & Ad. 951; 109 E.R. 1396; 11 Digest (Repl.) 511, *1265*.

(2) *Dutch West India Co.* v. *Henriques Van Moses* (1728), 1 Stra. 612; 93 E.R. 733, H.L.; 13 Digest (Repl.) 191, *96*.

(3) *National Bank of St. Charles* v. *De Bernales* (1825), 1 C. & P. 569; Ry. & M. 190, N.P.; 13 Digest (Repl.) 192, *114*.

(4) *Solomons* v. *Ross* (1764), 1 Hy. Bl. 131, n.; 126 E.R. 79; 5 Digest (Repl.) 870, *7305*.

Also referred to in argument:

Martin v. *Nicolls* (1830), 3 Sim. 458; 57 E.R. 1070; 11 Digest (Repl.) 520, *1372*.

Tenon v. *Mars* (1828), 8 B. & C. 638; 3 Man. & Ry. K.B. 38; 7 L.J.O.S.K.B. 89; 108 E.R. 1179; 11 Digest (Repl.) 538, *1475*.

Trimbey v. *Vignier* (1834), 1 Bing. N.C. 151; 4 Moo. & S. 695; 3 L.J.C.P. 246; 131 E.R. 1075; 11 Digest (Repl.) 430, *764*.

Doe d. Clark v. *Spencer* (1825), 3 Bing. 203; subsequent proceedings sub nom. *Spencer* v. *Clark* (1826), 3 Bing. 370; 130 E.R. 555; sub nom. *Doe d. Clark* v. *Spencer*, 11 Moore, C.P. 232; 4 L.J.O.S.C.P. 101; 38 Digest (Repl.) 911, *1019*.

Dance v. *Wyatt* (1830), 6 Bing. 486; 4 Moo. & P. 201; 8 L.J.C.P. 153.

Guthrie v. *Armstrong* (1822), 5 B. & Ald. 628; 1 Dow. & Ry. K.B. 248; 106 E.R. 1320; 1 Digest (Repl.) 442, *951*.

Walker v. *Witter* (1778), 1 Doug. K.B. 1; 99 E.R. 1; 11 Digest (Repl.) 527, *1399*.

Rule Nisi for leave to enter a verdict in favour of the plaintiffs in an action to recover a sum of £8,200 based on the judgment of a French court.

The third count of the declaration stated, that before Peter Beuvain became a bankrupt by a certain instrument in writing made between the defendant of the one part, and the said Peter Beuvain of the other part, the parties made a certain agreement in which it was agreed between the parties that, in case of disputes, the parties recognised the jurisdiction of the Tribunal de Commerce, sitting at Paris, and they thereby submitted the matters in difference to the decision of two arbitrators, being merchants, to be named by the parties respectively, such arbitrators, in case of disagreement, to have the power of naming an umpire, and that the two or the three arbitrators might be named by the Tribunal of Commerce, at the request of either of the parties. The decision of such arbitrators or their umpire was to be supreme, and without appeal.

After the making of the instrument and before Peter Beuvain became a bankrupt, such disputes as were mentioned and contemplated in and by the instrument arose and were depending between Peter Beuvain and the defendant, and thereupon before Peter Beuvain became a bankrupt, he, according to the laws of France, impleaded the defendant in the Tribunal de Commerce and prayed and required that arbitrators should be appointed by the court in pursuance of and according to the provision contained in the instrument. The plaintiffs further said that persons were duly, according to the laws of France, appointed in and by the court to decide the disputes which had so arisen between Peter Beuvain and the defendant, and that the arbitrators, having heard the allegations and proofs of the said parties, made their award, called an arbitral sentence, of and concerning the disputes referred to them, and did award and order that the defendant should pay to P. Beuvain two several sums of money, to wit, the sum of 51,589 francs, 50 centimes, and the sum of 157,819 francs, 68 centimes, making together the sum of 209,409 francs 18 centimes. The President of the Civil Tribunal of First Instance in the Department of the Seine in due course ordered that the arbitral sentence should be executed in all its particulars according to its form and contents.

Subsequently, P. Beuvain became a bankrupt according to the laws of France, and the plaintiffs were appointed provisional syndics of his estate and effects whereupon they, as such provisional syndics, became entitled and empowered in their own names to sue for and recover all debts which were due to the said P. Beuvain at the time when he became bankrupt, and entitled to enforce, by action in their own names, all claims and demands which P. Beuvain, at the time he became bankrupt had or might have against the defendant. The defendant appealed against the arbitral sentence to the Royal Court of Paris, which dismissed the appeal, and condemned the defendant to pay a fine and the expenses of the appeal. The plaintiffs brought the present action in England to recover the amount awarded to Beuvain. The defendant denied liability.

A commission, issued for the examination of witnesses, was executed at Paris. The original agreement, in the French language, deposited with a notary, was produced before the commissioners, and the signatures of Beuvain and the defendant were proved by the attesting witness Albert, who stated, in the course of his examination, that, according to the law of France, a notary, with whom an original agreement had been deposited could not part with it except by the directions of a French Court. The agreement was expressed to be "fait au double." An examined copy, verified by the former witness, was returned by the commissioners. A copy of the original award subscribed by the arbitrators was proved by the persons who had examined it with the original (which it appeared was deposited in the "Tribunal de Première Instance"), and also returned by the commissioners; and evidence was

given of the facts that Beuvain was a merchant, that he was in debt, and that he had stopped payment.

The cause was tried before VAUGHAN, B., at the Middlesex Sittings after Trinity Term, 1833. The depositions taken under the commission, and the papers returned therewith, were read. Official copies, verified by the seals impressed thereon, and proved to be those of the respective courts, were put in to show the judgment of the Tribunal de Commerce appointing arbitrators named by the parties; another judgment of that court, removing the arbitrator named by the defendant on the ground that he was a foreigner and not a merchant, and appointing a new arbitrator; a judgment of the Royal Court confirming, on appeal, the latter judgment; another judgment of the Tribunal de Commerce, extending the time for making the award; another judgment of the Royal Court, confirming the latter judgment on appeal, and further extending the time; the arbitral sentence; the ordinance, or exequatur of the President of the Tribunal of First Instance; another judgment of the Tribunal de Commerce, declaring Beuvain to be "en état de faillite;" another judgment of the same court, appointing the plaintiffs and one Chatonnay provisional syndics, with power "agir ensemble ou séparément, l'un en cas d'empêchement, ou d'absence de l'autre—sous la surveillance de M. le Juge Commissaire;" and another judgment of the Royal Court, confirming the ordinance on appeal, to which the plaintiffs and Chatonnay were therein expressed to be made parties, as provisional syndics, in the place of Beuvain.

M. Colin, a French advocate, examined for the plaintiffs, stated that, according to the law and practice in France, one or two, of three or more syndics, might sue, without proving the disability of the rest, or the authority of the juge commissaire, and deposed to the usage in France on various points of evidence. A French notary, who was examined for the defendant, stated that syndics could not bring an action unless authorised by the juge commissaire, and said that he did not suppose a solicitor in France would bring an action for syndics unless the authority of the juge commissaire had been obtained.

The defendant's counsel took a variety of objections. The learned judge, without pronouncing any opinion upon the objections, nonsuited the plaintiffs, giving them leave to move a verdict for £8,200. A rule nisi was obtained on their behalf.

Follett and *Tomlinson* for the defendant, showed cause against the rule.

Serjeant Bompas, *Manning* and J. *Henderson* for the plaintiffs, supported the rule.

Cur. adv. vult.

PARKE, B., delivered the following judgment of the court. Many objections were taken in this case to the right of the plaintiffs to recover. It was contended, first, that the agreement was not proved; secondly, that this was to be considered as an action on the award only and that the arbitrators were not duly appointed; thirdly, that the award was not made pursuant to the submission, and was, therefore, void; fourthly, that the plaintiffs had no right to maintain the action; fifthly, that the declaration was not proved. We have considered these objections, and are of opinion that they are not well founded, and that the rule must be absolute to enter a verdict for the plaintiffs.

The first objection is that the agreement was not properly proved. This divides itself into branches, one that, even if there were no evidence of a duplicate original being in existence, this proof would not have been sufficient, because the original deposited with the notary ought to have been produced, or clear proof given that by the written law of France it could not be removed. Another branch of this objection is that it was proved that there was another original of this agreement in existence, that the copy was only secondary evidence, and not admissible until the original was accounted for, and, if in the possession of the defendant, notice to produce given, and that no such notice was given. It seems to be clear that this document was not acknowledged before a notary, and is, therefore, not to be deemed a notarial act. It was simply deposited for safe custody, but there was

sufficient evidence in the testimony of M. Colin of the established usage at least in France, though it was not a provision of the written law, not to allow the removal of documents so deposited, and consequently to let in secondary evidence of the contents, for such evidence is admissible where it is in effect out of the power of a party to produce the original. That was sufficiently proved in this case to the satisfaction of the learned judge whose province it was to decide upon this question, and we cannot say that his decision was wrong. The second branch of this objection is that there was evidence of the existence of a duplicate original, and that there is an established rule that all originals must be accounted for before secondary evidence can be given of any one. There is no doubt as to this rule, but we are not satisfied that there was any such duplicate original in this case which had the same binding force and effect on the defendant as the one deposited and proved. The only evidence of its existence is the expression "fait double" at the foot of the agreement, but what is the precise meaning of these terms, and what was the nature of the duplicate executed in this case, if there was one, was not made out by the evidence; and neither in the numerous cross-interrogatories exhibited to the witness Albert, nor in his depositions which were read on the trial, is there one which hints at the existence of any other obligatory document than the one deposited with the notary. It is very true that art. 1325 of the CODE CIVIL requires duplicates where there are two interests, but I do not see how we can properly take notice of this law as it was not proved on the trial. The objection is strictissimi juris and beside the justice of this case, and we think that it ought not to succeed unless the existence of a duplicate original, in the proper sense of that word, was more distinctly made out than it was in this case.

I now come to the objections on the merits; and first as to the appointment of the arbitrators. First, it is contended, that, by the express agreement of the parties, in art. 12, merchants must be appointed, and that the Tribunal de Commerce had no power to appoint others. This depends on the construction of that article; which is as follows:

> "En cas de discussions, les parties reconnaissent la jurisdiction du Tribunal de Commerce, séant à Paris, Département de la Seine, et elles seront soumises à deux arbitres négociants respectivement nommés par elles, qui, en cas de désaccord, auront la faculté de nommer un troisième pour les départager; les deux ou les trois arbitres pourront également être nommés par le dit Tribunal de Commerce à la réquisition de l'une des parties, et la décision d'accord ou celle du partage sera souveraine et sans recours en appel."

We do not think that the Tribunal de Commerce is restrained by this clause from appointing arbitrators not merchants. The parties are, but the court has a general power, and it is to be remarked, that in none of the proceedings in the French courts is the objection taken that the Tribunal de Commerce exceeded its powers in this respect. It is then said that the Tribunal de Commerce has no power to annul the appointment made by the defendant himself, which they have done by their act of Nov. 15, 1827. By this act it appears that the appointment of a foreigner as arbitrator was not a due exercise of the power reserved by art. 12 and void, and was the same as if no arbitrator at all had been named by the defendant, and we must assume the judgment of the court to be according to the French law, at least until the contrary was distinctly proved, according to the principle laid down in *Becquet* v. *MacCarthy* (1). Next it is contended that the tribunal ought to have appointed two arbitrators and not one. But is there any substantial difference in allowing the former appointment to stand, naming another, and expressly appointing the arbitrator already named and the other jointly de novo? Certainly there is not, and in this respect also we must assume that the Tribunal de Commerce acted according to law, unless the contrary be proved.

The third head of objection is the award itself, which, it is suggested, is not warranted by the submission. The award has proceeded upon the principle that the

A defendant, instead of being merely placed in statu quo and reimbursed the expenses incurred upon the faith of the contract (which could have been done by awarding as damages the expense of constructing the new works, deducting the then value of the materials, to Beuvain under all the circumstances of the case) had a right to be placed in the same situation as if the defendant had fulfilled his contract. It is impossible for us to say that this principle of adjusting the damages is wrong as B being contrary to natural justice, and there is no evidence that it is not conformable to the law of France. Indeed it appears to follow the rule laid down in art. 1149 of the Code Civil.

The fourth head of objection is that the plaintiffs cannot sue, and this objection subdivides itself into several– first, that by the terms of the appointment two out of three cannot sue. The appointment is as follows:

C

> "Le tribunal nomme pour syndics provisoires de la faillite des sieurs Beuvain & Co. le sieur Chatonney, le sieur Deloustal, et le sieur Alivon, portes en la dite liste, pour exercer les dites fonctions de syndics provisoires telles qu' elles sont décrites dans les articles 476 à 525 du Code de Commerce, lesquels syndics pourront agir ensemble ou séparément, l'un en cas d'empêchement ou d'absence D de l'autre, sous la surveillance de M. le Juge Commissaire."

The answer to this objection is that, by the law of France in such a case, two out of three may do an act as well as one separately, and that is distinctly proved by M. Colin. Secondly it is said that they ought to have the previous authority of the juge commissaire. They are directed by the appointment to act under the surveillance of the juge commissaire (by art. 492 of the Code de Commerce, "Sous l'autorisE ation"), but M. Colin proves that they may bring an action without his authority. That is the effect of his testimony, and, though the defendant's witness, Girard, gave evidence to the contrary, it seems to amount only to this, that a solicitor would not act properly in doing so, not that the want of previous directions would avoid the act and constitute a defence to the action. This is in conformity with the principle F on which the cases cited for the plaintiff relating to actions brought by assignees of insolvents in this country were decided. Thirdly, it is insisted that by the law of France two cannot maintain an action for the debt due to the bankrupt. This also depends upon the evidence. That all may sue, appears by arts. 492 and 499 of the Code de Commerce, both given in evidence. That the bankrupt is deprived of the administration of his effects, appears by cl. 442, also read. And M. Colin deposes G that two have the same power to act under the appointment as three, and there is no evidence to the contrary. Fourthly, it is insisted that, if two can bring an action, it is a condition precedent upon the construction of the instrument of appointment that the third should be absent or should have objected to the act done, and that there was no proof of either circumstance in this case, but, in our opinion, this would be to put a very strict construction upon the terms of the appointment. It H seems to us that the act of two only sufficiently implies the absence or want of consent of the third, and that the effect of the authority given by the appointment is in substance to authorise two to do valid acts as to third persons, without the other. It was in fact proved that, by the law of France, one of the syndics might act if the other should not, without proving the absence of that other. Lastly, it is said that though two may act and bring an action, yet they must sue in the name I of all. The effect of the testimony of Colin is that two may sue in France without a third, and the witness for the defendant does not prove the contrary, and there seems no reason why it should not be so. The property in the effects of the bankrupt does not appear to be absolutely transferred to these syndics in the way that those of a bankrupt are in this country, but it should seem that the syndics act as mandatories or agents for the creditors, the whole three, or any two or one of them having the power to sue for and recover the debts in their own names. This is a peculiar right of action, created by the law of that country, and we think it may by the comity of nations be enforced in this as much as the right of foreign assignees

or curators, or foreign corporations, appointed or created in a different way from that which the law of this country requires: *Dutch West India Co.* v. *Henriques Van Moses* (2), *National Bank of St. Charles* v. *De Bernales* (3), *Solomons* v. *Ross* (4). We do not pronounce an opinion whether this objection is available on the plea of nil debet, or ought to have been pleaded in abatement (though we were much struck with the argument of the learned counsel for the plaintiff), as we think it is not available at all upon the evidence in this case.

The fifth head of objection is that of variance—that the award is said to be registered in the Tribunal de Commerce, instead of the court of first instance, but the answer is that this is clearly surplusage. The sixth objection is that there is a variance because Beuvain is averred to be a bankrupt, whereas he was only an insolvent, or en état de faillite, but this depends entirely upon the argument that the English term "bankrupt" necessarily means the same as the French, "banqueroute," which it does not, and it is to be observed that in the English copy of the appointment of syndics the word faillite is translated bankruptcy.

These are all the objections to the plaintiff's right to recover, and we think that they are not well founded, and that the action is maintainable without attributing to the acts of any of the courts the same force as if they had been judgments between the litigating parties. The third count is the one adapted to the plaintiff's case.

Rule absolute.

The defendant having been charged in execution upon the judgment in the above cause,

Follett, in Michaelmas Term, proved that he might be discharged out of custody, or that he might have such other relief as to the court, under the circumstances, should seem meet. He moved upon affidavits, stating that an appeal was now pending in France, in the Cour de Cassation, from the judgment or award upon which the plaintiffs had proceeded and recovered in this court; and that the fact of such appeal existing had not been brought before this court in the proceedings that had already taken place. PARKE, B. It ought to have been insisted upon by the defendant at the trial. An appeal has no other effect, while it is pending, than that of staying execution.] All that the defendant asks is, that the court will stay the execution. [PARKE, B.—There is no writ of error upon the judgment of this court.] As the judgment here proceeded upon the fact of there being a valid judgment in the French courts, and, as it now appears that such judgment is appealed against, and may, probably, be reversed, there is ground for the equitable interference of this court.

THE COURT said, that, at that stage of the proceedings in the French court, there was no ground for the relief prayed; but that, if the Cour de Cassation reversed the judgment, the application might be renewed.

Rule refused.

A

R. *v.* PAGHAM, SUSSEX, SEWERS COMMISSIONERS

[Court of King's Bench (Lord Tenterden, C.J., Bayley, Holroyd and Littledale, JJ.), June 14, 1828]

[Reported 8 B. & C. 355; 2 Man. & Ry. K.B. 468; 6 L.J.O.S.K.B. 338; 108 E.R. 1075]

B

Sea—Encroachment on land—Result of erection of groynes on adjacent land——Liability of authority erecting groynes.

Commissioners of sewers acting bona fide for the benefit of the levels for which they were appointed erected groynes and other defences against the inroads of the sea which caused it to flow with greater violence against adjoining land not within the levels so that it was gradually washed away.

C

Held: they could not be compelled to compensate the owner of the adjoining land or to erect new works for his protection, for all owners of land exposed to the inroads of the sea or commissioners of sewers acting for a number of landowners had a right to erect such works as were necessary for their own protection, even though they might be prejudicial to others.

D

Notes. Commissioners of sewers created by 13 Eliz. 1, *c.* 9 (1571) and subsequent Acts were abolished by s. 4 of the Land Drainage Act, 1930 (13 Halsbury's Statutes (2nd Edn.) 556), and their powers and duties transferred to catchment boards. Protection of the coast of Great Britain against erosion and encroachment by the sea is provided for by the Coast Protection Act, 1949 (26 Halsbury's Statutes (2nd Edn.) 1144 et seq.) and also by the Coastal Flooding (Emergency Provisions) Act, 1953 (33 Halsbury's Statutes (2nd Edn.) 955 et seq.).

E

Distinguished: *R.* v. *Trafford* (1831), 1 B. & Ad. 874. Applied: *Smith* v. *Kendrick*, [1843-60] All E.R. Rep. 273. Considered: *A.-G.* v. *Lonsdale* (1868), L.R. 7 Eq. 377. Applied: *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q.B. 131; *Marey Drainage Board* v. *Great Northern Rail. Co.* (1912), 106 L.T. 429; *Gerrard* v. *Crowe*, [1920] All E.R. Rep. 266. Referred to: *Hudson* v. *Tabor* (1877), 2 Q.B.D. 290; *Lagan Navigation Co.* v. *Lambeg Bleaching, Dyeing and Finishing Co.*, [1926] All E.R. Rep. 230; *Marriage* v. *East Norfolk Rivers Catchment Board*, [1949] 2 All E.R. 1021.

F

As to self-protection against extraordinary danger, see 28 Halsbury's Laws (3rd Edn.) 162; and for cases see 36 Digest (Repl.) 322. As to common law right of subject to erect groynes, see 39 Halsbury's Laws (3rd Edn.) 574; and for cases see 44 Digest 81.

G

Case referred to:

(1) *R.* v. *Vice-Chancellor of Cambridge* (1765), 3 Burr. 1647; 1 Wm. Bl. 547; 97 E.R. 1027; 13 Digest (Repl.) 187, *42*.

Also referred to in argument:

H

Cardiffe Bridge Case (1700), 1 Salk. 146; 91 E.R. 135; sub nom. *R.* v. *Glamorganshire (Inhabitants)*, 12 Mod. Rep. 403; 1 Ld. Raym. 580; sub nom. *R.* v. ——, 1 Com. 86; 16 Digest (Repl.) 447, *2545*.

Rooke's Case (1598) 5 Co. Rep. 99b; 77 E.R. 209; 41 Digest (Repl.) 65, *417*.

Keighley's Case (1609), 10 Co. Rep. 139a; 77 E.R. 1136; 4 Digest (Repl) 59, *380*.

I

R. v. *Severn and Wye Rail. Co.* (1819), 2 B. & Ald. 646; 106 E.R. 501; 16 Digest (Repl.) 339, *1172*.

Rule Nisi calling upon the commissioners of sewers to show cause why a mandamus should not issue, directed to them, commanding them to issue a precept to the sheriff of the county of Sussex to summon a jury for the purpose of inquiring what hurt, loss, or disadvantage had been sustained by W. Cosens by reason of certain groynes and other works erected and made by the commissioners within the limits of the levels, and of assessing and ascertaining the compensation to be paid to W. Cosens for the same; or to erect and make such other works as should be

necessary and sufficient to prevent further injury being done to the premises of W. Cosens by reason of the groynes and other works.

The rule was obtained on affidavits which stated that Cosens was owner of certain lands on the seashore of Sussex, abutting on the west on the levels above mentioned: that, thirty years ago, he erected a mill one hundred yards from high water mark, and that about that time the commissioners altered the groynes and other works, which had been before erected to protect the level against the inroads of the sea, by taking away several small groynes, and erecting one large groyne in lieu thereof, at the easternmost point of the levels, and adjoining his (Cosens's) land. That the effect of this groyne was to cause the sea to flow with increased force against his land; and that in consequence thereof his land had been gradually washed away until high water mark was within fifteen yards of his mill. That his property was thereby much reduced in value, and that he had made application to the commissioners for compensation and protection, but without effect.

The affidavits in answer stated that the sea was making encroachments on the whole of that part of the coast, and that no part of it could be secure unless groynes or other works were erected for its protection. That the groyne adjoining Cosens's land was essential to the safety of the levels placed under their care; that before it was erected they had endeavoured to ascertain the best position and shape for it, and had made it merely with a view to the protection of the levels, and not for the purpose of injuring Cosens. That the effect of every groyne was to make the water flow with greater force against the land to the eastward, but that if Cosens erected proper groynes for his own security his property would not be injured.

Gurney, *Thesiger* and *Capron* for the commissioners of sewers, showed cause against the rule.

Brodrick for Cosens, supported the rule.

LORD TENTERDEN, C.J.—I am of opinion that this rule must be discharged. At the time when the motion was made the court expressed great doubt whether it could be sustained. The matter has now been fully discussed, and the counsel for Mr. Cosens concluded by observing that it was reduced to this question: Who is to bear the expense of erecting the works necessary to protect Cosens's land? and I think he is perfectly correct in considering that as the substantial question.

Let us see, then, how the matter stands. The commissioners of sewers, for the protection of that land which it was their duty to protect, have erected a certain work. It is not pretended that in so doing they did not exercise, at least, an honest discretion; and, looking at the affidavits on the one side and on the other, it is not by any means clear that they did not do the very best thing that, under the circumstances, could be done to attain the object they had in view. But it is contended that this new groyne has caused the sea to flow with greater violence against the land of Cosens, and make a greater inroad upon it, than possibly it might otherwise have done; and that as the commissioners, acting for the benefit of the level, have occasioned this damage, they must make compensation for it. It may be conceived that such is the effect of the groyne; but the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several landowners, are, as to this question, in a different situation from any individual proprietor. Is there any authority for saying that any proprietor of land exposed to the inroads of the sea, may not endeavour to protect himself by erecting a groyne or other reasonable defence, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. If we were in this instance to say that the commissioners for the level in question were bound to erect a groyne for Cosens, it might, and probably would, cause injury to the land lying to the eastward in the same manner as that erected for the protection of the level has caused injury to Cosens; and the owner of the land lying eastward of Cosens would have a right to call upon the commissioners to

protect him also. In like manner each successive proprietor of land lying to the eastward would be entitled to claim protection, and the commissioners might be compelled to erect defences against the sea along the whole line of coast from the level of Pagham to the North Foreland; for so far, I believe, the sea is making inroads upon the land. The extent to which the principle must be carried, if once admitted, satisfies me that it cannot be sustained in reason or in law. I am, therefore, of opinion that the only safe rule to lay down is this, that each landowner for himself, or the commissioners acting for several landowners, may erect such defences for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy. For these reasons, the rule for a mandamus must be discharged.

BAYLEY, J. I am entirely of the same opinion. It seems to me that every landowner exposed to the inroads of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose; and the commissioners may erect such defences as are necessary for the land entrusted to their superintendence. If, indeed, they made unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention, to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment, for an abuse of the powers vested in them. But if they act bona fide, doing no more than they honestly think necessary for the protection of the level, their acts are justifiable, and those who sustain damage therefrom must protect themselves. It has been argued that Cosens, having sustained damage from the groyne erected by the commissioners, is entitled to compensation. I do not agree to that as an abstract proposition. If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title those two things must concur, damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient. Here Cosens may have sustained damage, but the commissioners have done no wrong. The dictum of WILMOT, J., in *R.* v. *Vice-Chancellor of Cambridge* (1) (3 Burr. at p. 1660) was cited to show that where there is a right this court ought to find a remedy. But the right that Mr. Cosens and each landowner has, is to protect himself; not to be protected by his neighbours. To that right no injury has been done, nor can any wrongful act be charged against the commissioners; the court, therefore, have no grounds for granting the mandamus applied for.

HOLROYD and **LITTLEDALE, JJ.,** concurred.

Rule discharged.

DAVID *v.* FROWD

[ROLLS COURT (Sir John Leach, M.R.), January 26, 1833]

[Reported 1 My. & K. 200; 2 L.J.Ch. 68; 39 E.R. 657]

Administration of Estates—Administration action—Distribution under order of court—Claim against persons entitled under order—Right to follow assets.

Where an intestate's estate has been distributed under an order in an administration action among persons found by the Master's report to be his next of kin, a person claiming to be the sole next of kin of the intestate is not precluded from claiming, against the persons alleged to have been erroneously found to be the next of kin, restitution of the fund distributed. If the right of the plaintiff is established, the persons among whom the fund has been distributed will be compelled to repay it to the plaintiff, but the plaintiff will be bound by the accounts taken in the administration action.

Notes. Considered: *Sawyer* v. *Birchmore* (1836), 1 Keen, 391; *Thomas* v. *Griffith* (1860), 2 Giff. 504. Applied: *Ministry of Health* v. *Simpson*, [1950] 2 All E.R. 1137. Referred to: *Waller* v. *Barrett* (1857), 24 Beav. 113; *Re McMurdo, Penfield* v. *McMurdo*, [1902] 2 Ch. 684.

As to claims after distribution, see 14 HALSBURY'S LAWS (3rd Edn) 633, and ibid., vol. 16, p. 313; and for cases see 24 DIGEST (Repl.) 856.

Case referred to:

(1) *Gillespie* v. *Alexander* (1827), 3 Russ. 130; 38 E.R. 525, L.C.; 23 Digest (Repl.) 441, *5112*.

Also referred to in argument:

Greig v. *Somerville* (1830), 1 Russ. & M. 338; 39 E.R. 131, L.C.; 23 Digest (Repl.) 441, *5113*.

Farrell v. *Smith* (1813), 2 Ball & B. 337.

Bill filed by the plaintiff praying that the defendants, who had obtained distribution of the personal estate of an intestate as being his next of kin at the time of his decease under a decree of the court in a suit instituted for the administration of the assets of the intestate, might be compelled to refund their shares in favour of the plaintiff who claimed as next of kin.

David Williams of Llanblethan, Glamorgan, died intestate in January, 1828, being possessed of property to the amount of £4,000 and upwards. On Feb. 21, 1828, Edward Frowd, a solicitor, and Jane his wife, who claimed to be one of the intestate's next of kin, took out administration to the intestate's estate. On Feb. 22 a bill was filed in the name of Ella Church, a sister of Jane Frowd, and other parties, also claiming to be next of kin of the intestate, against Frowd and his wife, praying the usual accounts of the intestate's estate, and an inquiry as to his next of kin. Frowd and his wife immediately put in answers to the bill and a decree in the cause was made by consent on Feb. 29. By it the usual accounts of the intestate's estate were directed to be taken and it was ordered that the Master should inquire who were the next of kin of the intestate.

On May 6, 1829, the Master made his report, certifying that in pursuance of advertisements Ella Church, Jane Frowd, and seven other persons named in the report had made their claims before him and that he found that they were the only next of kin of the intestate living at the time of his death. The Master further found that no creditors had come in: and he made his report as to the accounts of the intestate's estate. The report was confirmed by an order dated May 22, 1829, and by an order on further directions, dated May 29, 1829, an apportionment of the intestate's property was directed to be made between the next of kin. The Master made the apportionment, which amounted to £474 16s. for each share and an order for payment was obtained on Aug. 10, 1829.

In December, 1830, the plaintiff, Mary David, who was ninety years of age, stated to be bedridden and in receipt of parish relief, and who claimed to be the sole next of kin of the intestate, filed the present bill against Frowd, his wife, and the other persons among whom the intestate's estate had been distributed. The bill, after stating the proceedings in the suit of *Church* v. *Frowd*, alleged that the plaintiff was the first cousin once removed and sole next of kin of the intestate; that she had been long resident in the parish of Peterstone, Glamorgan, but that she was not aware of the death of the intestate until six months after the event took place; that being informed that no one could compel any distribution of the intestate's estate for twelve months after his decease, she took no steps to enforce her claims until February, 1830, when she laid a statement of her case before Messrs. Bassett, solicitors, and that they returned to her the papers and documents relating to her claims at the end of ten months, declining to take any steps on her behalf. The bill further stated that the plaintiff was an illiterate person, being unable to read; that she was ignorant, until very lately, of any proceedings having been instituted in the court; that she had never heard of any advertisements from the Master's office, and that no inhabitant of the parish of Peterstone ever took in a newspaper. The bill charged that the plaintiff was not bound by the proceedings in the suit under which the intestate's property had been distributed; and it prayed that the decree and decretal orders in that suit might be reversed; that the plaintiff might be declared to be entitled to the whole of the intestate's personal estate after payment of his debts and funeral expenses; and that the defendants might be decreed to pay to the plaintiff the several shares which had been allotted and paid to them respectively in respect of such estate.

The defendants, by their answers, put in issue the legitimacy of the plaintiff, and submitted that even if the plaintiff were the sole next of kin of the intestate, or one of his next of kin, the decree and decretal orders in the administration suit were a bar to her claims. It was agreed at the Bar that the plaintiff's title as next of kin should be admitted for the purpose of arguing the question whether she was precluded by the decree in the administration suit from claiming the relief sought by the bill.

Pemberton and *Lynch* for the plaintiff.

Agar, *K. Parker*, *Neate*, *Bickersteth* and *Stinton* for the defendants.

SIR JOHN LEACH, M.R. It is a matter of surprise to me that this is treated as a case of the first impression. I consider that all the principles which must govern this case are well established and rest upon clear precedents. The personal property of an intestate is first to be applied in payment of his debts and then distributed among his next of kin. The person who takes out administration to his estate in most cases cannot know who are his creditors and may not know who are his next of kin, and the administration of his estate may be exposed to great delay and embarrassment. A court of equity exercises a most wholesome jurisdiction for the prevention of this delay and embarrassment, and for the assistance and protection of the administrator.

Upon the application of any person claiming to be interested, the court refers it to the Master to inquire who are creditors and who are the next of kin, and for that purpose to cause advertisements to be published in the quarters where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in and make their claims before the Master within a reasonable time stated; and when that time is expired, it is considered that the best possible means having been taken to ascertain the parties really entitled, the administrator may reasonably proceed to distribute the estate among those who have, before the Master, established an apparent title. Such proceedings having been taken, the court will protect the administrator against any future claim. But it is obvious that notice given by advertisements may and must, in many cases, not reach the parties really entitled. They may be abroad and in a different part of the kingdom

from that where the advertisements are published, or from a multitude of circumstances they may not see or hear of the advertisements, and it would be the height of injustice that the proceedings of the court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owner to one who has no right to it.

It is for this reason that if a party, who has not gone in before the Master, applies to the court after the Master has reported the claimants who have established before him an apparent title, and makes out that he has not been guilty of wilful default in not claiming before the Master, the court will refer it to the Master to inquire into his claim, and if it be satisfactorily proved will, in the administration of the estate, give him the same benefit of his title, as if he had originally claimed before the Master. This is every day's practice with respect to creditors. For the same reason, if a creditor does not happen to discover the proceedings in the court until after the distribution has been actually made by the order of the court among the parties having by the Master's report an apparent title, although the court will protect the administrator who has acted under the orders of the court, yet upon a bill filed by this creditor against the parties to whom the property has been distributed, the court will, upon proof of no wilful default on the part of such creditor and no want of reasonable diligence on his part, compel the parties to restore to the creditor that which of right belongs to him. For this principle I need only refer to *Gillespie* v. *Alexander* (1) before LORD ELDON, which has been introduced in the argument. There the estate had been apportioned under the order of the court among the legatees and actually paid to them, except that one legatee being an infant, his proportion could not be paid to him but was carried to his account in the suit. After this distribution by the order of the court, a creditor who had not claimed before the Master established his title, and LORD LYNDHURST (then SIR JOHN COPLEY, M.R.), acting upon the principle which I have stated, directed payment of the creditor's demand out of the fund in court which had been carried to the account of the infant. LORD ELDON considered most justly that the share carried to the account of the infant was as much the property of the infant as if it had been actually paid to him, and that the infant's share was liable to the creditor's demand only in the proportion that the other legatees were liable in respect of the sums which they had received, and to that extent reversed LORD LYNDHURST'S order; thus establishing the principle that legatees who had received payment under the order of the court, were bound to refund to a creditor who had never claimed before the Master.

It is argued that there is a distinction between a creditor and a person claiming as next of kin, because a creditor, it is said, has a legal title; the right being equal, there is no distinction in a court of equity between a legal and equitable title. It is not, however, accurate to say that a creditor continues to have a legal title after the fund has been administered in this court; he has, under such circumstances, lost that title by the administration of the court and his only remedy is in a court of equity.

It is argued also that the case is extremely hard upon the party who is to refund, for that he has full right to consider the money as his own and may have spent it, and that it would be against the policy of the law to recall money which a party has obtained by the effect of a judgment upon a litigated title. There is here no judgment upon a litigated title; the party who now claims by a paramount title was absent from the court, and all that is adjudged is that upon an inquiry, in its nature imperfect, parties are found to have a prima facie claim, subject to be defeated upon better information. The apparent title under the Master's report is in its nature defeasible. A party claiming under such circumstances has no great reason to complain that he is called upon to replace what he has received against his right: complaints of hardship come with little force from the party who seeks to support a wrong. It must be referred to the Master to inquire whether

the plaintiff is the sole next of kin or one of the next of kin, with liberty to state special circumstances.

Regularly speaking this inquiry ought to have preceded the discussion upon the right of the next of kin; but for the convenience of the parties I consented to the course which has been adopted; and I must now add to the inquiry a declaration that if the plaintiff be established as the sole next of kin of the intestate the defendants are bound to refund to the plaintiff the several sums which they have received under the order of the court in the suit of *Church* v. *Frowd*, and that if the plaintiff be established as one of the next of kin of the intestate, the defendants are bound to repay to the plaintiff the amount of the sum which the plaintiff in that case shall appear to be entitled to. The plaintiff, if next of kin, is bound by the accounts which have been taken in the suit of *Church* v. *Frowd*.

Inquiry and declaration accordingly.

TWYFORD *v.* TRAIL AND OTHERS

[VICE-CHANCELLOR'S COURT (Shadwell, V.-C.), July 15, 16, 18, August 7, 20, 1834]

[Reported 7 Sim. 92; 58 E.R. 771]

Executor—Chain of representation—Breach—Foreign grant of probate.

A. died in India. B. one of his executors proved his will in India. B. died, and C. his executor, proved his will in England.

Held: C. was not the personal representative of A.

Partnership—Trust—Breach of trust—Liability—Improper use of trust property in partnership business—Liability of incoming partners.

A., a partner in a house of agency in India, died, having by his will directed his estate to be called in and invested on certain trusts and appointed two of his co-partners his executors. They, however, suffered his share in the partnership to remain in the house. After A.'s death, B. and C. were admitted as partners. They knew that A.'s share was remaining in the house and was subject to the trusts of his will. They afterwards retired, and other partners were admitted. The house ultimately failed.

Held: B. and C. were not responsible for the breach of trust committed by their co-partners, the executors.

Notes. As to improper employment of trust-property for partnership purposes, see the Partnership Act, 1890, s. 13: 17 HALSBURY'S STATUTES (2nd Edn.) 587. As to the chain of representation, see the Administration of Estates Act, 1925, s. 7: 9 HALSBURY'S STATUTES (2nd Edn.) 726.

Followed: *In the Goods of Gaynor* (1869), L.R. 1 P. & D. 723. Referred to: *Rendall* v. *Rendall* (1841), 1 Hare, 152; *Bond* v. *Graham* (1842), 11 L.J.Ch. 306.

As to the chain of representation, see 16 HALSBURY'S LAWS (3rd Edn.), 140-142; as to use of trust property in partnership business, see 28 HALSBURY'S LAWS (3rd Edn.) 509, 510; and for cases see 23 DIGEST (Repl.) 39, 40; 36 DIGEST (Repl.) 483, 484.

Cases referred to in argument:

Mucklow v. *Fuller* (1821), Jac. 198; 37 E.R. 824, L.C.; 43 Digest 851, *2983*.

Ex parte Watson (1814), 2 Ves. & B. 414; 2 Rose, 259; 35 E.R. 378, L.C.; 4 Digest (Repl.) 484, *4255*.

Re Moxon, Ex parte Heaton (1819), Buck, 386; 4 Digest (Repl.) 468, *4104*.

Wilson v. *Moore* (1833), 1 My. & K. 126; 39 E.R. 629; affirmed (1834), 1 My. & K. 337, L.C.; 43 Digest 960, *3993*.

Dickenson v. *Lockyer* (1798), 4 Ves. 36; 31 E.R. 19, L.C.; 36 Digest (Repl.) 487, *572*.

Smith v. *Jameson* (1794), 5 Term Rep. 601; 101 E.R. 336; 36 Digest (Repl.) 623, *1857*.

Gedge v. *Traill* (1823), 1 Russ. & M. 281, n.; 2 L.J.O.S.Ch. 1; 39 E.R. 109; 24 Digest (Repl.) 873, *8697*.

Walker v. *Symonds* (1818), 3 Swan. 1; 36 E.R. 751, L.C.; 43 Digest 863, *3085*.

Action by which the plaintiff, Samuel Twyford, as the husband of one of the beneficiaries of the estate of George Augustus Simpson deceased, sought to charge various defendants with liability for the loss of assets of his estate which had not been called in and invested as directed by his will.

By an indenture, dated May 1, 1809, John Palmer, William Logan, Patrick Maitland, George Augustus Simpson and William Hall agreed to become partners, as agents or factors, at Calcutta, for three years from the date of the deed, under the style or firm of Palmer & Co.; and it was agreed that the profits of the partnership should be divided into 24 parts, and that George Augustus Simpson should be entitled to five of such parts, and that the remainder should be divided among the other partners as therein mentioned: and it was also agreed that the accounts of the partnership should be made out on May 1 in every year: and that, if any of the partners should die before the end of the partnership term, the survivors should, in full of his share of the capital, stock, and profits of the partnership, pay to his executors within six months after the accounts of the year in which he should die should have been made up, so much money as would have been due to the deceased if he had been living at the last settlement of accounts.

Not long after the formation of the partnership, William Logan died, and, after his death, the surviving partners, under a proviso for that purpose contained in the deed, carried on the business under the firm of Palmer & Co., upon the same terms as before. In March, 1811, George Augustus Simpson died, leaving his wife (who afterwards married John Maitland) and three children, the eldest of whom was only five years old, him surviving. George Augustus Simpson, by his will appointed Patrick Maitland, William Hall and his brother, James Archibald Simpson, his executors: and he gave to them all his personal property, in trust, as soon as conveniently might be after his decease, to convert the same into money and invest it, either in government securities in India, or in the public funds in England, and to pay £800 a year to his wife, during the minority of his children, and, on their attaining 21, to divide his property, in certain proportions, between his wife and children. In March, 1811, William Hall and James Archibald Simpson proved George Augustus Simpson's will, in Calcutta. Shortly after George Augustus Simpson's death, his widow and children returned to England; and the widow opened an account with the house of Cockerell, Trail & Co. of London, as her bankers; and Trail, who was connected with her by marriage, acted as her friend or agent in respect of her late husband's property in India. The house of Cockerell & Co. were, also, the agents, consignees and correspondents of Palmer & Co. After George Augustus Simpson's death, the business of the Calcutta house was carried on as before, by the surviving partners; and, by an account made out by them on May 1, 1811, it appeared that a balance of 280,526 rupees was due to the estate of George Augustus Simpson, in respect of his share of the capital, stock and profits of the partnership. This balance was not paid to the executors; but they suffered it to be retained by Palmer & Co., who opened an account in their books, which was headed: "Estate of George Augustus Simpson, in account with Palmer & Co.;" and Palmer & Co. from time to time, received further sums of money on account of the estate, and, from time to time, sent to Cockerell & Co., accounts of the moneys in their hands belonging to the estate, and made remittances to them on account of the interest of such moneys: and they debited themselves with and gave credit to the estate for the sums which they received, and duly made for, and debited the estate with the sums which they paid on account of it.

Soon after George Augustus Simpson's death, his surviving partners signed a memorandum, by which they agreed that his executors should, from May 1, 1811, to April 30, 1812, receive three-twenty-fourths of the profits of the house of Palmer &

A Co., for the purpose of enabling them to improve the widow's income, and, generally, for the benefit of her late husband's estate as the firm might thereafter direct.

In 1814, Patrick Maitland returned to England; and, in November of that year, he proved George Augustus Simpson's will, in the Prerogative Court of Canterbury. In 1818 William Hall died, having appointed Henry Trail his executor in England, and John Palmer, Patrick Maitland, Francis Tipping Hall and two other persons his B executors in India; and Francis Tipping Hall alone proved his will in India. About the year 1820 Francis Tipping Hall, and John Brownrigg were admitted as partners in the firm of Palmer & Co.; and, in the same year, Henry William Hobhouse, who had been a partner in the firm, and had retired from it in the lifetime of William Hall, was re-admitted a partner. The new partnerships successively assumed and adopted the debts, credits and accounts of the former partner- C ships; and the accounts of the moneys belonging to George Augustus Simpson's estate were entered in the books of the house as before; and the dealings and transactions of the house, in respect to those moneys, were continued. Trail, as the agent or friend of Mrs. Maitland, frequently urged Palmer & Co. to invest the moneys in their hands belonging to George Augustus Simpson's estate, in government securities in India, and, in March, 1820, they did invest 100,000 rupees, part D of that balance, in a government note.

In January, 1821, Patrick Maitland died insolvent; and, in May of the same year, James Archibald Simpson died, having appointed Palmer, Brownrigg, Hobhouse and Francis Tipping Hall his executors in India, and Trail and two other persons his executors in England, and his will was proved in Calcutta, by Francis Tipping Hall alone, soon after his death; and, in December, 1821, his E will was proved by Trail, in the Prerogative Court of Canterbury. On June 18, 1822, administration de bonis non of George Augustus Simpson, was granted, by the same court, to Mrs. Maitland and, in 1823, Trail proved William Hall's will in the same court.

In 1823 Palmer & Co. altered the title of their account with George Augustus F Simpson's estate, and headed it: "Trust for Mrs. Maitland and minor Simpsons in account with Messrs. Palmer & Co." In 1825, Hobhouse and Brownrigg retired from the partnership, and by the deeds of dissolution which were executed on those occasions, they assigned their interests in the partnership property to the continuing partners, and the latter (one of whom was Francis Tipping Hall, the personal representative of George Augustus Simpson in India) took upon themselves G and covenanted to pay all the debts and sums of money due from the partnership, and released Brownrigg and Hobhouse from all demands respecting any matter relating to the partnership. At different times afterwards, certain other persons were admitted into the partnership. In January, 1830, Palmer & Co. became bankrupts.

In 1831 the plaintiff, Samuel Twyford, married one of the daughters of George H Augustus Simpson, who was only one year old at her father's death; and, in March, 1832, they filed the bill in this cause, against Trail, Sir Charles Cockerell and the other partners in the house of Cockerell, Trail & Co., and against Brownrigg, Hobhouse, Francis Tipping Hall, who was out of the jurisdiction of the court, Mrs. Maitland and her husband, and certain formal parties, alleging that William Hall and James Archibald Simpson, as the executors of George Augustus Simpson, ought to I have caused the moneys belonging to his estate which were in the hands of Palmer & Co. in their lifetime, to be invested on proper securities; and that, as they had neglected to do so, the amount of such moneys ought to be made good out of their assets: that Brownrigg and Hobhouse, during the times that they were partners in the firm of Palmer & Co., were, together with the other members of the firm, indebted to George Augustus Simpson's estate in the sums belonging to his estate which were in the hands of the firm during those periods, and that they still continued so indebted; and that they had notice, by the manner in which the accounts relating to those moneys were entered in their books, and from the

accounts relating thereto which were from time to time sent to Cockerell & Co., that the same were trust moneys and subject to the trusts of George Augustus Simpson's will, and that such moneys were thereby directed to be, or otherwise ought to have been invested on government securities; and that they ought to have caused the same so to be invested; and that such moneys were suffered to remain in the hands of the firm, by a breach of trust, of which they were aware, and in which they concurred, and that they became trustees thereof for the persons interested in George Augustus Simpson's estate, and became, and still were responsible for the same. The bill further alleged that Trail, after the death of James Archibald Simpson, and after having proved his will, became the personal representative of George Augustus Simpson, and that the letters of administration granted to Mrs. Maitland, were void; and that Trail, as such personal representative, ought to have procured the moneys in the hands of Palmer & Co., to be remitted to England; but that he neglected so to do, and permitted and sanctioned their retaining the same, and he thereby became and still was responsible for the same, or so much thereof as might be lost by the insolvency of Palmer & Co. The bill further charged that, in October, 1828, Palmer & Co. remitted to Trail or to Cockerell, Trail & Co. a bill of exchange for £5,000, drawn by them upon Cockerell, Trail & Co., on account of George Augustus Simpson's estate; and that they returned the bill, unaccepted, to Palmer & Co. The bill prayed that the usual accounts might be taken of George Augustus Simpson's estate possessed by his personal representatives, or which, without their default or neglect, might have been possessed by them, and that it might be declared that the personal estates of James Archibald Simpson and William Hall, and, also, the defendants Trail, Francis Tipping Hall, Brownrigg and Hobhouse were bound to make good the moneys belonging to George Augustus Simpson's estate, which were left in the hands of and were due from the firm, or successive firms of Palmer & Co.; and that it might be also declared that Cockerell & Co. were bound to make good the amount of the moneys received by them on account of George Augustus Simpson's estate and of the bill of exchange which had been returned to Palmer & Co.

Trail, in his answer, submitted, to the judgment of the court whether, by proving the will of James Archibald Simpson in England, he became the personal representative of George Augustus Simpson.

Brownrigg and Hobhouse, in their answers, said that the moneys belonging to George Augustus Simpson's estate, were entered to the debit of Palmer & Co. in account between them and the estate, in their books of account, and, in all the accounts furnished by them from time to time to his executors, as moneys in the hands of Palmer & Co., as bankers or agents for the executors, and payable to their order and under their control: and they said that their retirement from the partnership was well known to George Augustus Simpson's personal representatives, who adopted the remaining partners and also the succeeding members of the firm, as their debtors in respect of the moneys belonging to George Augustus Simpson's estate: and they relied on the releases executed to them on retiring from the partnership, and on the Statute of Limitations.

Rolfe, Jacob and *Wigram* for the plaintiffs.
Sir Charles Pepys and *Cockerell* for the defendant Trail.
Sir Edward Sugden and *Walker* for the defendants Cockerell & Co.
Knight and *Kindersley* for the defendant Brownrigg.
Sharpe for the defendant Hobhouse.
Rennalls for the other defendants.

SHADWELL, V.-C. I have often had occasion to consider this subject, particularly on questions regarding the assignment of terms of years, and I have always understood that, if a person dies possessed of chattels real in the province of York and also in the province of Canterbury, the proof of the will in one only of the two

provinces does not enable the executors to make a good assignment of the chattels real which are in the other province.

Supposing that, after probate of George Augustus Simpson's will had been granted in India, it had been thought necessary, on account of there being assets of the deceased in the province of Canterbury, to obtain probate of his will in that province, I apprehend that the probate in India would not have been conclusive upon the Prerogative Court of Canterbury, but that it would have been competent to that court to hear the next of kin and refuse the probate to the executors, and grant administration. It is quite evident that there might have been sufficient evidence, in India, to induce the Indian court to grant the probate, and, at the same time, sufficient evidence in this country to make it right for the Prerogative Court of Canterbury to refuse the probate and to grant administration. If a man makes A. his executor, and then A. dies and appoints B. his executor, and B. proves A.'s will in the court in which A. had proved the will of his testator, the reason why B. is said to represent the original testator, is that the court itself has jurisdiction over the original will: and I apprehend that that court, by reason of its being the court which did grant probate of the will of the first testator, would be able, itself, to entertain a suit against the executor of A., for the administration of the remaining assets of the first testator; for every executor who proves, comes under an obligation to be responsible to the court in which he does prove, for the assets of the estate which he represents.

But, in this case, it is not attempted to be said that Trail can be responsible through the English probate obtained by Maitland, there being no connection whatever between him and Maitland. The only way to make Trail responsible in England, is by connecting him with the original testator through James Archibald Simpson. During the lifetime of James Archibald Simpson, no suit could have been instituted against him, in the Prerogative Court, for the administration of the assets of the testator; and for this reason, namely, because the Prerogative Court had no jurisdiction over the will as against James Archibald Simpson: for he never proved the will in that court; but, on his death, Mr. Trail proved his will in that court. I apprehend that it is quite a matter of course for the ecclesiastical court, under such circumstances, to grant administration.

The question, however, is one of great importance, and, if the parties wish it, the opinion of a court of law must be taken upon it.

Rolfe declined to take a Case.

HIS HONOUR, therefore, after stating the facts of the case, delivered judgment as follows: There is no doubt that it was the duty of William Hall and James Archibald Simpson to withdraw, from the house of Palmer & Co., the share belonging to George Augustus Simpson. They, however, suffered it to remain in the house, and their assets, therefore, are responsible for the loss sustained in consequence: and, to the extent in which Trail has possessed assets of William Hall or of James Archibald Simpson, he will be liable to make good that default.

But the plaintiffs seek to make him, as well as Sir Charles Cockerell and his partners, and the defendants Hobhouse and Brownrigg, personally responsible. It has been argued that, by proving, in England, the will of James Archibald Simpson, who had proved in India the will of George Augustus Simpson, Trail became the personal representative of George Augustus Simpson, and that, therefore, it was his duty to withdraw George Augustus Simpson's share from the house of Palmer & Co., and that he is responsible for the loss arising from the non-performance of that duty. I apprehend the law clearly to be otherwise, and that, as James Archibald Simpson proved his testator's will in India only, Trail did not, by proving James Archibald Simpson's will in England, become, and is not now the personal representative of George Augustus Simpson, either in England or in India. In order to make him the representative of George Augustus Simpson, it was necessary that he should prove the will of his testator in that ecclesiastical court wherein his testator had

proved the will of George Augustus Simpson. But that he did not do. Therefore, he is not personally responsible, for the loss in question, as the representative of George Augustus Simpson; and his voluntarily acting as the agent, trustee or friend of Mrs. Maitland and her children, or as one of the partners of Sir Charles Cockerell & Co. (the only characters in which he did act) cannot make him personally liable. So far, therefore, as the bill seeks to make him personally liable for the loss, it must be dismissed with costs.

With respect to Sir Charles Cockerell & Co., they acted, merely, as the agents and correspondents of Palmer & Co., and there is no pretence for charging them. Therefore, so far as the bill seeks to charge them with the loss, it must also be dismissed with costs.

As to the defendants Hobhouse and Brownrigg, it is to be observed that they, in common with their partners, did, by the consent of James Archibald Simpson during his life, and, after his death, by the consent of Francis Tipping Hall, who was the Indian representative of George Augustus Simpson, merely act in the same manner as the house of Palmer & Co. had acted before they were admitted: and to assert that they must now be personally responsible, merely because, while they remained in the house, they allowed the account with the estate of George Augustus Simpson to subsist in the same manner as it had done before they became partners, is to assert a proposition somewhat new and rather alarming. Besides, when they retired from the firm in 1825, they each received a release from Francis Tipping Hall, the executor in India of George Augustus Simpson, of all demands in respect of any matter relating to their co-partnership. I am of opinion, therefore, that, as to them, the bill must be dismissed with costs.

The bill also prays for a declaration that Trail and his partners are responsible for the amount of the moneys received by them on account of the estate of George Augustus Simpson, and for the amount of the bill of exchange returned by them. It appears that Trail, by a letter of Jan. 10, 1827, had directed Palmer & Co. to invest the estate of George Augustus Simpson in government securities in India. In answer they sent a letter of June 5, 1827, saying that, on Dec. 31 next, they would invest 100,000 Sicca rupees, and that a like sum should be invested in December, 1828, and so on, yearly, till the whole was completed. But, on Feb. 9, 1828, they wrote to Trail, stating that his instructions of Jan. 10, 1827, would be sufficiently and most clearly met by periodical remittances instead of investments, and that they, accordingly, had elected the alternative of remittance, and sent a draft for £5,000 on themselves, and six months hence they would send an equal sum, and so on every six months until the whole balance should have been absorbed. The receipt of that letter and of the draft, was acknowledged, by Cockerell & Co., in a letter of July 21, 1828, and Trail also wrote to Palmer & Co. a letter of the same date, requesting they would refrain from sending home any further sum on account of the estate, repeating his instructions of Jan. 10, 1827, and desiring that they would carry his instructions into effect according to the tenor of their letter to him of June 5 last year. Palmer & Co., however, sent to Trail a letter of Oct. 1, 1828, enclosing a bill on Cockerell & Co. in favour of Trail, for the cost of which they said they debited the trust for Mrs. Maitland and the minor Simpsons. Cockerell & Co., under Trail's directions, returned that bill in a letter dated April 21, 1829, and, in two letters, each dated Jan. 2, 1830, one to Trail the other to Cockerell & Co., Palmer & Co. acknowledged the receipt of the returned bill, and stated that the value of it, with interest, had been written back to the trust account, and that Mr. Trail's instructions regarding the investment of the trust funds, should be carried into effect. In respect of this second bill the plaintiffs ask for relief.

So far as Trail, or Cockerell & Co. received any of the assets of George Augustus Simpson, they are liable to a common account. But, with respect to this second bill, it does not, in the first place, appear that Cockerell & Co. had assets of Palmer & Co. to answer it; and, if they had, Trail was under no obligation to receive money which he had expressly desired should not be sent to him; and, in the course of the

A bill, Cockerell & Co. merely acted as Trail's agents. In respect, therefore, of this returned bill, no case for relief is established; and the bill must be dismissed as against Trail and Cockerell & Co. with costs.

The result, upon the whole, is that relief can only be given in the shape of common accounts; and, so far as the plaintiffs do not choose to have the common accounts against any of the defendants who are accountable, the bill must be dismissed with
B costs.

The decree dismissed the bill, with costs, as against Cockerell & Co. and Brownrigg and Hobhouse, and as against Trail, so far as it sought to make him personally responsible as the alleged personal representative of George Augustus Simpson, or sought any relief against him as one of the partners in the firm of Cockerell & Co.;
C and declared that it was the duty of William Hall and James Archibald Simpson to withdraw, from the house of Palmer & Co., the moneys belonging to George Augustus Simpson's estate; and that their estates were responsible for the loss occasioned by their neglect; and referred it to the Master to ascertain the amount of such loss, with liberty to state special circumstances; and also to take an account of the estates of William Hall and James Archibald Simpson come to the hands of
D Trail, their legal personal representative in England, and to inquire what sums belonging to the estate of George Augustus Simpson, had come to Trail's hands and under what circumstances, and how the same had been applied; and to inquire and state the amount of the moneys belonging to the estate of George Augustus Simpson, which were in the hands or due from Palmer & Co. when they failed, and what dividends had become payable in respect thereof and by whom received, and how
E applied.

ROBERTS *v.* WALKER

F [ROLLS COURT (Sir John Leach, M.R.), July 27, August 2, 1830]

[Reported 1 Russ. & M. 752; 39 E.R. 288]

Administration of Estates — Legacy — Payment out of mixed fund of real and personal property—Proportionate contribution to fund—Effect of failure of legacy.

G Where a testator creates a mixed and general fund from real and personal estate and directs that fund to be applied in payment of debts and legacies, the real and the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies. If some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes, being undisposed of, belongs, as far as it is composed of real
H estate to the heir, and, as far as it is composed of personal estate to the next of kin.

Notes. In the case of a deceased person dying after 1925, his estate, if solvent, is applicable towards the discharge of his funeral, testamentary and administration expenses, debts and liabilities as provided by the Administration of Estates Act, 1925, s. 34 (3) and Part II of the First Schedule.

I As regards the payment of legacies in the case of a deceased person dying after 1925, the principle laid down in this case—namely, that where a testator creates a mixed fund of real and personal property and directs that fund to be applied in payment of legacies, then the legacies must be borne by the real and personal estate rateably—is still applicable: see *Re Owers, Public Trustee v. Death*, [1941] Ch. 17; [1940] 4 All E.R. 225, C.A.

(This case (*Roberts v. Walker*) also raised a further point as to the forfeiture to the Crown of the share of one of the next of kin, who was a felon; but this has been omitted from this report.)

Distinguished: *Hill* v. *Toogood* (1837), 1 Jur. 704. Applied: *West* v. *Cole* (1841), 4 Y. & C.Ex. 460. Distinguished: *Boughton* v. *Boughton*, *Boughton* v. *James* (1848), 1 H.L. Cas. 406. Followed: *Shallcross* v. *Wright* (1850), 12 Beav. 505. Distinguished: *Blann* v. *Bell* (1852), 5 De G. & Sm. 658. Considered: *Bentley* v. *Oldfield* (1854), 19 Beav. 225; *Tatlock* v. *Jenkins* (1854), Kay, 654. Applied: *Cradock* v. *Owen* (1854), 2 Sm. & G. 241; *Simmons* v. *Rose* (1856), 6 De G. M. & G. 411; *Allan* v. *Gott* (1872), 7 Ch. App. 439. Distinguished: *Wells* v. *Rowe* (1879), 48 L.J.Ch. 476. Explained: *Elliott* v. *Dearsley* (1880), 16 Ch.D. 322. Applied: *Re Spencer Cooper*, *Poë* v. *Spencer Cooper*, [1908] 1 Ch. 130. Distinguished: *Re Smith*, *Smith* v. *Smith*, [1913] 2 Ch. 216. Referred to: *Eyre* v. *Marsden* (1839), 4 My. & Cr. 231; *A.-G.* v. *Southgate* (1841), 12 Sim. 77; *Elborne* v. *Goode* (1844), 14 Sim. 165; *Robinson* v. *Geldard* (1852), 3 Mac. & G. 735; *Tench* v. *Cheese* (1855), 6 De G. M. & G. 453; *Percival* v. *R.* (1864), 3 H. & C. 217; *Disney* v. *Crosse*, *Eyre* v. *Parker* (1866), L.R. 2 Eq. 592; *Bellairs* v. *Bellairs* (1874), L.R. 18 Eq. 510; *Howard* v. *Dryland* (1877), 38 L.T. 24; *Re Dumble*, *Williams* v. *Murrell* (1883), 23 Ch.D. 360; *Re Milnes*, *Milnes* v. *Sherwin* (1885), 53 L.T. 534; *Re Oliver*, *Wilson* v. *Oliver*, [1908] 2 Ch. 74.

As to mixed fund for payment of debts and legacies, see 16 HALSBURY'S LAWS (3rd Edn.) 344, 354, 355; and for cases see 23 DIGEST (Repl.) 491-493. For the Administration of Estates Act, 1925, s. 34 and First Schedule, see 9 HALSBURY'S STATUTES (2nd Edn.) 737, 767.

Cases referred to in argument:

Ackroyd v. *Smithson* (1780), 1 Bro. C.C. 503; 28 E.R. 1262; sub nom. *Akeroid* v. *Smithson*, 2 Dick. 566; 3 P. Wms. 22, n., L.C.; 20 Digest (Repl.) 410, *1320*.

A.-G. v. *Earl of Winchelsea* (1791), 3 Bro. C.C. 373; 28 E.R. 591; 8 Digest (Repl.) 445, *1360*.

Paice v. *Archbishop of Canterbury* (1807), 14 Ves. 364; 1 Russ. & M. at p. 759, n.; 33 E.R. 560, L.C.; 44 Digest 967, *8206*.

Crosbie v. *Liverpool Corpn.* (1821), 1 Russ. & M. at p. 761, n.

Chitty v. *Parker* (1793), 4 Bro. C.C. 411; 2 Ves. 271; 29 E.R. 963; 20 Digest (Repl.) 408, *1293*.

Hill v. *Cock* (1813), 1 Ves. & B. 173; 35 E.R. 68, L.C.; 20 Digest (Repl.) 410, *1316*.

Smith v. *Claxton* (1820), 4 Madd. 484; 56 E.R. 784; 20 Digest (Repl.) 405, *1265*.

Lord Inchiquin v. *French* (1745), 1 Cox, Eq. Cas. 1; Amb. 33; 29 E.R. 1034; sub nom. *Lord Inchiquin* v. *O'Brien*, 1 Wils. 82; sub nom. *O'Brien* v. *Inchiquin*, Ridg. temp. H. 230, L.C.; 23 Digest (Repl.) 508, *5722*.

Southouse v. *Bate* (1814), 2 Ves. & B. 396.

Action for the administration of the estate of Sarah White.

The testatrix, Sarah White, by her will dated May 31, 1822, gave various legacies, and devised a "copyhold tenement to Hannah Dean for her life, and subject to the bequests and devises thereinbefore contained, so far as the same extended," she gave and bequeathed unto Thomas Walker and Thomas Gould, their heirs, executors, administrators, and assigns, certain freehold and copyhold messuages therein particularly described; also all that her leasehold messuage or dwelling-house, with the appurtenances, situate in Canal Street in Wolverhampton, etc.; also all her household goods, furniture, plate, linen, bedding, and other household effects, eight shares in the British Fire Office, six shares in the Birmingham New Brass Co., ten shares in the Birmingham Mining Copper Co., ten shares in the Birmingham and Worcester Canal, stock of copper and brass, moneys out on mortgages, bonds, notes of hand, and other securities, and the securities on which the same were invested, ready moneys, book debts, and all and singular other her real and personal estates whatsoever and wheresoever that she should die possessed of, interested in, or in anywise entitled to; and also all and singular the messuages, lands, tenements, and hereditaments whatsoever, which at the time of her decease should be vested in her either

in fee or during any life or lives, or for any term or number of years or otherwise, by way of mortgage, for securing any sum or sums of money, to hold the same messuages, lands, hereditaments, real and personal estates, and all other the premises thereinbefore mentioned (subject as therein aforesaid) unto and to the use of them the said Thomas Walker and Thomas Gould, their heirs, executors, administrators, and assigns respectively, for, during, and to the full extent of her estate, right, title, and interest therein and thereto, according to the nature, quantity, and quality thereof respectively, upon trust, as soon as conveniently might be after her decease (and subject to the said devise for the life of the said Hannah Dean), to make sale and dispose of, either by public auction or private contract, and in such lots as to them or him should seem meet, all her freehold, copyhold, and leasehold messuages, lands, seat or pew, hereditaments, and premises, and all other her real estate, for such price or prices in money as they or he should deem sufficient; and also to sell, dispose of, collect, get in, and convert into money all and singular her said personal estate bequeathed to them as aforesaid, as soon as conveniently might be after her decease: and as to the moneys arising from such sale and conversion of her said real and personal estates, and as to the rents and profits of her said real estates, until the same should be sold, upon trust, in the first place, to pay, satisfy, and discharge all her just debts, funeral expenses, and all the costs, charges, and expenses which her said trustees and executors should be put unto in proving, fulfilling, and carrying into execution the trusts and purposes of her said will, and in the next place, to pay the several legacies therein mentioned unto the several persons thereinafter named to whom she thereby bequeathed the same; all which said legacies she directed should respectively be paid at or calculated from the expiration of twelve calendar months after her decease, or so soon afterwards as there should be funds applicable thereto, with lawful interest for any time which should elapse from the said expiration of twelve calendar months: and she directed that her said trustees, or the survivor of them, his executors, administrators, and assigns, should, by and out of the said trust moneys, pay and apply such sum and sums of money as should be sufficient to pay all and every legacy duty and duties payable to government in respect of all the said several bequests payable out of the said trust moneys, so that the said legatees respectively might have and enjoy the same bequests entire and without any deduction or abatement whatsoever in respect of legacy duty: and she also directed that, in case any of her said legatees should be then dead, or should die in her lifetime, having left children or a child, such children or child should have and take the legacy thereby given to their, his, or her parent or parents respectively, in equal proportions, if more than one: and as to all the residue of the said trust moneys, she directed her said trustees and the survivor, his executors, administrators, or assigns, to pay and apply the same to and for the benefit of such person or persons, in such parts, shares and proportions, manner and form, at such time or times as she should, by any codicil or codicils to her said last will and testament, give and bequeath, direct or appoint, of and concerning the same, she not having then yet made up her mind in what manner she should dispose of such residue.

The testatrix died in July, 1822, without having made any codicil, or any further disposition of her real or personal estate.

The question was whether the debts and legacies of the testatrix were to be satisfied out of her personalty, as far as it would extend, in exoneration of the real estate, and for the benefit of the heir, or, whether they were to be borne by the real and personal estates proportionally.

Wray for the Crown.

Tinney, for the next of kin, contended that the debts and legacies were to be apportioned between the produce of the personal and the produce of the real estate in the ratio of their respective amounts.

Pemberton and *Lynch* for the heir.

SIR JOHN LEACH, M.R. The question is this: Where a testator directs his real and personal estate to be converted into money, and the mixed fund to be applied to certain stated purposes, and some of those purposes fail by lapse or otherwise, whether the remaining purposes, which are in their nature primary charges upon the personal estate, are to be satisfied out of the personal estate, as far as the same will extend, in exoneration of the real estate, for the benefit of the heir, or whether the remaining purposes are to be satisfied out of the real and personal estate pro rata?

It does not appear that the attention of the court has been distinctly called to this question in any of the numerous cases in which the facts would have raised it, and there would be great difficulty to reconcile the different decrees which have been made upon this point. The question is of great importance by reason of its frequent recurrence, and is to be carefully considered. It is a question of intention; and it must be admitted, that, in order to throw upon the real estate any part of the burden to which the personal estate is primarily liable, the intention of the testator must be manifest. When a testator creates from real estate and personal estate a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estates, which have been converted into that fund, shall answer the stated purposes and every of them pro rata according to their respective values. If any of those purposes fail, then the part of the fund which, according to the intention of the testator, would otherwise have been applicable to those purposes, is undisposed of. As far as this part of the fund has been composed of real estate, the heir is to have the benefit of it as so much real estate undisposed of; and as far as this part of the fund has been composed of personal estate, I am of opinion that it is personal estate undisposed of for the benefit of the next of kin; and in order to ascertain the proportions which will thus belong to the heir and next of kin respectively, it must be referred to the Master to compute the respective values of the real and personal estate, which are thus blended by the testator into one common fund.

The decree contained, among other directions, the following: "It is ordered, that the Master do apportion the legacies (except the charitable legacies), funeral expenses, and debts of the testatrix, and also the costs of this suit up to and including his further report, between the testatrix's real and personal estate, in proportion to their respective values; for which purpose he is to set a value on the real estate and on the outstanding personal estate (if any), and reserve the consideration how the proportion to be borne by the real estates, and any and what interest thereon are to be raised; and it is ordered that the rents of the real estates be received by the heiress-at-law ex parte materna; and His Honour doth declare the heir-at-law ex parte materna entitled to the undisposed surplus of the freehold and copyhold estates, and doth declare that the freehold and copyhold estates are liable to a rateable proportion, with the personal estate, of the sums charged by the testatrix on the mixed fund."

A

KENNEDY *v.* GREEN

LORD CHANCELLOR'S COURT (Lord Brougham, L.C.), November 18, 20, 21, 1834]

[Reported 3 My. & K. 699; 40 E.R. 266]

B *Equity—Notice—Constructive notice—Considerations giving rise to existence—Notice putting person on inquiry is notice of everything which inquiry might have revealed.*

The doctrine of constructive notice to a principal of facts known to his agent depends upon two considerations. First, that certain things existing in the relation or conduct of parties, or in the case between them, beget a presumption C so strong of actual knowledge that the law holds the knowledge to exist because it is highly improbable that it should not, and, next, that policy and the safety of the public forbid a person to deny knowledge while he is so dealing as to keep himself ignorant and yet all the while let his agent know, and himself, perhaps, profit by that knowledge. In such a case it would be most iniquitous and dangerous, and give shelter and encouragement to all kinds of fraud, were D the law not to consider the knowledge of the agent as common to both, whether it be so in fact or not. Under one or other of these heads, perhaps under both, comes the other principle, which is quite undeniable, that whatever is notice enough to excite attention, put the party on his guard, and call for inquiry, is also notice of everything to which it is afterwards found that such inquiry might have led, although all was unknown for want of the E investigation.

The plaintiff, as mortgagee, had certain premises vested in her. At the request of her solicitor, she executed a deed which assigned the premises to the solicitor, the solicitor fraudulently misrepresenting the nature of the deed. The actual form of the deed was in certain respects so unusual that it would have aroused in a professional person a suspicion of fraud. The solicitor then F mortgaged the premises to the defendant, he himself acting as solicitor for the defendant, and concealing his fraud from him. The question arose whether the defendant was bound by the plaintiff's mortgage.

Held: although generally the knowledge obtained by an agent or attorney fixed his principal with notice thereof, the defendant could not be fixed with actual knowledge of the fraud committed by his agent because the agent had G concealed the fraud from him, but, as an honest attorney employed by the defendant would have been put on inquiry by the suspicious form of the deed, the defendant was fixed with constructive notice of the fraud and was bound by the plaintiff's mortgage.

Notes. A receipt is now usually written in the body of a deed, without any H further receipt being endorsed on the deed: see the Law of Property Act, 1925, s. 67.

As to restrictions on constructive notice, see the Law of Property Act, 1925, s. 199—which however would not, it appears, have affected the result of this case had it then been in force.

Considered: *Marjoribanks* v. *Hovenden* (1843), Drury temp. Sug. 11; *Jones* v. *Smith* (1843), 1 Ph. 244. Applied: *Fuller* v. *Benett* (1843), 2 Hare, 394. Considered: *Hewitt* v. *Loosemore* (1851), 9 Hare, 449. Applied: *Frail* v. *Ellis* (1852), I 16 Beav. 350. Considered: *Greenslade* v. *Dare* (1855), 20 Beav. 284; *Atterbury* v. *Wallis* (1856), 8 De G.M. & G. 454. Distinguished: *Spencer* v. *Topham* (1856), 22 Beav. 573. Applied: *Eastham* v. *Wilkinson* (1859), 33 L.T.O.S. 234. Considered: *Espin* v. *Pemberton* (1859), 3 De G. & J. 547; *Perry* v. *Hall* (1860), 2 De G.F. & J. 38; *Ogilvie* v. *Leaffreson* (1860), 2 Giff. 353; *Re Cartwright, Thompson* v. *Cartwright* (1863), 2 New Rep. 569. Distinguished: *Greenfield* v. *Edwards* (1865), 2 De G.J. & Sm. 582. Applied: *Re European Bank, Ex parte Oriental Commercial Bank* (1870), 5 Ch. App. 358. Distinguished: *Rolland* v. *Hart* (1871),

6 Ch. App. 648. Applied: *Wakely* v. *Gray* (1875), L.R. 20 Eq. 238. Distinguished: *Bradley* v. *Riches* (1878), 38 L.T. 840. Explained: *Cave* v. *Cave*, *Chaplin* v. *Cave* (1880), 42 L.T. 730. Distinguished: *Kettlewell* v. *Watson* (1882), 2 Ch.D. 685. Considered: *Barwick* v. *Price*, [1905] 1 Ch. 632. Referred to: *Hiorns* v. *Holtom*, *Fortnum* v. *Hollom* (1852), 16 Beav. 259; *Robinson* v. *Briggs* (1853), 1 Sm. & G. 188; *Jones* v. *Williams* (1857), 24 Beav. 47; *Willes* v. *Greenhill* (*No. 2*) (1860), 29 Beav. 387; *Hunter* v. *Walters*, *Curling* v. *Walters*, *Darnell* v. *Hunter* (1871), 7 Ch. App. 75; *Agra Bank* v. *Barry* (1874), L.R. 7 H.L. 135; *Gordon* v. *James* (1885), 53 L.T. 641; *Farell* v. *Wright* (1891), 64 L.T. 85; *Dixon* v. *Winch*, [1900] 1 Ch. 736; *Bagot* v. *Chapman*, [1907] 2 Ch. 222; *Howatson* v. *Webb* (1907), 97 L.T. 730.

As to the equitable doctrine of notice, see 14 HALSBURY'S LAWS (3rd Edn.) 542–549; and for cases see 20 DIGEST (Repl.) 330–334. For the Law of Property Act, 1925, ss. 67, 199, see 20 HALSBURY'S STATUTES (2nd Edn.) 573, 822.

Cases referred to:

(1) *Mountford* v. *Scott* (1818), 3 Madd. 34; 56 E.R. 422; affirmed (1823), Turn. & R. 274; 37 E.R. 1105; 1 Digest (Repl.) 708, *2589*.

(2) *Hiern* v. *Mill* (1806), 13 Ves. 114; 33 E.R. 237; 1 Digest (Repl.) 707, *2583*.

Also referred to in argument:

Daniels v. *Davison* (1809), 16 Ves. 249; 33 E.R. 978, L.C.; 20 Digest (Repl.) 347, *757*.

Appeal by the defendant Kirby from a decree of SIR JOHN LEACH, M.R., ordering him to assign to the plaintiff certain premises.

The bill was filed by Hester Kennedy, widow, against George Green and John Bethell, the assignees of James Bethune Bostock, and against Robert Kirby; and it prayed that a deed of assignment alleged to have been executed by the plaintiff in favour of James B. Bostock might be declared fraudulent and void, and that the premises comprised therein might be re-assigned to her; and, in case it should appear to the court that the defendant Kirby was entitled to priority over the plaintiff in respect of any assignment made to him of the said premises by James B. Bostock, that the plaintiff might be declared entitled to redeem the same.

The facts stated by the bill and proved by the evidence were, that in 1824, James Bethune Bostock was employed by the plaintiff, who resided at Ipswich, as her solicitor, to invest the sum of £9,000 on mortgage. In January, 1825, Bostock, on behalf of the plaintiff, agreed to advance to White the sum of £3,000 on the security of two leases; and by an indenture, dated Jan. 21 in that year, between White of the one part, and the plaintiff Hester Kennedy of the other part, in consideration of the sum of £3,000 advanced to White by the plaintiff, White assigned to the plaintiff the premises comprised in the two leases subject to redemption on repayment of the £3,000, with interest for the same at 5 per cent. In March, 1825, Bostock wrote a letter to the plaintiff, stating that a mortgage for the sum of £3,000 had been completed; and in April following he wrote another letter to the plaintiff, purporting to contain an account of the application of the whole sum of £9,000, and stating that the additional income arising from the investment would be upwards of £160 per annum more than she had previously received; that the securities were most ample, and that the strictest punctuality would be observed in the payment of the interest.

The plaintiff received from Bostock the interest upon the sum advanced to White, and upon the other sums alleged to be invested on mortgage, until March, 1828. In that month Bostock wrote a letter to the plaintiff, in which he stated that he should in a few days be near Ipswich, the place of her residence, and that he would take the opportunity of paying her a visit. Bostock, shortly afterwards, arrived at the house of the plaintiff; and after partaking of breakfast with the plaintiff and some friends who were staying at her house, he stated that he had some business to transact with the plaintiff; and, after mentioning that one of the

A mortgagors to whom part of the plaintiff's money had been advanced was rather irregular in paying his interest, he produced a parchment writing, which he said it was necessary for the plaintiff to sign in order to make the principal and interest in such mortgage more secure, and to compel the mortgagor, under a heavy penalty, to be punctual in the payment of the interest as it became due. The plaintiff, without reading or examining the instrument presented to her, signed her name B in compliance with Bostock's request, in the places pointed out by Bostock; and Captain James M'Farland and his wife, who were the friends of the plaintiff staying with her in her house, also wrote their names, as attesting witnesses, in the parts of the instrument pointed out by Bostock.

The instrument, to which the execution of the plaintiff was thus obtained, purported to be a deed of assignment, dated March 26, 1828, whereby, after reciting C the two leases and the assignment by way of mortgage of January 21, 1825, by White to the plaintiff, and further reciting that Bostock was about to become the purchaser of the premises comprised in the mortgage to the plaintiff, and that there was then due and owing to her for principal and interest the sum of £3,046 17s., and that Bostock was desirous of purchasing the mortgage, it was witnessed that in consideration of the sum of £3,046 17s. therein expressed to be paid to D the plaintiff by Bostock, the plaintiff assigned the mortgaged premises, and all the estate, right, title, and term of years of her, the plaintiff, in the said mortgaged premises to Bostock, his executors, administrators, and assigns, to hold the same for the residue of the terms of years granted by the indentures of lease respectively. On the back of the instrument was endorsed a receipt, to which were annexed E the signature of the plaintiff and the attestation of Captain M'Farland and his wife, purporting to be an acknowledgment by the plaintiff of her having received from Bostock the sum of £3,046 17s. The receipt for the consideration money was not, as usual, written by the stationer, but by Bostock; nor was it in the usual place, which is at the upper extremity of the left-hand square formed by the fold of the deed, but much lower down, so that there was a space reserved for F writing the receipt, if it were not written before the plaintiff signed her name; or if written before the plaintiff wrote her name in that part of the parchment, the deed might have been presented to her in a folded form, so that she would not have observed the receipt.

In February, 1827, a commission of bankrupt was issued against White. Bostock afterwards contracted with the assignees, appointed under White's commission, G for the purchase of the bankrupt's equity of redemption, and that equity of redemption was conveyed to Bostock by a deed, dated April 18, 1828, which contained a recital that the plaintiff's mortgage had been paid off by Bostock, and that she had by an indenture, dated Mar. 26, 1828, in consideration of the principal and interest then due to her having been paid by Bostock, assigned the premises to Bostock for the residue of the term granted by the two indentures of lease therein H recited.

Some time afterwards Bostock applied to the defendant Joseph Kirby, who was his father-in-law, to advance to him the sum of £2,000 on security of the leasehold premises; and by an indenture, dated Aug. 7, 1829, and made between Bostock of the one part, and the defendant Joseph Kirby of the other part, after reciting the leases, that Bostock had become and then was absolutely entitled to I all the residue of the several terms granted by the said leases, and that the defendant Kirby had agreed to advance to Bostock the sum of £2,000 on the terms and security thereinafter expressed, it was witnessed that, in consideration of £2,000 paid to Bostock by the defendant Kirby, Bostock assigned to the defendant Kirby, his executors, administrators, and assigns, all the premises comprised in the said leases and all the estate, term, etc., of Bostock in the same, to hold the same to the defendant Kirby, his executors, etc., for the residue of the unexpired terms, upon trust to secure to the defendant Kirby, his executors, etc., the payment by Bostock, his heirs, executors, etc., of the £2,000 and interest at 5 per cent.

The deed gave a power of sale to the defendant Kirby, his executors, etc., in case of default in payment of the principal sum at the time appointed for the payment of the same, and also a power to raise any sum by mortgage, and afterwards to sell the leasehold premises, if Kirby, his executors, etc., should think fit.

In June, 1831, default having been made in payment to the plaintiff of the interest of the £3,000 advanced to White, the plaintiff called upon Bostock to send to her the title-deeds relating to White's mortgage, and to procure the repayment of the mortgage-money. Bostock sent a letter in answer to the plaintiff, stating that the arrear of interest would be shortly paid, and that the title deeds would be sent to her as soon as a transfer of the mortgage was effected.

On June 9, 1831, a fiat in bankruptcy was issued against Bostock, to which he did not surrender, having in fact absconded; and he was duly declared a bankrupt, and the defendants Green and Bethell were appointed his assignees.

The bill was filed on July 10, 1832: it charged that no debt was really due from Bostock to the defendant Kirby, his father-in-law, but that the assignment to Kirby was executed fraudulently, and with a view to defeat the claim of the plaintiff; and that, at the time when such assignment was executed, Kirby or his solicitor had notice of the previous assignment of the mortgaged premises to the plaintiff, and knew that the sum of £3,000 and interest was still due to the plaintiff.

The defendant Kirby, by his answer, stated that Bostock, when he applied to him for the loan of £2,000 upon the security of the leasehold premises in question, delivered over to him the title-deeds relating thereto; and that he, the defendant, felt himself competent from his own knowledge and experience in such transactions to examine the same and make himself master of the title without any professional assistance; and that, if he had found anything which he could not comprehend, he should have applied to Mr. Kearsey, whom he considered as his solicitor, and whom he had employed before he became acquainted with his son-in-law Bostock: that he, the defendant, had been in possession of the title-deeds from August, 1829, until May, 1832, without any claim being made on the part of the plaintiff, and without any suspicion of the plaintiff or any other person having any claim in opposition to his rights. The defendant denied that he had employed Bostock as his solicitor; and he stated that, on default of payment by Bostock of the sum of £2,000 at the time appointed in the indenture of Aug. 7, 1829, he had caused notice to be served upon Bostock, previous to the filing of the plaintiff's bill, requiring him to pay the principal money and interest due on the defendant's security, or that he, the defendant, should proceed to a sale; but that no sale had been made, or was intended to be made; and the defendant insisted that he was entitled to hold the premises comprised in his mortgage, as a security for the repayment of the principal sum and interest due, in priority to the plaintiff. The defendant did not know whether Bostock was ever let into possession of the premises in question, or into the receipt of the rents and profits thereof, but was informed by Bostock that he was in possession. The defendant denied all knowledge of or participation in the fraud alleged to have been committed by Bostock, and he insisted that the receipt on the back of the deed was in the usual form; and he stated that he believed that the whole width of the upper part of the deed, comprising the first and second folds, was exposed to the view of the plaintiff and witnesses at the time the receipt was signed and attested, inasmuch as parts of letters composing the words written by the plaintiff and the witnesses were in the upper division of the parchment made by the fold, and other parts of the same letters in the lower division.

It appeared by the evidence of the law-stationer, by whose assistant the indenture of Mar. 26, 1828, was engrossed, that it is the usual practice for law-stationers to endorse receipts for the consideration money expressed in the deed at the upper part of the left-hand corner of the back of the engrossment, unless instructions were given to the contrary; and that this endorsement was not made on the deed

in question before it was returned to the person for whom it was engrossed. Several experienced solicitors were examined, who deposed that the unusual circumstances attending the receipt, and the form of the deed itself, would have so much excited their suspicion, that they would not have suffered any client of theirs to become a mortgagee under Bostock without further inquiry. The deed purported to be an assignment of a mortgage, and bore only a common deed stamp; but, instead of assigning the mortgage-debt, it assigned the premises charged with the debt; and it did not assign the mortgage deed, or contain the usual powers to the assignee to recover and receive the debt. It, moreover, recited that Bostock had agreed to purchase the mortgaged premises of Mrs. Kennedy; and if it had been really a purchase either of the mortgage debt, or of the mortgaged premises, it would have required an ad valorem stamp.

The questions raised in the cause were, (i), whether, supposing the legal estate of the mortgaged premises to be vested in the defendant, Kirby, Bostock was to be considered as the solicitor of Kirby, and Kirby, therefore, affected with actual notice of the fraud committed upon the plaintiff; (ii), whether, if Kirby had not actual notice, the unusual circumstances attending the receipt, and the unusual and irregular contents of the deed, did not amount to implied notice of the fraud.

The Master of the Rolls held that the defendant Kirby had notice of the plaintiff's mortgage, and ordered him to assign the premises to the plaintiff, and to pay the costs of the suit. Kirby appealed.

Robert Monsey Rolfe, *Sir William Horne* and *Girdlestone, jun.*, in support of the decree.

Sir Edward Sugden, *Wigram* and *Hughes* for the defendant.

Bethell for the assignees of Bostock.

LORD BROUGHAM, L.C.—This case, from the peculiar circumstances of fraud which belong to it, and from the hardship in which the court is placed of throwing the consequences of the injury worked by the guilt of the wrongdoer upon one of two equally innocent persons, has naturally excited considerable interest both below and here. Much has been said of SIR JOHN LEACH, M.R.'s habitual dislike of fraudulent transactions, a feeling which I hope and trust his Honour shared with all other judges, as he certainly did with all good and honourable men. But it seems to be supposed that he carried this feeling so far as to let it affect his judgment, and make him draw false conclusions from facts—nay, for, unless this further step is made, it explains nothing here—that his indignation against wrongdoers caused him to conceive like feelings against the innocent, and in search of a victim, because a wrong had been done, involve the blameless with the guilty, and even punish the victims for the injury which had been done by the wicked against themselves. In such feelings I hope and trust no judge ever does indulge. I am confident SIR JOHN LEACH, M.R., did not. I know that, were I to bring such to the decision of this case, I should be working the grossest and most unpardonable injustice. Mrs. Kennedy is innocent; Mr. Kirby is innocent; both are dupes and victims. The connection by marriage between the latter and the wrongdoer is only an additional misfortune, and surely no fault, and the only question is which of the two in this court, and as far as equitable relief extends, shall suffer the consequences of the crime. If either has been guilty of negligence, that, though blameless, must be recorded against them and affect their claims, and that must be taken into account with all the rest of the facts in the case.

These are few and simple, nor are they at all in dispute between the parties. James Bethune Bostock was the solicitor of the plaintiff Mrs. Hester Kennedy, an elderly lady, but in the full enjoyment of her faculties, and he was employed by her with a more than ordinary share of confidence reposed in him. This he grossly abused. Finding it necessary, for the purpose of enabling him to obtain money from Mr. Kirby, the defendant, his father-in-law, to get from her an assignment of a mortgage for above £3,000, he caused a deed to be prepared, and employed

a stationer, to whom he was apparently unknown, for he paid ready money for the engrossment, and received it back without the title of the instrument endorsed on the usual place, and in the accustomed engrossing hand. He then carried it to his client, and obtained her signature and seal and execution on the face of the deed, at the foot, in the ordinary way. Captain and Mrs. M'Farland subscribed on the back the usual attestations as witnesses, and there appears further on the back a very extraordinary receipt for the whole money, signed also by Hester Kennedy and witnessed by the M'Farlands.

In all deeds the receipt is put on the upper of the squares, formed by folding the parchment, or, if the deed is executed before the folding, it is still at the top, in order to prevent any fraudulent addition being made after the party shall have signed the receipt. But here the receipt is written not only far down the skin; it is written at the very bottom of the upper left hand square, so that there might have been anything prefixed, and then the word "further" added to connect it with what follows, and what is signed. Again, the name is always signed immediately after the receipt, and on the same square, and above the fold. But here, for the first time, we see the receipt on one square and the name on the one below, so that no one can look at the instrument without perceiving that the party might have signed it when folded up, and when no part of the receipt had been written on the skin. I pass over the other lesser singularities of part of the receipt, and part of the name being written laterally on one square and part of each on another.

It is said that all this is not evidence sufficient to convict Bostock of fraud, and that it does not raise more than a suspicion; that it is only consistent with the supposition of fraud, but that it does not prove in what manner Mrs. Kennedy's signature was obtained. For all that, the subscribing witnesses swear that they have no knowledge or recollection of any receipt or anything being written above the place where Mrs. Kennedy and themselves signed what is now the receipt. To one very material circumstance, however, they both distinctly swear—that no money passed and nothing whatever was said about any money or receipt of anything on the occasion. This is carefully to be kept in view. If we now look at what afterwards happened, it leaves no doubt at all upon the transaction. Bostock took the deed away with him, and retained it in his possession until he handed it over to Mr. Kirby, when he applied to Mr. Kirby for the loan of £2,000 upon the security of the leasehold property. That Bostock was employed in this transaction by Mr. Kirby as his solicitor, and in his professional capacity, no one can affect to doubt. Mr. Kirby was in trade, and did not trust his own ignorance of law writings and inexperience in conveyancing. Bostock was acting, therefore, as his professional man, his agent to do, and his adviser to counsel. He then obtains the £2,000 from Mr. Kirby on the assignment of the mortgage, and not a farthing of this does he pay over to Mrs. Kennedy whose receipt he had obtained. He employs it in his own speculations, or to supply other of his necessities, and, his practices being discovered, his conduct brought before the Court of King's Bench, his affairs plunged into confusion and bankruptcy, he did not meet the charges, nor face his creditors, but absconded and went abroad.

This throws a broad and clear light upon all the story which the inspection of the deed tells, making quite plain with what view and in what way the signature of Mrs. Kennedy was gotten, and showing as clearly that he made her sign the receipt without seeing what she was setting her hand to by a statement that she was only completing her execution of the mortgage deed itself, or doing an act by which she would secure the regular payment of the interest upon her mortgage money. To say that the deed only raises suspicion after this, is wholly impossible. The after acting clears all doubt away, and we see the whole transaction in its proper and hideous colours.

How much worse than ordinary breaches of trust, committed under the pressure of embarrassment, this conduct of Bostock's was, need not be noted in passing

A The man of business who diverts to his own use his client's money entrusted to his hands, and while his client employs him in some sort as a banker, is far from blameless, though that peculiar kind of employment, the nature of that deposit, and the pressure of his unforeseen necessities may greatly extenuate his fault. But here was a person who actively contrived a fraud to delude both his employers; took advantage of one of those clients to obtain an instrument by getting a signature

B to one thing, while he made the party suppose she was signing another; imposed on his other client and relative by giving him for a large sum an instrument of his not worth a farthing, if the truth came out; and then applied the money so obtained to his own use—conduct approaching in a moral view, nearer than by any assignable distance, to forgery. But the degree of Bostock's guilt or the complexion of his fraud—be it more aggravated, be it less—is immaterial to the

C decision of the present question. That there was fraud is abundantly clear—such fraud as, if proved to a court and jury, would have rebutted all claims at law upon this instrument, and sustained the plea of *non est factum* by Mrs. Kennedy pleaded in bar. I have no kind of doubt that such would be the case, and this the result of an action or of an issue, which I, therefore, hold it superfluous to direct.

D Has not Mrs. Kennedy also a right to the equitable relief of this court? That depends upon a defence competent to Mr. Kirby here, though immaterial elsewhere. He says he was a purchaser for value, and without notice; and the question thus raised is, had he notice or not? Of actual knowledge there is no question. No evidence touches Mr. Kirby, nor is he charged in any way with knowing or partaking in the fraud of Bostock. But it is said that neither had he any constructive

E notice.

The doctrine of constructive notice depends upon two considerations. First, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge that the law holds the knowledge to exist because it is highly improbable it should not, and, next, that policy and the safety of the public forbid a person to deny knowledge

F while he is so dealing as to keep himself ignorant and yet all the while let his agent know, and himself, perhaps, profit by that knowledge. In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not. Under one or other of these heads, perhaps under both, comes the other principle, which is quite undeniable, that whatever is enough to excite attention, put the party on his guard, and call for inquiry, is notice of everything to which it is afterwards found out that such inquiry might have

G led, although all was unknown for want of the investigation. These principles are so plain that they need not be supported by reference or authority, and they dispose of the present question.

Bostock was acting as Mr. Kirby's solicitor in the transaction, and although, generally speaking, the knowledge obtained by a man's attorney or agent fixes

H himself, if obtained while so employed and on the same business (he I do not at all differ from *Mountford* v. *Scott* (1), *Hiern* v. *Mill* (2), and the other cases), yet it cannot here be said that Mr. Kirby is fixed with all which Bostock knew. For the fraud, practised by Bostock upon Mr. Kirby himself, was of course concealed from him; and so we may say would certainly be that other fraud which he had practised

I on Mrs. Kennedy. Indeed that was only another part of the same fraud, another act of the same plot, and, therefore, I think we cannot, on this account alone, fix his client Mr. Kirby any more than his other employer Mrs. Kennedy, with the knowledge of his criminal proceedings. We must lay out of our view all the knowledge, the actual and full knowledge he had of his own fraud, and are not to hold Mr. Kirby as cognisant—I mean of course cognisant in law and constructively—of that, merely because his solicitor himself, the contriver, the doer, and the gainer of the transaction, knew it all well.

But suppose him not the actor, and only regard him as an attorney wholly unconcerned in the plot, employed by Mr. Kirby, and not only innocent of the whole affair, but wholly ignorant of it. This supposition is as strong as we can make in Mr. Kirby's favour, gets rid of all the last argument I have adverted to, and meets the objection that the plotter of the fraud never could communicate it to one of its victims, and that to charge the latter with his guilty knowledge would be unjust. I say still, with all this deduction and all this supposition, Mr. Kirby is fixed. For Bostock, had he been wholly free from the guilty knowledge, and only employed as a solicitor to act for and advise Mr. Kirby must, on seeing the deed, have had his attention at once called to the suspicious circumstances under which it was executed. The contents of the instrument itself were perhaps calculated to rouse suspicion, and prompt inquiry. But the back of the deed was checkered all over with suspicious appearances. The title of the deed, not in the engrossing hand, but written in a somewhat slovenly way, and with the words of the title of different sizes, beget a suspicion of hurry and imperfection in the preparation of the instrument. When does a stationer ever send such a blank indenture out of his office unless when pressed for singular dispatch? Then the receipt written across one fold into a second square sideways, and the signature in like manner running into the second square. But, above all, the receipt removed far from the top, and leaving such a space as might by the holder of the deed, supposing that space to have been left in blank, have been filled up in any manner he chose. This was, at once, a circumstance to excite the greatest, the most jealous suspicion. Had a cheque been originally written with an inch of blank to the left hand of the sum, would not all who saw it start at the risk run by the maker, and would not the maker, on his attention being drawn to it, nay, even the holder, take the precaution of drawing a line or two over the blank? But suppose a banker had discounted a cheque with a sum as "one hundred" interlined, would any judge direct any jury to let that banker recover against the maker, though full value had by him the banker been paid for it? All the cases have decided the contrary, and held that every unusual circumstance is a ground for suspicion, and prescribes inquiry; and I hold the receipt written here in a way to enable any person to commit a gross fraud—a way for that reason never adopted—was abundant ground for suspicion, and demanded inquiry and explanation. When to this we add the further unusual circumstance of the party's name being written on the square below, and with a fold between it and the receipt, so that it was most probably written when the receipt was folded down, assuredly no one can hesitate in pronouncing that whoever, especially a man of business, looked at the deed, must have conceived such suspicions as to call for inquiry; and if he had inquired, Mrs. Kennedy would have told him that she knew of no receipt, and had received no money, and that the whole, consequently, was a fraud.

Thus, taking Bostock to be merely an ordinary solicitor, employed by Mr. Kirby in settling this transaction for him, the deed was such as at once gave him notice that all was not right, and put him upon inquiring. That is notice to him and his employer of whatever the inquiry would have disclosed. Can it make the least difference that in this case Bostock abstained from making the inquiry, because he already knew the whole fraud, the tissue of which his own hands had woven? Can it alter the fact, or displace the point, on which the whole turns, of the existence of suspicious appearances, and the certainty that the inquiry, instigated by them, must have disclosed the truth, that this truth was already within the full knowledge of the person employed, and whom we are supposing to have examined the deed for his client? A difference it may make, but the difference is against, and not in favour, of the defendant's argument. Can it, again, make any difference in the case we are supposing of a solicitor employed to examine a deed, and having ground to suspect, and, suspecting, being bound to inquire as to its fraudulent concoction, that here, beside being so employed, he was himself the fabricator of the whole fraud, and only did not suspect, because he knew for certain

A the whole plot? A difference it may make, but that difference is against, and not in favour, of the defendant's argument.

I, therefore, consider the case of constructive notice as here abundantly made out, and I affirm the decree of the Master of the Rolls; but I think, as the plaintiff resorts to this court for relief against her own handwriting, we must recollect that she, by simply looking at the parchment which she signed without seeing what B it contained, might possibly have discomfited the wicked man who was engaged in circumventing her; and I do not, therefore, think she ought to have had her costs below against the other party, to whom no laches at all is imputable personally, who also is the defendant, and does not come to ask anything of the court. The decree must, therefore, be affirmed with this alteration as to the costs, and, for the same reason, I do not give her the costs of the appeal. The deposit must be C returned.

Order accordingly.

D

TOOGOOD *v.* SPYRING

[Court of Exchequer (Parke, Bolland, Alderson and Gurney, BB.), June 5, 1834]

[Reported 1 Cr. M. & R. 181; 4 Tyr. 582; 3 L.J.Ex 347; 149 E.R. 1044]

Slander—Privilege—Qualified privilege—Statement to plaintiff in presence of third person—Complaint to plaintiff's employer.

E In general an action lies for malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters F where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any G narrow limits.

In this class of communications is, no doubt, comprehended the right of a master bona fide to charge his servant for any supposed misconduct in his service and to give him admonition and blame; and the simple circumstance of the master exercising that right in the presence of another person does by no means of necessity take away from it the protection which the H law would otherwise afford. Where indeed an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention and thus deprive it of that immunity which the law allows to such a statement when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorised though it may be a circum- I stance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted bona fide in making the charge or been influenced by malicious motives.

A tenant farmer, having occasion to complain of bad workmanship by the plaintiff, a journeyman employed by the estate carpenter, and suspecting the plaintiff of having broken into his cellar and made himself drunk on the cider which was stored there, charged the plaintiff therewith on three separate occasions (a) to his face in the presence of a fellow workman, (b) to the same

fellow workman in the plaintiff's absence, and (c) to the estate carpenter. On the question whether the occasions were protected by qualified privilege,

Held: the communication (a) was privileged though made in the presence of a third person, and so was the communication (c), but the communication (b) was not privileged and was defamatory if it was in fact false though made in the bona fide belief that it was true.

Notes. By s. 2 of the Defamation Act, 1952 (32 HALSBURY'S STATUTES (2nd Edn.) 400), in an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

Applied: *Kine* v. *Sewell* (1838), 3 M. & W. 297. Followed: *Padmore* v. *Lawrence* (1840), 11 Ad. & El. 380. Applied: *Blackham* v. *Pugh* (1846), 2 C.B. 611. Considered: *Coxhead* v. *Richards* (1846), 2 C.B. 569. Followed: *Taylor* v. *Hawkins* (1851), 16 Q.B. 308. Considered: *Harrison* v. *Bush* (1855), 5 E. & B. 344. Applied: *Croft* v. *Stevens* (1862), 7 H. & N. 570; *Whiteley* v. *Adams* (1863), 15 C.B.N.S. 392. Considered: *Jackson* v. *Hopperton* (1864), 16 C.B.N.S. 829; *Cowles* v. *Potts* (1865), 6 New Rep. 289. Applied: *Harrison* v. *Fraser* (1881), 29 W.R. 652. Considered: *Capital and Counties Bank, Ltd.* v. *Henty & Son*, [1881–5] All E.R. Rep. 86. Applied: *Jones* v. *Thomas* (1885), 53 L.T. 678. Considered and Applied: *Stuart* v. *Bell*, [1891] 2 Q.B. 341. Approved: *Macintosh* v. *Dun*, [1908–10] All E.R. Rep. 664. Considered: *Adam* v. *Ward*, [1916–17] All E.R. Rep. 157. Applied: *London Association for Protection of Trade* v. *Greenlands, Ltd.*, [1916–17] All E.R. Rep. 452; *Watt* v. *Longsdon*, [1929] All E.R. Rep. 284. Considered: *Osborn* v. *Thomas Boulter & Son*, [1930] All E.R. Rep. 154; *Chapman* v. *Ellesmere*, [1932] All E.R. Rep. 221; *White* v. *Stone, Ltd.*, [1939] 3 All E.R. 507. Referred to: *Griffiths* v. *Lewis* (1845), 7 Q.B. 61; *Bennett* v. *Deacon* (1846), 2 C.B. 628; *Cooke* v. *Wildes* (1855), 5 E. & B. 328; *Manby* v. *Witt* (1856), 18 C.B. 544; *Revis* v. *Smith* (1856), 20 J.P. 453; *Crisp* v. *Gill* (1857), 5 W.R. 494; *Shufflebottom* v. *Allday* (1857), 28 L.T.O.S. 292; *Senior* v. *Medland* (1858), 4 Jur. N.S. 1039; *Lawless* v. *Anglo-Egyptian Cotton Co.* (1869), L.R. 4 Q.B. 262; *Henwood* v. *Harrison* (1872), L.R. 7 C.B. 606; *Hamon* v. *Falle* (1879), 4 App. Cas. 247; *Hebditch* v. *MacIlwaine*, [1891-4] All E.R. Rep. 444; *Russell* v. *Duke of Norfolk*, [1948] 1 All E.R. 488; *Turner* (*otherwise Robertson*) v. *Metro-Goldwyn-Mayer Pictures, Ltd.*, [1950] 1 All E.R. 449.

As to qualified privilege and functions of judge and jury, see 24 HALSBURY'S LAWS (3rd Edn.) 54 et seq. 107; and for cases see 32 DIGEST (Repl.) 129 et seq.

Case referred to:

(1) *Child* v. *Affleck* (1829), 9 B. & C. 403; 4 Man. & Ry. K.B. 338; 7 L.J.O.S.K.B. 272; 109 E.R. 150; 32 Digest (Repl.) 138, *1584*.

Also referred to in argument:

M'Dougall v. *Claridge* (1808), 1 Camp. 267, N.P.; 32 Digest (Repl.) 155, *1721*.

Moore v. *Meagher* (1807), 1 Taunt. 39; 127 E.R. 745, Ex. Ch.; 32 Digest (Repl.) 208, *2245*.

Dunman v. *Bigg* (1808), 1 Camp. 269, n., N.P.; 32 Digest (Repl.) 155, *1722*.

Rogers v. *Clifton* (1803), 3 Bos. & P. 587; 127 E.R. 317; 32 Digest (Repl.) 193, *2060*.

Godson v. *Home* (1819), 1 Brod. & Bing. 7; 3 Moore, C.P. 223; 129 E.R. 925; 32 Digest (Repl.) 27, *162*.

Rule Nisi obtained by the defendant to enter a nonsuit or for a new trial in an action for slander.

The plaintiff, a journeyman carpenter, was at the material time employed by one Brinsdon, a master carpenter in the employ of the Earl of Devon at Powderham

A Castle. The defendant resided on a farm of which he was tenant under the Earl of Devon. The plaintiff and another workman were sent by Brinsdon on Jan. 7, 1834, to fit a new door to the defendant's toolhouse which adjoined his cellar, and to carry out certain other repairs. The work was negligently done, during the course of it the plaintiff became drunk and from the circumstances the defendant concluded that he had broken open the cellar door and obtained access to the defen-
B dant's cider. Brinsdon, who was not satisfied with the work, requested the defendant to inspect it and on Jan. 9 the defendant approached the plaintiff who was working at Powderham Castle with another man named Taylor and the following dialogue ensued in Taylor's presence:

"Defendant: What a d—— d pretty piece of work you did at my house the other
C day.
Plaintiff: What, sir?
Defendant: You broke open my cellar door and got drunk and spoiled the job you were about."

The plaintiff denied the charges, but the defendant said he would swear it and so would his three men. Subsequently, in the plaintiff's absence, Taylor asked the
D defendant whether he really thought that the plaintiff had broken the cellar door and the defendant replied: "I am sure he did it, and my people will swear to it." He then left in search of Brinsdon. Later the same day the defendant saw Brinsdon and told him that the plaintiff had spoiled the door, that the cellar had been broken open, that the plaintiff had got drunk, and that he considered that the plaintiff had done the work badly because of his getting drunk.

E Brinsdon told the plaintiff that he could not remain in the employ of the Earl of Devon until the matter was cleared up and that he must attend next morning with the other workman at the defendant's farm to have it investigated. Next morning at the farm, in the presence of the plaintiff and the defendant, Brinsdon examined the cellar door, but, although the bolt was broken, he doubted whether the door had
F been broken open at all, and he told the plaintiff that he considered the charge had not been made out and that he thought his character was cleared so that he might go to work again if he thought proper. The plaintiff, however, said his character was not cleared and he did not return to work.

In an action for slander the plaintiff alleged special damage, and that the words were spoken of him in the way of his calling. The defendant pleaded the general
G issue and also justification. At the trial before BOSANQUET, J., the jury were directed that regarding the first publication, it not being a complaint to the plaintiff's employer and being in the presence of a third person, the plaintiff was entitled to sue on it, and that the defendant was not privileged in making the subsequent charge to Taylor. The jury found a verdict for the plaintiff generally, with 40s. damages. The defendant obtained a rule nisi for a nonsuit, or, alternatively, a new trial on the
H grounds of privilege and misdirection.

Praed for the plaintiff, showed cause against the rule.
Follett for the defendant, supported the rule.

Cur. adv. vult.

June 5, 1834. **PARKE, B.,** delivered the following judgment of the court in which
I he stated the facts and continued: The judge thought that the statement to Brinsdon might be a privileged communication, but not the charge made in the presence of Taylor; and in respect of that charge and of what was afterwards said to Taylor, both which statements formed the subject of the action, the plaintiff had a verdict. We agree that the communication to Brinsdon was protected, and that the statement to Taylor in the plaintiff's absence was not, but we think upon consideration that the statement made to the plaintiff, though in the presence of Taylor, falls within the class of communications ordinarily called privileged—i.e., cases where the occasion of the publication affords a defence in the absence of express malice. In general,

an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

Among the many cases which have been reported on this subject one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice is that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry alone and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed: *Child* v. *Affleck* (1)), the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if on every occasion in which they were made they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master bona fide to charge his servant for any supposed misconduct in his service and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another does by no means of necessity take away from it the protection which the law would otherwise afford. Where indeed an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention and thus deprive it of that immunity which the law allows to such a statement when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorised though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted bona fide in making the charge or been influenced by malicious motives.

In the present case the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorise him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment; and we think that the fact that the imputation was made in Taylor's presence does not of itself render the communication unwarranted and officious, but at most is a circumstance to be left to the consideration of the jury. We agree with the judge, that the statement to Taylor in the plaintiff's absence was unauthorised and officious and, therefore, not protected although made in the belief of its truth, if it were in point of fact false; but inasmuch as no damages have been separately given upon this part of the charge alone, to which the fourth count is adapted, we cannot support a general verdict, if the judge was wrong in his opinion as to the statement to the plaintiff in Taylor's presence; and as we think that at all events it should have been left to the jury whether the defendant acted maliciously or not on that occasion there must be a new trial.

Rule absolute for a new trial.

A

CARTER *v.* DEAN AND CHAPTER OF ELY AND ANOTHER

[Vice-Chancellor's Court (Shadwell, V.-C.), December 6, 8, 10, 11, 1834; January 13, 1835]

B [Reported 7 Sim. 211; 4 L.J.Ch. 132; 58 E.R. 817]

Specific Performance—Contract—Time of the essence—Delay by plaintiff—Refusal of decree.

Specific Performance—Refusal of decree—Termination of contract by defendants—Apparent acquiescence by plaintiff.

The plaintiff sought specific performance of an alleged contract by an ecclesi-
C astical corporation for the grant to him of a concurrent lease in consideration of a fine which was divisible among the members for the time being of the corporation. The plaintiff was guilty of substantial delay. Further, at a meeting at which he was told there must be an end of the negotiations, he left without making any complaint.

Held: (i) as the lapse of every day changed the value and nature of the thing
D to be granted, and changed also the persons entitled to participate in the sum to be paid, time was, in a very great degree, of the essence of the contract; (ii) the plaintiff's conduct at the meeting had absolved the corporation from any agreement; and (iii) on each of those grounds, the plaintiff would be denied specific performance, and also on the further ground that there was in any event no binding agreement at all.

E **Notes.** The first point which arose in this case was whether there was any binding agreement. The vice-chancellor held that there was never a binding agreement, on the ground that eleemosynary and ecclesiastical corporations were not bound by anything in the shape of an agreement regarding their lands unless it was evidenced by a deed or writing with their corporate seal affixed to it. Having regard to the
F provisions of the Corporate Bodies' Contracts Act, 1960, the reasons for this part of the decision have been omitted from this report.

As to rescission and lapse of time as defences to specific performance, see 36 Halsbury's Laws (3rd Edn.) 319–326; and for cases see 12 Digest (Repl.) 352. For the Corporate Bodies' Contracts Act, 1960, see 40 Halsbury's Statutes (2nd Edn.) 204.

G Cases referred to in argument:

Seton v. *Slade*, *Hunter* v. *Seton* (1802), 7 Ves. 265; 32 E.R. 108, L.C.; 12 Digest (Repl.) 347, *2687*.

Newman v. *Rogers* (1793), 4 Bro. C.C. 391; 29 E.R. 950, L.C.; 12 Digest (Repl.) 350, *2715*.

H **Bill** for specific performance of an alleged agreement for the grant of a lease.

In November, 1830, the plaintiff proposed, in writing, to the dean and chapter of Ely, to take a concurrent lease of their rectory and manor of Lakenheath, in Suffolk, for 21 years from Michaelmas then last, at the yearly rent of £42 10s. 4d., under the covenants contained in the then existing lease (which would expire at Michaelmas, 1831) and to pay, to the dean and chapter, a fine of £2,950 in January
I then next. At an audit held on Nov. 25, 1830, at which the plaintiff and the dean and five of the prebendaries (who constituted a majority of the body) were present, the plaintiff's proposal was taken into consideration and accepted by the dean and chapter; and they caused an entry to be made, in one of their books called the Rough Book, to the following effect:

"November 25, 1830. The subject of the Lakenheath manor and rectory was taken into consideration, when an offer was made, by a Mr. Carter, for a concurrent lease of the same. After much discussion, the lease was granted to him, upon paying £2,950, as a fine for the lease for 21 years, to be dated from

Michaelmas Day last. It was finally arranged to accept the above Mr. Carter as our lessee, upon the payment of the sum before mentioned, namely, £2,950. To this Mr. Carter consented."

At the same audit, the dean and chapter caused an entry to be made, by their registrar, in their chapter book, to the following effect:

"November 25, 1830. Agreed that a concurrent lease of the manor and rectory of Lakenheath be granted to W. P. Carter, Esq., for 21 years from Michaelmas last. Fine £2,950. Seal £2."

This entry was signed by the dean and the five prebendaries who were present; but it was not, nor was the prior entry made in Carter's presence. A few days afterwards, R. H. Evans, who was the solicitor and agent of the dean and chapter, sent a letter to a Mr. Eagle (who, also, had applied for the lease), stating that the dean and chapter had agreed, with Carter, for a concurrent lease of Lakenheath Rectory.

On Dec. 10, 1830, Evans sent, to Carter, the draft of the proposed lease for his perusal, and, on the 24th of that month, wrote to him a letter containing the following passage:

"As I understand the fine to be paid by you for the concurrent lease of Lakenheath Rectory, is to be paid early in January, I shall be thankful to hear from you with my draft of the proposed lease."

On Jan. 8, 1831, Evans again wrote to Carter as follows:

"I am desired, by the dean, to ask you how soon you will be prepared to pay the money for the concurrent lease of Lakenheath Rectory; as the members of the chapter understood the business was to be settled in the early part of this month."

On Jan. 10, Carter sent the following answer:

"I have not the slightest recollection that any mention was made of the early part of January for the payment of the fine; but I will, in the course of the present week, write you fully as to it and my other Lakenheath matters."

On Jan. 27, Evans wrote to Carter as follows:

"January (the month, certainly in which the sum for the concurrent lease of Lakenheath Rectory was agreed to be paid) is fast approaching to a close. On Dec. 10 last, I sent you the draft of the proposed lease: on the 10th instant, you wrote to me to say that, before the end of that week, you would write to me fully as to it and your other Lakenheath matters. I am still without any further communication from you. I showed your last letter to the dean, who desired me to express his hope you would finish the business before the end of the month. The sum agreed for, forms part of the audit division for last November, which has been kept open on account of the present sum not having come in. Allow me, therefore, respectfully to press the business upon your immediate attention."

On Jan. 31, Carter wrote, to Evans, a letter which concluded in these words:

"I will, if possible, send you down the draft on Thursday, and, so soon as it is approved and can be engrossed, I shall be ready to exchange the money for it."

On Feb. 8, Evans wrote to Carter as follows:

"From the tenor of your last letter of the 31st ult., I fully expected you would have returned me my draft of the proposed concurrent lease of Lakenheath Rectory, which I sent you on the 10th of December last, on Thursday last, the 3rd instant, according to your promise. I can assure you your delay in concluding the business relative to the proposed purchase of the concurrent lease, has given great dissatisfaction and been productive of no little inconvenience to the affairs of the dean and chapter, and of actual loss to the estate of one of the prebendaries, who died on Saturday last, of the whole of his proportion of the

A money which, as you admit, was to be paid in January last. You had been fully acquainted, by me, with the reasons that made the completion of the business so necessary. Allow me to press the matter on your immediate attention."

Carter afterwards sent to Evans the draft of the lease; and, on Feb. 11, the latter wrote to the former, as follows:

B "I have got the draft, but I do not feel myself authorised to agree to the additions you have made in it, without the consent of the dean and resident prebendaries. I am, however, going to Cambridge tomorrow, for the purpose of meeting them at the dean's. I will write to you as soon as the meeting is over."

Again, on Feb. 12, Evans wrote to Carter, as follows:

C "In the hopes that you can give me a meeting at your chambers, on Tuesday morning, between 10 and 11 o'clock, I will run up to town and see you. An hour's conversation will do more than a week's writing. The dean and chapter are about to hold a special meeting in a few days, and it is, for many reasons, highly desirable the business with you should be brought to an immediate close."

At the meeting between Carter and Evans on Feb. 15, the draft of the lease was D finally settled and signed by Evans on behalf of the dean and chapter: and Carter then told Evans that he did not expect to be in a condition to pay the fine before June then next. On Feb. 18, Evans sent, to Carter, the following letter:

"I am sorry to say the dean and such of the prebendaries as I have seen since my return, are by no means satisfied as to the causes of your delay in paying them the sum which they offered to take for the concurrent lease of Lakenheath E Rectory; as it was upon the faith of your paying the money in time for it to form part of the audit receipts, they listened to your proposals. If you cannot be prepared to pay before June, there will be another half year elapsed, and, of course, the calculation will have to be recast, with reference to that circumstance. A special chapter will be called in the course of a very few days. I F earnestly recommend it to you, therefore, to prepare yourself with the money in the meantime. It would be in the power of any future prebend to refuse his sanction to the completion with you upon the terms contained in your proposals."

On Feb. 26, Evans wrote to Carter as follows:

G "A special chapter is summoned for the 4th of next month, at the deanery in Ely, at 11 o'clock in the forenoon. I advise you, by all means, to bring your negotiation with the dean and chapter to a satisfactory close before that day, or upon it at the latest. From what I know of the sentiments of several of the members of the chapter, I am satisfied they fully expect you will be prepared to do so. I have been waiting in the hopes of hearing from you in answer to my H last letter."

On Feb. 28, Carter wrote, to Evans, as follows:

"I had your letter of the 18th. I should have written you in reply to it today, if I had not received your letter of Saturday. Some indisposition and much vexation at not being able to complete my contract as I wished, so perplex me I as to preclude me the power of determining what to do. Although I could wish, just now, to be spared a journey to Ely, I will, if I do not hear further from you, be there on Thursday evening."

On Mar. 1, Evans again wrote to Carter, urging him, by all means, to come to Ely.

On Mar. 4, Carter went to Ely and attended the special chapter, and one of the members of the chapter then informed him that they had been, already, put to great inconvenience by his having delayed to pay the fine, as they had been prevented thereby from making a dividend of their audit fines at the usual period: that a loss

had been already occasioned to Mr. King (one of the prebendaries who died after the meeting in November, 1830) and that a loss might ensue to other aged members of the body; and, therefore, the chapter had determined not to allow him any further time; and, if he did not then pay the fine, they would not execute the lease, but must put an end, at once, to the business then pending between them. Carter, in reply, said that he was not then prepared to pay the fine, and that he could not expect the chapter to wait any longer, nor could he expect them to come to any other determination than to put an end to the business. The chapter then said that the books must be closed, as they could not allow further time; and Carter left the meeting, without making any complaint or remonstrance. The chapter, considering that, after what had taken place, the business between them and Carter was concluded, asked Evans whether he was willing to take the lease on the terms proposed by Carter; and Evans having assented, they resolved that his name should be substituted for Carter's, in the lease, which had been already engrossed, blanks being left for the name of the lessee. The blanks were accordingly filled up with Evans's name, and the lease was executed to him. Afterwards Carter returned to the chapter-room, and stated that he then recollected that he had £500 at his banker's, and pressed the chapter to receive that sum as part of his fine; but they declared that they thought it trifling with them, and that they could not accede to his request. Upon which Carter said that he should expect to have the lease, and would pursue it wherever he found it, and threatened to file a bill in Chancery against the dean and chapter, to which they paid no attention. On Mar. 14, Evans paid the fine.

On April 16, Carter commenced another correspondence with Evans, by writing to him a letter stating that he was then quite ready to complete his contract with the dean and chapter, and that he would exchange the money for the lease on such day after Monday week, as Evans might appoint; and that, if Evans would send the lease and counterpart to his agents in London, he, Carter, would execute the counterpart. On April 20, Evans sent the following answer:

> "I have shown your letter to the dean, who directs me to express his great surprise at its contents. I assure you my surprise is equal to the dean's. When you were present with the dean and prebendaries, at their capitular meeting at Ely on the 4th of last month, you were expressly told by them that the negotiation between you and them must then be closed, on account of your acknowledged inability to pay the money at that time. To this you assented, adding you could not expect the dean and chapter would wait any longer; and you were, afterwards, acquainted by me, in answer to your question to that effect, that, in consequence of what had passed at the meeting, the lease had been, subsequently, offered to me at the sum which you had proposed to give for it, and that it would be sealed before the meeting was closed. This was, accordingly, done, and the money has been paid and divided."

After some further correspondence had taken place between Carter and Evans, but which led to no result, Mr. Frere, of Lincoln's Inn, wrote to Evans on June 7, 1831, saying that he was desired, by Carter, to say that £3,000 had been lodged, in his hands, for paying the fine and fees on the lease to be granted, to Carter, by the dean and chapter.

In Trinity Term, 1831, the bill was filed against the dean and chapter and Evans, insisting that there was a binding agreement between the plaintiff and the dean and chapter, and that the lease which had been granted to Evans, had been fraudulently obtained by him; and praying that the dean and chapter might be decreed specifically to perform their agreement with the plaintiff; and that the lease granted to Evans, might be set aside.

Sir Edward Sugden and *Wright* for the plaintiff.
Sir William Horne and *Tennant* for the dean and chapter of Ely.
Knight for Evans.

SHADWELL, V.-C., having stated that there was no binding contract in this case because there was no agreement under seal, continued: There is not any evidence that the plaintiff was at any time ready to pay the fine. I consider that where a person is dealing with an ecclesiastical corporation time must of necessity be in a very great degree of the essence of the contract; especially where the plaintiff is not dealing for the purchase of a fee-simple estate in possession (in which case, the interest of the purchase-money is considered as an equivalent for the rents and profits) but for a concurrent lease; in which case the lapse of every day changes the value and nature of the thing to be granted, and changes also the persons who are to participate in the sum to be paid. That it was so in this case is beyond all doubt, because Mr. King, one of the prebendaries, died between Nov. 25 and Mar. 4: and, since Mar. 4, two of the other prebendaries have died. Therefore, it would be the grossest injustice to hold that the agreement of the dean and chapter is to be treated in precisely the same manner as the agreement of a single individual, the effect of which would be to give the benefits of the resolution, not to those persons who signed it in the expectation of participating in the benefits of it, but to their successors. I think, therefore, that non-payment of the consideration, is, of itself, fatal to the plaintiff's case.

I also think that what took place on Mar. 4, 1831, is a decisive answer to this bill. Because Mr. Carter, at his first interview with the dean and chapter on that day, declared that he was not ready to pay the fine (and, according to his own representation, he was not, at any time on that day, able to pay more than the sum of £500) and the dean and chapter then said that there must be an end of the negotiation; upon which Carter left the room without making any complaint or remonstrance: and my opinion is that, from that moment, the dean and chapter were utterly absolved.

What took place afterwards is of very little importance. For no further attempt was made to represent that there was a possibility of the money being ready, until Mr. Carter wrote the letter of April 16; and, even then, he does not propose to pay it till some day after the Monday week. Indeed, there is no evidence that the money was ready to be paid at any time whatever, for Mr. Frere, who wrote the letter of June 7, was not examined as a witness to prove the fact that he had the £3,000 in his hands.

Therefore, the case, as against the dean and chapter, fails in every respect. I wish to have it understood that I rest my judgment on all the grounds which I have stated. First: the entries in the books of the dean and chapter did not constitute an agreement which was binding upon them. Secondly: the conduct of Mr. Carter in holding out, when he was dealing with a body that was fluctuating in its nature, that he should have the money ready in the month of January, but not being prepared with it on Mar. 4 (which was after the lapse of more than a fortnight from the time when the drafts were completely settled by himself as well as by Mr. Evans), is, of itself, a reason why the dean and chapter should not be held bound. And, thirdly: Mr. Carter's conduct on Mar. 4, would have absolved the dean and chapter, if there ever had been any agreement that was binding upon them.

Then it was said that Carter was induced to expect that further time would be given him; and that is rested upon a passage in Mr. Evans's letter of Feb. 18. In that letter, Mr. Evans says:

> "If you cannot be prepared to pay before June, there will be another half year elapsed, and, of course, the calculation will have to be recast with reference to that circumstance."

If there was to be a departure from the original valuation, what was the sum that ought to have been paid? That does not appear; and, therefore, on Mr. Carter's own showing, his case must fail because this letter cannot be taken in the sense of a mere postponement of payment; for Mr. Evans says, if there be a postponement,

it must be accompanied with the circumstance of a recasting of the calculation. The letter then proceeds thus:

"A special chapter will be called in the course of a very few days. I earnestly recommend it to you, therefore, to prepare yourself with the money in the meantime. It would be in the power of any future prebend to refuse his sanction to the completion with you upon the terms contained in your proposals."

And Evans, in his subsequent letters, urges Carter to come to Ely, prepared with the money. It cannot, therefore, be said that there has been any giving of time in this case.

His Honour then observed upon the charges of fraud made, by the bill, against Mr. Evans, and said that they were most unjust and improper, and that Mr. Evans had conducted himself with the utmost fairness to Mr. Carter. He concluded by dismissing the bill, as against Mr. Evans, as well as the dean and chapter, with costs.

Bill dismissed.

DIXON AND ANOTHER *v.* YATES AND OTHERS

[Court of King's Bench (Denman, C.J., Littledale, Parke and Patteson, JJ.), June 7, 1833]

[Reported 5 B. & Ad. 313; 2 Nev. & M.K.B. 177; 2 L.J.K.B. 198; 110 E.R. 806]

Lien—Seller's lien—Delivery of part—No intention of delivery of whole—Lien over remainder.

Sale of Goods—Re-sale by buyer—Original seller unpaid—Right of sub-buyers to possession of goods.

D. bought of Y. forty-six puncheons of rum lying in the warehouse of Y., at Liverpool, and sold them to C., who was a clerk of Y., but carried on business for himself. D. gave C. an invoice, specifying the marks and numbers of each puncheon, and took his acceptances for the price. The rum and the samples which had been taken remained in Y.'s warehouse. The invariable mode of delivering goods sold while they were in warehouses at Liverpool was by the vendor's giving a delivery order to the vendee. D. was asked by C. for delivery orders, but he declined to give any, except for two or three puncheons, which C. received. C. marked, coopered, and gauged the casks. While the bills were running, C. sold twenty-six of the puncheons to K., who paid him for them, and, by C.'s permission, without the knowledge of D., gauged and coopered the casks in the warehouse of Y., and marked them with his initials. C. gave an invoice to K., stating the marks and numbers of the casks, and by whom the rum was bonded. C. also, while the bills were running, sold eighteen puncheons of the rum to two other parties, to whom he gave similar invoices, and samples. They afterwards obtained three of the puncheons on a delivery order signed by themselves, but not by D. They paid C. for the whole. The bills given by C. for the price of the forty-four puncheons were dishonoured.

Held, upon a Special Case whereby it was agreed that the court should be at liberty to draw from the facts any inference that the jury might have drawn: (i) C. never had acquired the actual possession of the rum, and the delivery of part to him did not operate as constructive delivery of the whole, because it was not intended so to operate: accordingly, on his dishonouring his acceptances, D. had a lien on it for the price; and (ii) a second vendee who

neglected to take either actual or constructive possession was in the same position as the first vendee under whom he claimed, and got a title defeasible on non-payment of the price by the first vendee: accordingly, C.'s sub-vendees could not claim from D. the rum which remained undelivered to them.

Notes. For the rules for ascertaining the intention of the parties as to the time at which the property in goods passes to the buyer, see s. 18 of the Sale of Goods Act, 1893; for the lien of an unpaid seller in the case of part delivery, see s. 42 of that Act; and for the effect of sub-sale by the buyer, see s. 47 of that Act.

Applied: *Lackington* v. *Atherton* (1844), 7 Man. & G. 360. Considered: *Godts* v. *Rose* (1855), 17 C.B. 229; *Kemp* v. *Falk* (1882), 7 App. Cas. 573. Referred to: *Townley* v. *Crump* (1835), 4 Ad. & El. 58; *Jones* v. *Jones* (1841), 8 M. & W. 431; *Scott* v. *England* (1844), 2 Dow. & L. 520; *Tanner* v. *Scovell* (1845), 14 M. & W. 28; *Davies* v. *Lowndes* (1847), 3 C.B. 808; *Logan* v. *Le Mesurier* (1847), 11 Jur. 1091; *Pearson* v. *Dawson* (1858), 27 L.J.Q.B. 248; *Meyerstein* v. *Barber* (1866), L.R. 2 C.P. 38; *Heilbutt* v. *Hickson* (1872), 41 L.J.Q.B. 228; *Re McLaren, Ex parte Cooper* (1879), 27 W.R. 518.

As to transfer of specific goods in a deliverable state, see 34 Halsbury's Laws (3rd Edn.) 68; as to what operates as delivery, see ibid. 92, 93; as to seller's lien, see ibid. 122–127; as to delivery of part, see ibid. 134; as to seller's assent to buyer's disposition, see ibid. 137, 138; and for cases see 39 Digest (Repl.) 617, 744, 745. For the Sale of Goods Act, 1893, ss. 18, 42 and 47, see 22 Halsbury's Statutes (2nd Edn.) 996, 1009, 1012.

Cases referred to:

(1) *Bunney* v. *Poyntz* (1833), 4 B. & Ad. 568; 1 Nev. & M.K.B. 229; 2 L.J.K.B. 55; 110 E.R. 569; 39 Digest (Repl.) 745, *2228*.

(2) *Simmons* v. *Swift* (1826), 5 B. & C. 857; 8 Dow. & Ry. K.B. 693; 5 L.J.O.S.K.B. 10; 108 E.R. 319; 39 Digest (Repl.) 597, *1138*.

(3) *Bailey* v. *Culverwell* (1828), 8 B. & C. 448; 2 Man. & Ry. 564; Dan. & Ll. 176; 7 L.J.O.S.K.B. 19; 108 E.R. 1109; 1 Digest (Repl.) 476, *1201*.

(4) *Craven* v. *Ryder* (1816), 6 Taunt. 433; 2 Marsh. 127; 128 E.R. 1103; 39 Digest (Repl.) 769, *2457*.

(5) *Davis* v. *Reynolds* (1815), 4 Camp. 267; 1 Stark. 115; 171 E.R. 85, N.P.; 39 Digest (Repl.) 748, *2261*.

Also referred to in argument:

Bloxam v. *Sanders* (1825), 4 B. & C. 941; 7 Dow. & Ry. K.B. 396; 107 E.R. 1309; 39 Digest (Repl.) 777, *2530*.

Bloxam v. *Morley* (1825), 4 B. & C. 951.

Langfort v. *Tiler* (1704), 1 Salk. 113; Holt, K.B. 96; 6 Mod. Rep. 162; 91 E.R. 104, N.P.; 39 Digest (Repl.) 777, *2529*.

Anon. (1537), 1 Dyer, 29 b.

Stevenson v. *Blakelock* (1813), 1 M. & S. 535; 105 E.R. 200; 32 Digest (Repl.) 267, *136*.

Clay v. *Harrison* (1829), 10 B. & C. 99; L. & Welsb. 104; 5 Man. & Ry. K.B. 17; 8 L.J.O.S.K.B. 90; 109 E.R. 388; 39 Digest (Repl.) 773, *2490*.

Hodgson v. *Loy* (1797), 7 Term Rep. 440; 101 E.R. 1065; 39 Digest (Repl.) 743, *2201*.

Baldey v. *Parker* (1823), 2 B. & C. 37; 3 Dow. & Ry. K.B. 220; 1 L.J.O.S.K.B. 229; 107 E.R. 297; 39 Digest (Repl.) 455, *80*.

Knowles v. *Horsfall* (1821), 5 B. & Ald. 134; 106 E.R. 1142; 5 Digest (Repl.) 809, *6843*.

Slubey v. *Heyward* (1795), 2 Hy. Bl. 504; 126 E.R. 672; 39 Digest (Repl.) 762, *2399*.

Hinde v. *Whitehouse* (1806), 7 East, 558; 3 Smith, K.B. 528; 103 E.R. 216; 39 Digest (Repl.) 460, *116*.

Cooper v. *Elston* (1796), 7 Term Rep. 14; 101 E.R. 830; 39 Digest (Repl.) 454, *70.*

Stovold v. *Hughes* (1811), 14 East, 308; 104 E.R. 619; 39 Digest (Repl.) 769, *2460.*

Chaplin v. *Rogers* (1800), 1 East, 192; 102 E.R. 75; 39 Digest (Repl.) 462, *139.*

Hammond v. *Anderson* (1803), 1 Bos. & P. N.R. 69; 127 E.R. 384; 39 Digest (Repl.) 746, *2237.*

Horncastle v. *Farran* (1820), 3 B. & Ald. 497; 106 E.R. 743; 32 Digest (Repl.) 355, *766.*

Lickbarrow v. *Mason* (1793), 4 Bro. Parl. Cas. 57; 6 East, 22, n., H.L.; 39 Digest (Repl.) 750, *2279.*

Ellis v. *Hunt* (1789), 3 Term Rep. 464; 100 E.R. 679; 39 Digest (Repl.) 754, *2331.*

Lempriere v. *Pasley* (1788), 2 Term Rep. 485; 100 E.R. 262; 39 Digest (Repl.) 652, *1560.*

Snee v. *Prescot* (1743), 1 Atk. 245; 26 E.R. 157, L.C.; 39 Digest (Repl.) 765, *2426.*

Kinloch v. *Craig* (1790), 3 Term Rep. 783; 4 Bro. Parl. Cas. 47, H.L.; 32 Digest (Repl.) 256, *31.*

Hawes v. *Watson* (1824), 2 B. & C. 540; 4 Dow. & Ry. K.B. 22; Ry. & M. 6; 2 L.J.O.S.K.B. 83; 107 E.R. 484; 39 Digest (Repl.) 759, *2369.*

Green v. *Haythorne* (1816), 1 Stark. 447; 171 E.R. 525, N.P.; 39 Digest (Repl.) 747, *2241.*

Hanson v. *Meyer* (1805), 6 East, 614; 2 Smith, K.B. 670; 102 E.R. 1425; 39 Digest (Repl.) 620, *1330.*

Crawshay v. *Eades* (1823), 1 B. & C. 181; 2 Dow. & Ry. K.B. 288; 1 L.J.O.S.K.B. 90; 107 E.R. 68; 39 Digest (Repl.) 757, *2356.*

Harman v. *Anderson* (1809), 2 Camp. 243; 170 E.R. 1143; 39 Digest (Repl.) 760, *2371.*

Hurry v. *Mangles* (1808), 1 Camp. 452; 170 E.R. 1018, N.P.; 39 Digest (Repl.) 667, *1670.*

Wright v. *Lawes* (1801), 4 Esp. 82; 170 E.R. 649, N.P.; 39 Digest (Repl.) 752, *2313.*

Foster v. *Frampton* (1826), 6 B. & C. 107; 9 Dow. & Ry. K.B. 108; 5 L.J.O.S.K.B. 71; 108 E.R. 392; 39 Digest (Repl.) 750, *2294.*

Tooke v. *Hollingworth* (1793), 5 Term Rep. 215; affirmed sub nom. *Hollingworth* v. *Tooke* (1795), 2 Hy. Bl. 501; 126 E.R. 670, Ex. Ch.; 39 Digest (Repl.) 779, *2545.*

Wilson v. *Anderton* (1830), 1 B. & Ad. 450; 9 L.J.O.S.K.B. 48; 109 E.R. 855; 3 Digest (Repl.) 123, *414.*

Hardman v. *Willcock* (1831), 9 Bing. 382, n.; 131 E.R. 659; 3 Digest (Repl.) 32, *233.*

Pope v. *Biggs* (1829), 9 B. & C. 245; 4 Man. & Ry. K.B. 193; 7 L.J.O.S.K.B. 246; 109 E.R. 91; 35 Digest (Repl.) 389, *862.*

Syeds v. *Hay* (1791), 4 Term Rep. 260; 100 E.R. 1008; 46 Digest (Repl.) 477, *229.*

Howard v. *Tucker* (1831), 1 B. & Ad. 712; 9 L.J.O.S.K.B. 108; 109 E.R. 951; 1 Digest (Repl.) 623, *2073.*

Brandt v. *Bowlby* (1831), 2 B. & Ad. 932; 1 L.J.K.B. 14; 109 E.R. 1389; 39 Digest (Repl.) 638, *1474.*

Todd v. *Reid* (1821), 4 B. & Ald. 210; 106 E.R. 915; 29 Digest (Repl.) 341, 2595.

Ruck v. *Hatfield* (1822), 5 B. & Ald. 632; 106 E.R. 1321; 39 Digest (Repl.) 764, *2409.*

Special Case, being a feigned issue directed by PARKE, J., under the Interpleader Act, 1831, to try whether the property in, or the right of possession of, forty-four

puncheons of rum, then being in a certain warehouse of the defendant Yates, or any part thereof, was in the plaintiffs on Nov. 18, 1831, when they demanded the same of Yates, and he refused to deliver the same or any part thereof to the plaintiffs.

At the trial before PATTESON, J., at the Lancaster Spring Assizes, 1832, a verdict was found for the plaintiffs, subject to the opinion of this court on the following Case: and it was agreed that the court should be at liberty to draw from the facts therein stated any inference that the jury might have drawn.

On June 28, 1831, the plaintiffs, spirit merchants at Liverpool, bought of the defendant Yates 147 puncheons, 10 hogsheads, 2 barrels of rum, which had been bonded by Yates in his own name, and placed by him in his own bonded vaults, in Atherton Street, Liverpool. At the time of this purchase Yates handed an invoice to the plaintiffs, specifying the marks and numbers of each puncheon or cask, and the name of the vessel which imported it; and at the bottom was written: "Warehoused per J. B. Yates & Co., in Yates's, Atherton Street." The price, £1,812, was paid by the plaintiffs to Yates, in August and September. On the same June 28 on which this purchase was made, the plaintiffs re-sold a part, viz., 35 puncheons, to Collard, who was clerk to Yates, and also carried on business on his own account, as a spirit merchant, with the knowledge of his employer. For the price of this parcel of 35 puncheons, Collard accepted two bills for £240 each; and after the sale, the plaintiffs gave Collard delivery orders on Yates for the whole 35 puncheons. The invariable mode of delivering goods in warehouses at Liverpool, was by handing delivery orders. Yates kept no transfer books. On Oct. 5, 1831, one of the bills given in payment for the parcel of 35 puncheons was dishonoured, and was taken up by the plaintiffs. Up to that time Collard had been in good credit with the plaintiffs. When the other bill was nearly at maturity, the plaintiffs, on Oct. 29, 1831, to save their own and Collard's credit, advanced money to take it up. Both bills were in the hands of Moss & Co. the plaintiffs' bankers.

On Aug. 13, 1831, the plaintiffs bought of the defendant Yates another parcel, consisting of 51 puncheons of rum, which had been imported from Jamaica in the ship *Alecto*, and which were bonded by him in his own name, and placed in his own bonded vaults in Atherton Street. Yates gave an invoice as follows: "Liverpool, August 13, 1831, Messrs. W. Dixon jun. & Co. Bought from J. B. Yates & Co. 51 puncheons Jamaica rum. Payment two months and two months." The numbers and marks of the casks were then inserted, and at the bottom there was a memorandum: "Warehoused per J. B. Yates & Co. July 29, 1831, in Atherton Street." The price of this lot, £624 6s. 1d., was paid by the plaintiffs on Nov. 5, 1831. On the same day on which this latter purchase was made by the plaintiffs, viz., Aug. 13, 1831, they sold to Collard 46 puncheons: viz., 10 puncheons of the parcel first above mentioned, of 147 puncheons, 10 hogsheads, and 2 barrels; and 36 of the 51 puncheons last mentioned; and they delivered to him an invoice specifying the marks and numbers of each puncheon. For the price, £589 6s. 2d., Collard accepted two bills drawn upon him by the plaintiffs, dated Aug. 13, 1831, payable respectively at three and four months, at Barclay, Trittons & Co. in London. One of these bills the plaintiffs paid away; the other they paid to their bankers as cash.

After the last-mentioned purchase by Collard from the plaintiffs, he applied to them for delivery orders on Yates, which they refused to give; but said that, if he wanted one or two puncheons, they would let him have them. Collard addressed to the plaintiffs two orders in the following form: "Messrs. W. Dixon & Co. please to deliver one puncheon of rum, J.B.Y. J.T.33, bought Aug. 13, 1831. A. W. Collard." The plaintiffs gave corresponding orders upon Yates, and the two puncheons were delivered to a purchaser from Collard. These two puncheons were part of the 46 sold to Collard on Aug. 13, and the delivery order for the two puncheons was produced from the possession of Collard's assignees. At the trial

the remaining 44 puncheons sold to Collard on Aug. 13 were the subject-matter of the issue.

On Nov. 16, 1831, the first of the two bills accepted by Collard for the 46 puncheons became due in London, and was dishonoured. It was returned to and taken up by the plaintiffs on Nov. 19; and the other bill was also dishonoured when at maturity, and taken up by the plaintiffs. Collard's insolvency was generally known at Liverpool about Nov. 12 or 14.

On Nov. 18, 1831, the plaintiffs gave notice to the defendant Yates not to deliver the rum to any person but themselves. On the 19th they made a verbal demand, and on the 21st, a written demand, of the rum, which Yates refused to deliver. The plaintiffs had had dealings with Yates often before, for some years back, and had bought of him large quantities of rum, which they left in his cellars; and when they effected re-sales, they gave delivery orders to the purchasers, and Yates had not delivered any of such rums bought on former occasions by the plaintiffs without delivery orders from them. Yates was not in the habit of accepting general delivery orders; but when the plaintiffs bought of him goods lying in bond, they got orders accepted when they wanted them out. In the meantime, the plaintiffs looked after the casks, sampled them, and coopered them, as occasion required. The plaintiffs did not get a delivery order accepted for either of the parcels bought by them on June 28 and Aug. 13, 1831, but re-sold a part of each parcel to Collard on the day of the purchase; to which re-sale the want of a delivery order was no impediment.

The rums which the plaintiffs bought on June 28 and Aug. 13 were sampled on the quay when landed, and the samples taken to Yates's sale room. The plaintiffs received the samples of those which they did not sell to Collard, but not of those which they did. Collard kept the remainder at Yates's. It was the custom for purchasers of rum always to take the samples, and to cooper the casks. Collard, soon after the purchase, had the puncheons which he bought coopered in Yates's warehouse, and marked with the letter C. The plaintiffs never touched those puncheons, or sampled them, but left Collard to look after them until Nov. 21, when they had them sampled.

On Oct. 28, after the negotiation of the bills given by Collard, and before they had arrived at maturity, Collard sold 26 puncheons, part of the 46 which he had bought of the plaintiffs on Aug. 13, to the defendant Kaye, who, on Oct. 31, accepted bills for the price, which were duly honoured. Collard got those acceptances from Kaye, between ten and twelve in the morning of Oct. 31. An invoice containing the marks and numbers of the casks, and stating where and by whom the rum was bonded, was made out and delivered by Collard to Kaye.

On Oct. 31, the cooper employed by the defendant Kaye applied at the counting-house of Yates for permission to have the 26 puncheons coopered and gauged, on behalf of Kaye, and about nine o'clock of that morning, Yates's warehouseman accompanied the cooper to the warehouse of the defendant Yates, when the cooper prepared the casks for the gauger, and marked them J. A. K. On the same day the gauger attended, and gauged the puncheons on behalf of Kaye; and on that and the following day the cooper coopered the casks on his behalf. The warehouseman of the defendant Yates was present nearly all the time of gauging and coopering the puncheons. If the cooper had met with any impediment at Yates's at nine o'clock that morning, there would have been time to inform Kaye before he had accepted the bills of Collard. When the persons came from the defendant Kaye to gauge the rums, they were refused three times by a clerk of Yates; then Collard came and had it done. The coopering and marking were also done with Collard's knowledge and by his permission. On Nov. 19, Kaye presented to the plaintiffs, for their acceptance, a delivery order for the 26 puncheons bought by them of Collard, which the plaintiffs refused to accept.

The remaining 18 puncheons were sold by Collard, on Sept. 7, to the defendants Bend and Proctor, and he made out and delivered to them an invoice specifying

A the marks and numbers of the puncheons, and where and by whom the same was landed. On Sept. 9, Bond and Proctor settled with Collard for these rums; partly by cash, partly by brandies which had been bought before, partly by wines bought then, and partly by a bill for £39, which was afterwards paid. The samples of these 18 puncheons, and which were part of the samples which Collard kept at Yates's counting-house, were taken to Bond and Proctor, after the sale to them; B out of this lot of 18 puncheons, Yates delivered three to the defendants Bond and Proctor, with the assent of Collard, viz., one on Oct. 15, one on Nov. 1, and one on Nov. 8, upon separate delivery orders, signed by Bond and Proctor, and without any delivery order from the plaintiffs.

On Nov. 19, Bond and Proctor presented to the plaintiffs, for acceptance, a delivery order for the remainder of the rums sold to them by Collard, which the C plaintiffs refused to accept.

On Nov. 21, after the demand made on Yates by the plaintiffs, they, by his permission, sampled the 41 puncheons then remaining in his warehouse.

In October, 1830, the plaintiffs bought a quantity of rum from Yates at two and three months' credit, which they re-sold on the same day to Collard.

D *Cresswell* for the plaintiffs.
Wightman for Kaye.
Roscoe for Bond and Proctor.
Cowling for Yates.

DENMAN, C.J. In this case it appears that the plaintiffs purchased 46 E puncheons of rum lying in the warehouse of the defendant Yates, and paid for them, and thus became the owners. They sold a part of the rum to Collard, a clerk in the service of Yates, and he paid for that part by bills, which were afterwards, but before the plaintiffs had demanded possession of the rum, dishonoured. The right of property and possession thereby re-vested in the plaintiffs, unless something had been done in the interval to divest them of their right of possession. F While the bills were running, Collard had the power to take the rum into his possession, and to dispose of and sell it, but he did not exercise that power by any sufficient means. The invariable mode of delivering goods sold while in warehouses in Liverpool, is found to be by the vendors handing to the vendees delivery orders; and here Collard obtained no delivery orders except for two puncheons. It is said that the delivery of a part operates in law as a constructive delivery of G the whole; but that is so only where the delivery of part is intended to be a delivery of the whole. Here that was not so; for the plaintiffs, by refusing to deliver more than the two puncheons, gave notice to Collard that they meant to retain the possession of the rest.

The taking of samples and coopering are circumstances from which a jury might infer an actual delivery of the whole; but that is not found as a fact in the case, H and I think the circumstances do not make it incumbent on the court to say there was such a delivery of the whole. If I had been on the jury, I should have found that there was no such actual delivery. It has been contended that the plaintiffs, after having received notice of the dishonour of the bills by Collard, were bound to take some step to enforce their lien; but it seems to me that nothing short of an actual delivery could divest a vendor of the right to stop in transitu, which is I admitted to be analogous to the right of retaining. That being so, Yates, then, is not able to set up as against the plaintiffs the act of any third party, and, therefore, is not entitled to retain the possession of the rum. It has been said that the plaintiffs cannot recover, because they have given Collard the means of going into the market with an apparent title to the property: the answer to that is, he had not that evidence of a transfer to him, without which any purchaser's title would have been imperfect. Under all the circumstances, I think the right of property and possession as to the 41 puncheons remained in the plaintiffs, and that they are entitled to recover.

LITTLEDALE, J. I think the property and right to the possession of the 44 puncheons of rum are in the plaintiffs. They sold to Collard a parcel of goods in June, and another parcel in August. The first parcel was paid for by two bills of exchange, which were dishonoured, and taken up by the plaintiffs to save their own credit; and those goods not having been paid for by Collard, he has clearly no right of property in them.

As to the second parcel; Collard became insolvent in November; the bills given by him for the goods were dishonoured. The plaintiffs, therefore (unless something had been done to prevent it, in the interval between the purchase by Collard and the dishonour of his bills), might resume possession and prevent the delivery. The only question is, whether, in the interval, anything of that nature was done by Collard. The invariable mode of delivering goods sold while they are lying in warehouses at Liverpool, is by the vendor handing delivery orders to the vendee. The plaintiffs had not given to Collard orders for the rum in question, therefore, there had not been a delivery to him in the usual mode. Had he, then, acquired the possession (as he undoubtedly might) in any other way? An invoice was delivered. In the case of any sale of goods, the common course is for the vendor to deliver to the vendee an invoice, but that does not vest the actual possession of the goods in the vendee. The delivering of the invoice, therefore, did not give Collard any colourable title. Then, after receiving the invoice, Collard coopered and marked the casks. The coopering was an act which might be done in order to ascertain that the casks were in proper order. The marking of the casks with his initials is an act which looks much more like taking possession. But Collard knew at the time that he had no delivery order. He was a clerk to Yates, and had the management of his cellar, and full power to mark and gauge the casks as he pleased. If that act had been done with the approbation of Yates, the latter knowing that Collard had bought the rum, it might have been sufficient to vest the actual possession in the latter. But that was not so. It seems, therefore, to me that Collard had not done sufficient to take possession: and then, the bills having been dishonoured on Sept. 1, the plaintiffs were entitled to retain.

It remains to be considered whether the fact of Collard having sold part of the rums to Kaye, and to Bond and Proctor, and the acts done by them, make any difference. It is a general principle of law, that a man who has not the property and right of possession in goods cannot transfer them to a vendee; and, therefore, if the original vendor chooses to retain or stop in transitu, a second vendee is in no better situation than the first. Then it is said there was a part delivery here, and that that, in point of law, operated as a constructive delivery of the whole. But that rule is confined to cases where the delivery of part is intended to be a delivery of the whole: *Bunney* v. *Poyntz* (1), *Simmons* v. *Swift* (2). On the contrary, there was in this case an express refusal to deliver the whole.

There are two general principles of law which must decide the present case. The one is, that so long as goods sold and unpaid for remain in the immediate possession of the vendor, he may refuse to deliver them; and if they remain in the possession of his agent, i.e., a warehouseman or carrier, he may stop them. The other is, that a second vendee of a chattel cannot stand in a better situation than his vendor.

PARKE, J. I am of the same opinion. No doubtful principle of law is involved in this case. The question is, what inferences ought to be drawn from the facts given in evidence; and, particularly, whether there has been a delivery of the 44 puncheons of rum to Collard, or of 18 puncheons to Bond and Proctor, or 26 to Kaye? Those are questions of fact. The issue is whether the plaintiffs are entitled to the property in, or to the right of possession of 44 puncheons of rum marked and numbered as stated in the issue, and being in the warehouse of the defendant Yates. Collard purchased of the plaintiffs. Kaye, Bond, and Proctor are sub-purchasers. It is clear that the plaintiffs were, originally, entitled to the goods

A An invoice was made out to them, and the price was paid by them. I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery is questioned in *Bailey* v. *Culverwell* (3) (2 Man. & Ry. K.B. at p. 566) in a note by the reporters; but I apprehend the rule is correct as confined to a bargain for a specific chattel. B Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained; but where, by the contract itself, the vendee appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel C is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.

The defendant Yates is a warehouseman, and, therefore, may set up the jus tertii; then the question is whether any third persons are entitled. The plaintiffs parted with the property in the goods. They sold to Collard, but he did not take actual D possession. There was no delivery order, nor was the rum delivered to him. The whole quantity sold to him in June and August was paid for by bills, three of which were dishonoured before the plaintiffs demanded the possession, and one bill afterwards; and Collard had become generally insolvent before the demand was made. It is said that Collard is entitled to the property in the goods; but the E plaintiffs were vendors retaining the possession, and every vendor has a lien until he is paid. It is true that their lien was suspended as long as the bills were running; but it revived as soon as they were dishonoured. On Nov. 16 Collard had dishonoured three bills, and had become insolvent, and was known to be so. The lien of the vendors then revived. If they had parted with the actual possession, and the goods had remained in the hands of a carrier, they would have been F entitled to stop them in transitu, unless the sub purchasers from Collard had taken actual possession, and not having parted with the possession at all, they have a right to retain it under the same circumstances.

If, indeed, Collard had taken possession of these goods, then the plaintiffs' right was at an end. It is true he had taken samples; but they were not part of the bulk of the commodity to be delivered. Then it is said that by taking possession G of the two puncheons, he took possession of the whole; but it is clearly established, that if part be delivered with an intent to separate that part from the rest, it is not an inchoate delivery of the whole, so as to divest the right of property out of the vendor. Here the vendors, on being asked to give a delivery order for the whole, said they would give an order for one or two puncheons only; thereby separating that part distinctly from the rest. As to the marking; that is an H equivocal act: it may be for the purpose of taking possession, or merely for that of identifying the property. Besides, here it is proved that the invariable mode of delivering goods sold while they are in warehouses at Liverpool, is by giving the vendee a delivery order. I agree that, notwithstanding such custom, there may be a delivery by some other mode. The absence of a customary order, however, is a strong circumstance to show that possession was not intended to be delivered, I where the acts relied upon to show that possession was taken, are equivocal. These are all the facts of the case, as far as they relate to Collard. Then it is said that Collard sold 26 puncheons to Kaye, and 18 to Bond and Proctor, that possession has been taken by them, and the lien of the plaintiffs was thereby divested. Kaye coopered and gauged the casks. Gauging is an equivocal act; it might be done to ascertain the quantity contained in them, before he paid for them. Coopering is an act much more like taking possession; and it is the only part of the case upon which I have entertained any doubt. But when we consider that it was objected to at first, and until Collard interfered; and that a delivery order, which is the

usual mode of transferring property from vendor to vendee, at Liverpool, was wanting in this instance—I think we ought not to come to the conclusion that Kaye took possession, merely because he coopered and gauged the casks. As to Bond and Proctor, the case is less strong, for they never coopered or gauged. Then there was no delivery to the sub-vendees; and the rule is clear, that a second vendee, who neglects to take either actual or constructive possession, is in the same situation as the first vendee under whom he claims. He gets the title defeasible on non-payment of the price by the first vendee: *Craven* v. *Ryder* (4). There is no question on these propositions of law. The only difficulty is one of fact—whether there was a delivery or not.

It being thus established that Yates is liable to the plaintiffs, another point arises; and that is, whether he has made himself liable by his own conduct to the sub-purchasers also. If he had undertaken to deliver to them, or represented to them that they were the goods of Collard, and they had acted on the faith of that engagement or representation, he might be liable to them; but there is nothing to show that. As to Bond and Proctor, nothing of the sort took place; and, with regard to Kaye, the only circumstance is, that he was allowed to gauge the casks: but it would be going very far to say, considering the circumstances under which it took place, that this was an admission by Yates that Kaye might have full possession whenever he pleased; nor does it appear that Kaye was induced to alter his condition in consequence. Therefore, he, as well as Bond and Proctor, is without remedy against Yates.

PATTESON, J.—The question to be decided in this case is one rather of fact than of law. The only doubtful point is whether possession of the goods has been taken by Collard or his sub-vendees. We are empowered by the Case to draw from the facts the same inference which a jury might. It appears that Yates sold the goods to the plaintiffs, and they paid for them. The property thereby was transferred to them, and when they sold, it was in like manner transferred to the sub-vendee, subject to the right of stoppage in transitu. The sale to the plaintiffs placed Yates in the situation of warehouseman to them. It is found to be the invariable mode of delivering goods sold, while lying in warehouses at Liverpool, for the vendor to give the vendee a delivery order on the warehouseman. The difficulty in this case arises from that circumstance, and also from Collard's filling two characters, that of clerk to Yates, and that of purchaser. If there had been transfer books, and the transfer had been into Collard's name, he might have made a good title to the sub-purchasers: but here the goods remain with the warehouseman in the name of the first purchasers, although there may be twenty different changes of property. The acts relied on to show that Collard took possession are, that he had samples, and that he coopered and gauged the casks; but the rums were sampled on the quay when landed, and the samples were clearly no part of the bulk sold. If the coopering had been by a purchaser from the plaintiffs, who was wholly unconnected with Yates, and who had been suffered by Yates to cooper the casks in the warehouse, I am not prepared to say that that would not have been an act of ownership from which I should have inferred a delivery to, and an actual possession by Collard. But he was Yates's clerk, and had the control over his cellar, and coopered the casks immediately after he had made the purchase. The plaintiffs refused to give him a general delivery order; they could not do a more deliberate act to shew that they did not intend to give him the actual possession. The coopering was referable rather to his character of clerk to Yates, than to that of a purchaser from the plaintiffs; and, if so, it was not a taking possession by him. Then, it is said, the re-sale to Bond and Proctor, and to Kaye, alters the case, because they have paid Collard; but that is immaterial, except so far as it would prevent Collard (as against them) from stopping in transitu. But it does not divest the original vendor of his right to stop in transitu: *Craven* v. *Ryder* (4). Collard's bills having been dishonoured, the plaintiffs were clearly entitled to retain: *Davis* v. *Reynolds* (5). The

act of coopering by Kaye, therefore, as against the plaintiffs, can have no greater effect than the act of coopering by Collard.

Then, as between Yates and Kaye, a question arises whether the property was vested in Kaye, the sub-purchaser, as against Yates. It appears that Kaye, after Yates's other clerk had refused to allow him to cooper the puncheons, obtained permission of Collard to do so. Here again, the difficulty arises from the fact of Collard being both seller of the rums to Kaye, and servant to Yates. If he had been a person wholly unconnected with Yates, the act done by him would only have been referable to his character of seller. And if Collard had not been the seller, and Kaye had been suffered by Collard, as the clerk of Yates, to cooper the casks, Yates might have been bound by this act. But here Kaye knew Collard to be the seller of the rums, and, knowing also that the other clerk of Yates would not allow him to cooper the casks, he applied for and obtained permission of Collard. The latter, therefore, must be considered as having acted in his character of purchaser and seller, and not of clerk to Yates. Yates, therefore, is not bound by his act as the act of an agent, but Kaye must take the consequences of the acts of Collard; and, consequently, the property was not in Kaye as against Yates. The plaintiffs are, therefore, entitled to judgment.

The judgment was given generally for the plaintiffs, but, on application afterwards made, it was referred to PARKE, J., to order specially at chambers, how the judgment should be drawn up.

By a rule of court of Hilary Term, 1834, reciting the rule for judgment, and an order made by PARKE, J., on Dec. 23, whereby it appeared that the rum claimed by Kaye, Bond and Proctor, had been delivered to the plaintiffs, and their costs paid by the defendant Yates, it was ordered that Yates should be discharged from all claim by the plaintiffs in respect of the damages and costs in the postea, costs, and all the other matters in issue. And, after reciting further that the Master had been, by the above order, directed to tax the costs of the defendant Yates for preparing the brief or briefs (as he might think fit) for the trial, and of one witness, such brief or briefs to be such as ought to have been prepared and given for the purpose of making out Yates's defence as to the three puncheons of rum, and as to the alleged acts by which it was contended that he would be personally liable to the plaintiffs though the other defendants should not be, and also the costs of Yates's appearing by counsel, and arguing the Special Case, on the like principle; and reciting the Master's allocatur for £34 13s. 8d., it was ordered that the said costs should be paid by the plaintiffs to Yates. And, after reciting also, that the Master, by the said order, was further directed to tax the costs of the defendant Yates of the action brought against him, of his application to interplead, and of this cause, and that it appeared by the Master's allocatur that he had taxed them at £163 16s. 4d., it was further ordered that the defendants Kaye, Bond, and Proctor should pay the same, together with costs paid by the defendant Yates to the plaintiffs (after giving credit for the said costs to be paid by the plaintiffs, when received, to Yates) upon a pro rata according to the value of the goods respectively claimed by them (but not including the three puncheons of rum delivered to the defendants Bond and Proctor), to be settled by the Master in case of difference; and in case the said moneys should not be received from the plaintiffs at the time when the respective amounts to be paid by the other defendants should be ascertained, that the same when received by the defendant Yates should be paid over to the other defendants in like proportion, to be settled in like manner in case of difference.

Judgment for plaintiffs.

LIGGINS *v.* INGE

[COURT OF COMMON PLEAS (Tindal, C.J., and other judges), June 11, 1831]

[Reported 7 Bing. 682; 5 Moo. & P. 712; 9 L.J.O.S.C.P. 202; 131 E.R. 263]

Licence—Revocation—Parol licence affecting the use of land—Licence executed at expense of grantee—Water—Riparian rights—Parol leave to lower bank of river—Diversion of water from grantor's mill—Action by grantor's successor in title to compel restitution of height of bank.

After a parol licence has been executed at the expense of the grantee it cannot be revoked by the grantor.

Where, therefore, the plaintiff's father and predecessor in title gave the defendants leave by parol to lower the bank of a river, the soil being the property of the defendants, and erect a weir whereby a part of the water which had flowed to the plaintiff's mill was diverted.

Held: the plaintiff could not maintain an action against the defendants for continuing to divert the water although his father a few years after the licence had required the defendants to raise the bank and pull down the weir, for, notwithstanding the fact that the right to the flow of water could only pass by grant as an incorporeal hereditament and not by parol licence, after the grantor had once clearly signified relinquishment of the water, whether by word or deed, and suffered other persons to act upon the faith of such relinquishment and incur expense in so doing the very act to which consent was given, it was too late to retract such consent or to throw on those other persons the burden of restoring matters to their former state and condition.

Notes. Considered: *Bridges* v. *Blanchard* (1834), 1 Ad. & El. 536; *R.* v. *Chorley* (1848), 12 Q.B. 515; *Plimmer* v. *Wellington Corpn.* (1884), 9 App. Cas. 699. Referred to: *Mason* v. *Hill* (1833), ante p. 73; *Cocker* v. *Cowper* (1834), 5 Tyr. 103; *Wood* v. *Leadbitter*, [1843-60] All E.R. Rep. 190; *Davies* v. *Marshall* (1861), 10 C.B.N.S. 697; *Jones* v. *Tapling* (1862), 31 L.J.C.P. 110; *Mellor* v. *Watkins* (1874), L.R. 9 Q.B. 400; *Kay* v. *Oxley* (1875), L.R. 10 Q.B. 360; *Armstrong* v. *Sheppard and Short, Ltd.*, [1959] 2 All E.R. 651.

As to revocation of a licence, see 23 HALSBURY'S LAWS (3rd Edn.) 432; and for cases see 30 DIGEST (Repl.) 539 et seq.

Cases referred to:

(1) *Bealey* v. *Shaw* (1805), 6 East, 208; 2 Smith, K.B. 321; 102 E.R. 1266; 19 Digest (Repl.) 63, *354*.

(2) *Winter* v. *Brockwell* (1807), 8 East, 308; 103 E.R. 359; 19 Digest (Repl.) 28, *128*.

(3) *Webb* v. *Paternoster* (1619), 2 Roll. Rep. 143, 152; Palm. 71; 81 E.R. 713, 719; 30 Digest (Repl.) 539, *1738*.

(4) *Taylor* v. *Waters* (1816), 7 Taunt. 374; 2 Marsh. 551; 129 E.R. 150; 19 Digest (Repl.) 21, *83*.

(5) *Hewlins* v. *Shippam* (1826), ante p. 276; 5 B. & C. 221; 7 Dow. & Ry. K.B. 783; 4 L.J.O.S.K.B. 241; 108 E.R. 82; 19 Digest (Repl.) 6, *2*.

Also referred to in argument:

Barker v. *Richardson* (1821), 4 B. & Ald. 579; 106 E.R. 1048; 19 Digest (Repl.) 67, *373*.

R. v. *Horndon-on-the-Hill (Inhabitants)* (1816), 4 M. & S. 562; 105 E.R. 942; 19 Digest (Repl.) 21, *81*.

Fentiman v. *Smith* (1803), 4 East, 107; 102 E.R. 770; 19 Digest (Repl.) 21, *80*.

Rule Nisi obtained by the defendants to set aside an arbitrator's award argued by the direction of the court in the form of a Special Case.

In June, 1822, the defendant, Edward Inge, the owner of a watermill on the

A river Sherborne in Warwickshire which was leased to another defendant John Grimmitt, acted on a parol licence from George Liggins, the plaintiff's father and predecessor in title, the owner of another mill lower down the same river, to cut away part of the river bank and to erect a weir or fletcher there. These works were completed with the result that water was abstracted from the river in quantities which materially reduced the flow to the plaintiff's mill. In 1827 George Liggins B complained to the defendants that the existence of the weir was detrimental to his mill and required them to remove it and restore the bank to its former height. They refused to do so. In 1828 the plaintiff commenced this action which was by consent referred to arbitration.

The arbitrator, finding the facts as above, awarded the plaintiff 1s. damages and ordered the defendants to raise the height of the weir by 1½ inches. The C defendants obtained a rule nisi to have the award set aside, which was argued in the form of a Special Case for the opinion of the court whether the award was good in law.

Serjeant Merewether for the plaintiff.
Serjeant Goulburn for the defendants.

D *Cur. adv. vult.*

TINDAL, C.J., delivered the following judgment of the court. It will be unnecessary on the present occasion to consider more than one of the questions which have been argued at the Bar, namely, whether the present action, upon the facts stated in the award of the arbitrator, is maintainable against the defendants. The E action is in point of form an action of tort, and charges the defendants with wrongfully continuing a certain weir or fletcher, which the defendants had before erected upon one of the banks of the river, and by that means wrongfully continuing the diversion of the water and preventing it from flowing to the plaintiff's mill in the manner it had been formerly accustomed to do.

It appeared in evidence before the arbitrator that the bank of the river which had F been cut down was the soil of the defendants; and that the same had been cut down and lowered and the weir erected and the water thereby diverted by them, the defendants, and at their expense, in 1822 under a parol licence to them given for that purpose by the plaintiff's father, the then owner of his mill; and that in 1827 the plaintiff's father represented to the defendants that the lowering and cutting down the bank were injurious to him in the enjoyment of his mill and had called G upon them to restore the bank to its former state and condition; with which requisition the defendants had refused to comply. The question, therefore, is, whether such non-compliance and the keeping the weir in the same state after, and notwithstanding the countermand of the licence, is such a wrong done on the part of the defendants as to make them liable to this action. The argument on the part of the plaintiff has been that such parol licence is in its nature countermandable H at any time at the pleasure of the party who gave it. That to hold otherwise would be to allow to a parol licence the effect of passing to the defendants a permanent interest in part of the water which before ran to the plaintiff's mill; which interest at common law could only pass by grant under seal, being an incorporeal hereditament, and which at all events would be determinable at the will of the grantor since the Statute of Frauds, as being "an interest in, to, or out of lands, tenements, and I hereditaments."

If it was necessary to hold that a right or interest in any part of the water, which before flowed to the plaintiff's mill, must be shown to have passed from the plaintiff's owner to the defendants under the licence in order to justify the continuance of the weir in its original state, the difficulty above suggested would undoubtedly follow. For it cannot be denied that the right to the flow of the water, formerly belonging to the owner of the plaintiff's mill, could only pass by grant as an incorporeal hereditament and not by parol licence.

But we think the operation and effect of the licence, after it has been completely executed by the defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burden of restoring to its former state what has been done under the licence, although such licence is countermanded, and, consequently, that they are not liable to an action as wrong doers for persisting in such refusal.

The parol licence, as it is stated in the award of the arbitrator, was a licence to cut down and to lower the bank, and to erect the weir. Strictly speaking, if the licence was to be confined to those terms, it was at once unnecessary and inoperative, for, the soil being the property of the defendants, they would have the right to do both those acts without the consent of the owner of the lower mill. But as the diversion of part of the water which before flowed to that mill would be the necessary consequence of such acts, it must be taken that the object and effect of the licence was to give consent, on the part of the plaintiff's father, to the diverting of the water by means of those alterations.

We do not, however, consider the object, and still less the effect, of the parol licence to be the transferring from the plaintiff's father to the defendants of any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment on the part of the plaintiff's father that he wanted that water no longer for the purposes of his mill and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir or fletcher which he then consented should be erected by the defendants. We think that after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late to retract such consent or to throw on those other persons the burden of restoring matters to their former state and condition.

Water flowing in a stream, it is well settled by the law of England, is publici juris. By the Roman law, running water, light and air were considered as some of those things which had the name of res communes, and which were defined "things, the property of which belong to no person, but the use to all." By the law of England the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he thus appropriates against any other: *Bealey* v. *Shaw* (1). It seems consistent with the same principle that the water, after it has been so made subservient to private uses by appropriation, should again become publici juris by the mere act of relinquishment. There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment. Suppose a person, who formerly had a mill upon a stream, should pull it down, and remove the works with the intention never to return. Could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished? Or that he could be compellable to pull down his mill if the former millowner should afterwards change his determination and wish to re-build his own?

In such a case it would undoubtedly be a subject of inquiry by a jury whether he had completely abandoned the use of the stream or had left it for a temporary purpose only, but, that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill for not pulling it down again after notice. If, instead of his intention remaining uncertain upon the acts which he had done, the former proprietor had openly and expressly declared his intention to abandon the stream, that is, if he had licensed the other party to erect a mill, the same inference must follow with greater certainty. Or suppose A. authorises B. by express licence to build a house on B.'s own land close adjoining to some of the windows of A.'s house so as to intercept part of the light, could he afterwards compel B. to pull the house down again simply by giving notice that he countermanded the licence? Still further this is not a

licence to do acts which consist in repetition, as to walk in a park, to use a carriage way, to fish in the waters of another, or the like, which licence if countermanded, the party is but in the same situation as he was before it was granted; but this is a licence to construct a work, which is attended with expense to the party using the licence; so that after the same is countermanded the party to whom it was granted may sustain a heavy loss. It is a licence to do something that in its own nature seems intended to be permanent and continuing. It was the fault of the party himself, if he meant to reserve the power of revoking such a licence after it was carried into effect, that he did not expressly reserve that right when he granted the licence or limit it as to duration. Indeed the person who authorises the weir to be erected becomes, in some sense, a party to the actual erection of it; and cannot afterwards complain of the result of an act which he himself contributed to effect.

Upon principle, therefore, we think the licence in the present case, after it was executed, was not countermandable by the person who gave it and consequently that the present action cannot be maintained. And, upon authority this case appears to be already decided by *Winter* v. *Brockwell* (2), which rests on the judgment in *Webb* v. *Paternoster* (3). We see no reason to doubt the authority of that case, confirmed as it since has been by *Taylor* v. *Waters* (4) in this court, and recognised as law in the judgment of BAYLEY, J., in *Hewlins* v. *Shippam* (5), in the court of King's Bench.

We, therefore, think the rule for setting aside the award of the arbitrator must be made absolute.

Rule absolute: award set aside.

R. *v.* PEMBROKESHIRE JUSTICES

[COURT OF KING'S BENCH (Lord Tenterden, C.J., and other judges), May 7, 1831]

[Reported 2 B. & Ad. 391; 1 L.J.M.C. 92; 109 E.R. 1188]

Case Stated—Magistrates. Mandamus to compel statement—Refusal of magistrate to sign any Case except one which would lead to no result. Refusal of mandamus.

When the sessions on determining an appeal have granted a Case, but none has been stated, the court will in appropriate circumstances direct a mandamus to the justices who heard the appeal to state a Case. But not where it is clear that such a proceeding could lead to no result, as where the chairman, in consequence of his own opinion and that of the court upon the facts, refused to sign any statement but one which would have excluded the point of law relied upon by the party demanding a Case.

Notes. Considered: *R.* v. *Cheshire Justices, Ex parte Meekin* (1846), 11 J.P. 6; *R.* v. *Staffordshire Justices* (1857), 7 E. & B. 935; *R.* v. *Somerset Justices, Ex parte Cole (Ernest J.) & Partners*, [1950] 1 All E.R. 264. Referred to: *Ex parte Jarvis* (1840), 9 Dowl. 120.

As to failure of justices to state a Case, see 25 HALSBURY'S LAWS (3rd Edn.) 314, 315; and for cases see 33 DIGEST (Repl.) 367, 368.

Case referred to:

(1) *R.* v. *Earl of Effingham* (1782), 2 B. & Ad. 393, n.

Rule Nisi for a mandamus to the justices of Pembrokeshire to state a Special Case for the opinion of this court, pursuant to an order of sessions made on hearing an appeal against an order of removal from Narberth to Llanboidy, and to return the Case so stated into this court.

It appeared by the affidavits in support of the rule, that the appeal came on to be tried at the Midsummer quarter sessions for Pembrokeshire, in 1830, when,

after hearing contradictory evidence on behalf of the two parties on a question of settlement by renting a tenement, the court confirmed the order; but, being requested to grant a Case, did so in general terms, and without reference to any specific point. The attorneys could not agree in drawing up a Case: and, upon their waiting on the chairman in order that he might settle the statements they had prepared, he said he could not sign any Case by which it should not appear that the court had decided in favour of the respondents on the facts, independent of the law. The appellants' attorney declined taking a Case so stated.

It appeared by the affidavits against the rule, that the question of law which the appellants wished to bring before this court regarded the effect of a supposed agreement between the pauper and the landlord of the tenement that certain repairs to be done by the pauper (and which it was alleged he had afterwards done) should be allowed in lieu of rent, but it seemed that the justices at sessions, although they granted the Case, had been of opinion, upon the evidence, that the agreement had not been made, nor the repairs done, and the chairman would not sign any statement to a different effect.

John Evans showed cause against the rule.

Campbell supported the rule.

LORD TENTERDEN, C.J. The justices have confirmed the order, subject to a Case. That is no confirmation, unless a Case be stated. All we can do, under the circumstances, is to require them to enter continuances, and hear the appeal. I do not see how we can order them to state a Case.

The rest of the court concurred.

Rule discharged.

On a subsequent day in the term, *Campbell* mentioned to the court a case, *R.* v. *Earl of Effingham* (1) (determined in Hilary Term, 1782), of which he had obtained a note taken by Mr. Dealtry, and in which the court granted a mandamus to the justices present at the last Bradford (West Riding of Yorkshire) sessions, to state a Case.

LORD TENTERDEN, C.J. I admit that there may be instances in which such a mandamus may issue; but not that it ought to go upon the present application. Here the Case, if stated, could come to nothing. The facts are for the judgment of the sessions; and, under the circumstances disclosed, it would evidently be useless to call upon them for a Case.

A

R. *v.* SUFFOLK JUSTICES

[Court of King's Bench (Lord Tenterden, C.J., and Parke, J.), January 24, 26, 1832]

B [Reported 1 Dowl. 163]

Case Stated—Magistrates—Failure to agree over Case Stated—Mandamus directed to justices to hear appeal.

Where quarter sessions had confirmed an order of removal against the officers of a parish, subject to a Case being stated for the opinion of the court, and the justices failed to agree for several sessions on the terms of the Case, C the Court of Queen's Bench granted a mandamus commanding them to enter continuances and hear the appeal, for, the order of sessions being only conditional, there was no decision unless the Case were returned in the meantime.

Notes. Distinguished: *R.* v. *Staffordshire Justices* (1832), 1 Dowl. 484. D Explained: *R.* v. *Hampshire Justices* (1862), 32 L.J.M.C. 46. Followed: *R.* v. *Hallett, Ex parte Smith*, [1939] 2 All E.R. 552.

As to failure of justices to state a Case, see Halsbury's Laws (3rd Edn.) 314, 315; and for cases see 33 Digest (Repl.) 367, 368.

Cases referred to:

(1) *R.* v. *Sussex Justices* (1813), 1 M. & S. 734; 33 Digest (Repl.) 369, *1823*.

E (2) *R.* v. *Westmorland Justices* (1735), 2 Sess. Cas. K.B. 352; 2 Bott. 6th Edn., 734; 93 E.R. 227.

(3) *R.* v. *Bodmyn (Inhabitants)* (1750), Burr. S.C. 295; sub. nom. *Bodmin* v. *Warligen*, 2 Bott. 6th Edn., 750; 33 Digest (Repl.) 282, *1101*.

(4) *R.* v. *Sussex Justices* (1768), 2 Bott. 6th Edn., 770.

F **Rule Nisi** to show cause why an order of mandamus, directed to the Suffolk justices commanding them to enter continuances and hear the appeal, should not issue.

An appeal was heard at the Easter general quarter sessions, held in 1830, by adjournment, at Bury St. Edmunds, for the county of Suffolk, in which the parish officers of Whepstead were appellants, and the churchwardens and overseers of G the parish of Lanshall respondents, against an order of removal. The order was confirmed, subject to a Case to be stated for the opinion of the Court of King's Bench.

Junior counsel for the appellants drew up the Case, and submitted it to the junior counsel for the respondents, who returned it, with various alterations, about June 12, 1830, at which time a certiorari was obtained for returning both orders. The counsel, however, not agreeing, an application was made by the H appellants to the justices at their next quarter sessions at Bury St. Edmunds, to settle the Case. The court referred them to the chairman of the sessions at which the Case was granted, and reference was had to him. He was attended by counsel on both sides, but did not settle the Case. At the July sessions, the appellants renewed their application to the court; but they, being of opinion that I they had no jurisdiction, refused to interfere. No notice of their intended applications had been given by the appellants to the respondents. The 10th rule of the sessions required, that

> "whenever the court should think fit to reserve a point of law for the opinion of the Court of King's Bench, the Case should be settled and signed by one counsel on each side, subject to the approval and revision of the court, to be made known by the chairman's signature; but if the counsel could not agree on the Case, the same might be drawn up by the Clerk of the Peace, subject to such approval and revision."

Application was accordingly made to the Clerk of the Peace, to draw up the Case; but he refused, on the ground that he could only draw it up subject to the revision of the court which had granted the Case.

A rule was obtained by counsel on behalf of the appellants, to show cause why a mandamus should not issue, to be directed to the justices, commanding them to enter continuances and hear the appeal, unless they could agree on a Case for the opinion of the court.

B. Andrews and *Gunning* showed cause against the rule.—After the lapse of time between the granting of the Case and this application, there being no default shown on the part of the respondents in using efforts to procure the drawing of the Case, the court would not now interfere. But the court could not, if willing. The Case should have been drawn at the quarter sessions at which the appeal was heard. In NOLAN'S POOR LAWS (4th Edn.), ch. 2, p. 558, it was laid down, that "no other sessions has power to grant a Case, but that before which the appeal is decided and judgment given;" and a manuscript case in the note is cited as an authority. There, an application was made for a Case, but not granted; and an unconditional order for quashing the order of removal was entered, and remained on the records of the sessions. At the following sessions, on application made, a Case was granted. A certiorari was lodged at the next sessions for removing the orders. The court afterwards quashed the certiorari, on the ground that a subsequent sessions has no power "to control or qualify the absolute order made at the Easter Sessions previously, for quashing the order of removal."

PARKE, J. But here, no absolute order of removal was made. The sessions have restricted it, subject to the opinion of the Court of King's Bench.

Andrews.—But the orders cannot be removed into this court now; for the certiorari, by the statute 13 Geo. 2, c. 18 [repealed by S.L.R., 1888], s. 5, must be applied for within six months after the order has been made, and not after settling the Case. In *R.* v. *Sussex Justices* (1), LORD ELLENBOROUGH said (1 M. & S. 734):

> "The statute expressly requires that the certiorari shall be applied for within six months after order made; and I think it will be attended with beneficial consequences if we put a strict interpretation on this clause, as it will have a tendency to accelerate the settlement of cases which are intended to be brought up for our revision."

BAYLEY, J., also observed, that, "in strictness, the Case ought to have been settled at the Michaelmas sessions, sedente curiâ." Besides, if the court were to interfere, it would be in breach of the 10th rule of the sessions, which is in accordance with the law, as declared in *R.* v. *Sussex Justices* (1), and which requires that the Case should be settled at the sessions where the appeal is heard. The rule for a mandamus must, therefore, be discharged.

Austin supported the rule.—As to the delay remarked by the other side, in making the present application, every possible effort was made to get this Case settled; and, therefore, the appellants were not to blame. Similar applications have been granted in other cases by the court. In *R.* v. *Westmorland Justices* (2), it was decided, that, if the magistrates present are equally divided, the sessions cannot make any order, but ought to enter continuances until the next session, in order that the court may again proceed on the appeal; and there, the Court of King's Bench was disposed to grant a peremptory mandamus to proceed with the appeal, unless the sessions had complied. In *Bodmin* v. *Warligan* (3), on an appeal against an order of removal, there being only two justices, and they divided in opinion, no order was made, but an entry was made by the Clerk of the Peace, that the appeal was lodged, and nothing done in it. One of the parishes gave fresh notice of appeal to the next sessions, when the justices proceeded in it, and quashed the order.

A "PER CURIAM. The difficulty arises from the penning of the entry by the Clerk of the Peace. If they were divided equally in opinion, that was a sufficient warrant for the Clerk of the Peace to have entered an adjournment, and it was his duty so to have done."

He referred to *R.* v. *Sussex Justices* (4), and also cited a manuscript note of a case which occurred in Easter Term, 1831, before the four judges.

B

PARKE, J.—In contemplation of law, the Case is stated by the justices at sessions. In fact, the justices at sessions have not determined the appeal. It is quite clear that they have not decided the appeal, for a decision of that conditional nature is no decision at all.

C **LORD TENTERDEN, C.J.**—The return to us is, that they have confirmed the order, subject to a Case. Let them enter continuances and hear the appeal. We cannot order them to state a Case; but, as they have confirmed the order subject to a Case, that is no confirmation at all, unless they return the Case. I do not say whose business it is to draw a Case. All that we order them to do is to hear and determine.

D **PARKE, J.**—The effect of their order is just the same as if they had refused to hear the appeal at all.

LORD TENTERDEN, C.J.—Let the rule be to enter continuances, and hear the appeal.

E **PARKE, J.**—The only doubt in my mind, at the present moment, is whether the appellants have satisfactorily excused themselves from the charge of delay. Since the question is of some importance, I will take an opportunity of speaking to the other judges of the King's Bench, as it may become a rule in similar cases for the future. If there has been no improper delay, I think a mandamus ought to go to the justices to enter continuances to hear the appeal, for they have not F absolutely decided it. They have only decided it subject to a Case for the opinion of this court. We cannot order them to state a Case.

Cur. adv. vult.

Jan. 26, 1832. **PARKE, J.**—I have taken an opportunity of speaking to the other judges. They think with me, that the delay has not been so great as to preclude the appellants from having the rule for a mandamus to enter continuances G and hear the appeal made absolute. The mandamus will, therefore, go, unless a Case be settled in the meantime.

Rule absolute.

BRIGHT *v.* WALKER

[COURT OF EXCHEQUER (Parke, Bolland, Alderson and Gurney, BB.), June 12, 1834]

[Reported 1 Cr. M. & R. 211; 4 Tyr. 502; 3 L.J.Ex. 250; 149 E.R. 1057]

Easements—Right of way—User for over twenty years—Servient land held under lease for lives—Right against persons having estates in locus in quo.

A way was used adversely and under a claim of right for more than twenty years over land in the possession of a lessee who held under a lease for lives granted by the Bishop of Worcester.

Held: under the terms of the Prescription Act, 1832, this user gave no right as against the bishop, nor could it give a title against all persons having estates in the locus in quo; it gave no title as against the lessee and the persons claiming under him, and no title was gained by a user which did not give a valid title as against the bishop and did not permanently affect the See.

Notes. Considered: *Wright* v. *Williams* (1836), Tyr. & Gr. 375; *Palk* v. *Shinner* (1852), 18 Q.B. 568; *Winship* v. *Hudspeth* (1854), 10 Exch. 5; *Harris* v. *De Pinna* (1886), 33 Ch.D. 238; *Wheaton* v. *Maple & Co.*, [1893] 3 Ch. 48; *Fear* v. *Morgan*, [1906] 2 Ch. 406. Referred to: *Monmouthshire Canal Co.* v. *Harford* (1834), 1 Cr. M. & R. 614; *Tickle* v. *Brown* (1836), 4 Ad. & El. 369; *Onley* v. *Gardiner* (1838), 4 M. & W. 496; *Salkeld* v. *Johnson* (1848), 2 Exch. 256; *Harbidge* v. *Warwick* (1849), 3 Exch. 552; *Dalton* v. *Angus* (1881), 6 App. Cas. 740; *Hollins* v. *Verney* (1884), 13 Q.B.D. 304; *Bass* v. *Gregory* (1890), 25 Q.B.D. 481; *Damper* v. *Bassett*, [1901] 2 Ch. 350; *Gardner* v. *Hodgson's Kingston Brewery Co.* (1903), 172 L.J.Ch. 558; *Kilgour* v. *Geddes*, [1904-7] All E.R. Rep. 679; *Richardson* v. *Graham*, [1908] 1 K.B. 39; *Davies* v. *Du Paver*, [1952] 2 All E.R. 991.

As to the creation of easements under the doctrine of prescription, see 12 HALSBURY'S LAWS (3rd Edn.) 543 et seq.; and for cases see 19 DIGEST (Repl.) 57 et seq. For the Prescription Act, 1832, see 6 HALSBURY'S STATUTES (2nd Edn.) 669.

Cases referred to in argument:

Coriton and Harvey v. *Lithby* (1670), 1 Vent. 167; 2 Keb. 803, 822; 86 E.R. 114; sub nom. *Coryton* v. *Lithebye*, 2 Wms. Saund. 112; sub nom. *Lithebury* v. *Coriton*, 2 Lev. 27; 17 Digest (Repl.) 13, *121*.

Barlow v. *Rhodes* (1833), 1 Cr. & M. 439; 3 Tyr. 280; 2 L.J.Ex. 91; 149 E.R. 471; 19 Digest (Repl.) 32, *154*.

Whalley v. *Tompson* (1799), 1 Bos. & P. 371; 126 E.R. 959; 19 Digest (Repl.) 98, *574*.

Barker v. *Richardson* (1821), 4 B. & Ald. 579; 106 E.R. 1048; 19 Digest (Repl.) 67, *373*.

Runcorn v. *Doe d. Cooper* (1826), 5 B. & C. 696; 8 Dow. & Ry. K.B. 450; 4 L.J.O.S.K.B. 281; 108 E.R. 259; 19 Digest (Repl.) 506, *3448*.

Rule Nisi obtained by the defendant to enter a nonsuit in an action on the case for obstruction of a right of way.

The first count of the declaration stated that the plaintiff was, at all material times, lawfully possessed of a wharf, close and premises with the appurtenances, situate in the county of Worcester and, by reason thereof, he ought, during all material times, to have had and still, of right, ought to have a certain way from the premises, into, through and along a certain close and from thence into, through and along a certain road and into a certain common king's highway for himself and his servants on foot and with horses, carts, etc., to pass and re-pass at all times at his and their free will and pleasure; yet the defendant wrongfully placed five gates and large quantities of timber in and across the way so that the way was obstructed and stopped up. The defendant pleaded the general issue.

A At the trial, before GURNEY, B., at the Worcester Assizes, 1833, it appeared that the way claimed was from a wharf in a close called Cliff Meadow which adjoined the river Severn, through a meadow called Eacham Meadow over a close called the Acre, where the obstruction took place, into a public highway; that the Cliff and Eacham Meadow were, in 1805, demised by the then Bishop of Worcester to a Mr. Alderman Davis for three lives. In 1809, one Roberts, under whom the B plaintiff claimed, purchased the leasehold interest in both the meadows from Davis and established a large brickwork in Cliff Meadow. He then made an opening or carriage road out of Cliff Meadow into Eacham Meadow, and by that road carried the bricks through the piece called the Acre into the highway. At that time the Acre, now the property of the defendant, belonged to one Dallow who, in April, 1811, erected a gate in the Acre to prevent Roberts from carrying bricks from the C Cliff Meadow through the Acre, and locked up the gate. Roberts broke the gate down and he, and the plaintiff who claimed under him, continued to carry bricks without interruption until April, 1833, when the defendant, who had purchased Dallow's interest in the Acre, put up a gate across the road and locked it up. This action was brought for that obstruction.

D It appeared that when Roberts first purchased Davis's interest in the Eacham and Cliff Meadows, there was a road through the Acre to the Eacham Meadow, but no communication between the Eacham and the Cliff Meadow; but the road to the latter was by a place called Grimley Stile. The defendant contended that the plaintiff had a right to use the road through the Acre to the Eacham Meadow only and had no right to use it to the Cliff Meadow. The plaintiff on the contrary E insisted that he had acquired a right of way to the Cliff Meadow by uninterrupted enjoyment for more than twenty years.

The plaintiff obtained a verdict with £5 damages, the jury finding that there had not been any grant of a right of way by the bishop, but that the plaintiff and Roberts had actually enjoyed the way without interruption for more than twenty years. The judge gave the defendant leave to move to enter a nonsuit; and counsel F for the defendant obtained a rule nisi on two grounds: (i), that the right of way was not made out by the evidence; and (ii), that it was not properly described in the declaration.

Serjeant Ludlow and *Whatley* for the plaintiff, showed cause against the rule.

R. V. Richards for the defendants, supported the rule.

Cur. adv. vult.

G June 12, 1834. **PARKE, B.,** delivered the following judgment of the court. This was an action on the case for obstructing a way to the plaintiff's wharf, which was tried before GURNEY, B., at Worcester Assizes, when a verdict passed for the plaintiff with liberty to move to enter a nonsuit on two grounds: first, that the plaintiff's title to the right of way was not made out by the evidence, and, secondly, H that it was not properly described in the declaration. On showing cause, the second objection was disposed of by the court and the only point now to be considered is whether the right of way was established.

The way claimed was from a wharf in a close called Cliff Meadow, through Eacham Meadow, over the locus in quo called the Acre, where the obstruction took place, into a public highway. Cliff and Eacham Meadows were held under the I Bishop of Worcester, by a lease for three lives, granted in 1805 to Alderman Davis. In 1809, Roberts purchased the leasehold interest from Davis; he began to make bricks in Cliff Meadow and carried them through Eacham Meadow and the Acre into the highway. In 1811, Dallow, the then occupier of the Acre, and the assignee of a lease for four lives under the Bishop of the Acre, put up a gate to obstruct Roberts in carrying bricks. Roberts broke it down and he, and the plaintiff, who claimed under him, continued to carry bricks over the Acre without interruption for more than twenty years, when the defendant, claiming as assignee of the Bishop's lease under Dallow, obstructed the way, and for that obstruction the action was brought.

No proof was given on either side that either of the original leases had been surrendered and, therefore, the case must be considered as if both had continued to the time of the obstruction. The jury found—first, that they would not presume any grant of right of way by the bishop, and, secondly, that the plaintiff and Roberts had actually enjoyed the way without interruption for more than twenty years. The only question is whether such an enjoyment gives the plaintiff a right of way over the defendant's close, so as to enable him to maintain this action. This depends upon the construction of the Prescription Act, 1832, and particularly s. 2.

For several years prior to the passing of this Act, judges had been in the habit, for the furtherance of justice and the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years by analogy to the Statute of Limitations. Such presumptions did not always proceed on a belief that the thing presumed had actually taken place, but, as is properly said by STARKIE in his excellent TREATISE ON EVIDENCE, vol. 2, p. 669: "A technical efficacy was given to the evidence of possession beyond its simple and natural force and operation;" and though in theory it was presumptive evidence, in practice and effect it was a bar. That learned author observes that so heavy a tax on the consciences and good sense of juries, which they were called on to incur for the sake of administering substantial justice, ought to be removed by the legislature. The act in question is intended to accomplish this object by shortening, in effect, the period of prescription and making that possession a bar or title of itself which was so before only by the intervention of a jury.

The title of the Act is: "For shortening the time of prescription in certain cases." It recites that the expressions "time immemorial" or "time whereof the memory of man runneth not to the contrary," is now, by the law of England, in many cases considered to include and denote the whole period of time from the reign of King Richard I, whereby the title to matters which have been long enjoyed is sometimes defeated, by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice. It then proceeds to enact in s. 2 that

> "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived, upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way, by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

In order to establish a right of way and to bring the case within the section, it must be proved that the claimant has enjoyed it for the full period of twenty years and that he has done so "as of right," for that is the form in which, by s. 5, such a claim must be pleaded. The like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done,—if he shall have occasionally asked the permission

of the occupier of the land no title would be acquired, because it was not enjoyed "as of right." For the same reason it would not, if there had been unity of possession during all or part of the time, for then the claimant would not have enjoyed "as of right" the easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated, that is, by the same means by which a similar claim, arising by custom, prescription or grant, would now be defeasible; and, therefore, it may be answered by proof of a grant or of a licence written or parol, for a limited period, comprising the whole or part of the twenty years or of the absence or ignorance of the parties interested in opposing the claim and their agents, during the whole time that it was exercised.

So far the construction of the Act is clear and this enjoyment of twenty years, having been uninterrupted and not defeated on any ground above mentioned, would give a good title. But if the enjoyment take place with the acquiescence or by the laches of one who is tenant for life only, the question is what is its effect according to the true meaning of the statute? Will it be good to give a right against the See [of Worcester] and those claiming under it by a new lease or only as against the termor and his assigns during the continuance of the term, or will it be altogether invalid?

In the first place, it is clear that no right is gained against the bishop; whatever construction is put on s. 7, it admits of no doubt under s. 8. This section provides:

> "That when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof."

It is certain that an enjoyment of forty years instead of twenty, in the circumstances of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period, as against the bishop, it certainly must from the shorter. Therefore, there is no doubt but that this possession of twenty years gives no title as against the bishop and cannot affect the right of the See.

The important question is whether this enjoyment, as it cannot give a title against all persons having estates in the locus in quo, gives a title as against the lessee and the defendants claiming under him, or not at all. We have had considerable difficulty in coming to a conclusion on this point; but on the fullest consideration, we think that no title at all is gained by a user which does not give a valid title against all, and permanently affect the See. Before the statute, this possession would indeed have been evidence to support a plea or claim by a non existing grant from the termor, in the locus in quo, to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. Since the statute, however, such a qualified right, we think, is not given by an enjoyment for twenty years. For, in the first place, the statute is "for the shortening the time of prescription;" and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for these periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. In the second place, the statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute—valid as

to some persons and invalid as to others. From hence we are led to conclude that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now and is, therefore, not good as against everyone, it is not good as against anyone and, therefore, not against the defendant.

This view of the case derives confirmation from s. 7, which provides as follows:

> "That the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim to the way) is tenant for life and, unless the context makes it necessary for us in order to avoid some manifest incongruity or absurdity to put a different construction, we ought to construe the words in their ordinary sense. That construction does not appear to us to be at variance with any other part of the Act nor to lead to any absurdity. During the period of a tenancy for life, the exercise of an easement will not affect the fee: in order to do that, there must be that period of enjoyment against an owner of the fee.

The conclusion, therefore, at which we have arrived is that the statute gives no right from the enjoyment that has taken place; and as s. 6 forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other by the proof of possession alone.

Of course, nothing that has been said by the court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself or on proof of its loss by secondary evidence; nor prevent the jury from taking the possession into consideration with other circumstances, as evidence of a grant which they may still find to have been made, if they are satisfied that it was made in point of fact. We are, therefore, of opinion that in the present case, the plaintiff is not entitled to recover but that a nonsuit must be entered.

Rule absolute.

A

GREENOUGH AND OTHERS *v.* GASKELL

[Lord Chancellor's Court (Lord Brougham, L.C.), January 17, 31, 1833]

[Reported 1 My. & K. 98; Coop. temp. Brough. 96; 39 E.R. 618]

B *Discovery—Privilege—Legal professional privilege—Documents relating to proceedings on client's behalf—Solicitor sued by third party for fraud in those proceedings.*

If, in the course of professional employment, counsel, attorneys and solicitors receive or make communications or commit to paper on the client's behalf matters which they know only through their professional relationship with the C client, they are bound to withhold them and will not be compelled to disclose them or provide them in court whether proceedings are in contemplation or not.

On a bill which sought to charge a solicitor with a fraud practised on the plaintiffs in the course of proceedings on his client's behalf, the court refused to order the production of entries and memoranda contained in the defendant's D books, or of written communications made or received by him, relating to those proceedings and admitted by the answer to be in the defendant's custody.

Notes. Considered: *Bland* v. *Wainwright* (1835), 4 L.J.Ex. Eq. 19; *Bishop of Meath* v. *Marquis of Winchester* (1836), 10 Bli. N.S. 330; *Story* v. *Lennox* (1836), 1 Keen, 341; *Turquand* v. *Knight* (1836), 2 Gale, 192; *Desborough* v. *Rawlins* (1838), 3 My. & Cr. 515; *Mackenzie* v. *Yeo* (1841), 2 Curt. 866; *Herring* v. E *Clobery* (1842), 1 Ph. 91; *Walsingham* v. *Goodricke* (1843), 3 Hare, 122; *Weeks* v. *Argent* (1847), 16 M. & W. 817; *Chant* v. *Brown* (1849), 7 Hare, 79; *Glyn* v. *Caulfeild* (1851), 3 Mac. & G. 463; *Russell* v. *Jackson* (1851), 9 Hare, 387. Distinguished: *Brown* v. *Foster* (1857), 1 H. & N. 736; *Ford* v. *Tennant* (*No. 2*) (1863), 32 Beav. 162; *Ramsbotham* v. *Senior* (1869), L.R. 8 Eq. 32. Considered: *Wilson* v. *Northampton and Banbury Junction Rail. Co.* (1872), L.R. 14 Eq. 477. F Explained: *Anderson* v. *Bank of British Columbia* (1876), 2 Ch.D. 644. Explained and Distinguished: *R.* v. *Cox*, [1881–5] All E.R. Rep. 68. Considered: *Re Strachan*, [1895] 1 Ch. 439; *Ainsworth* v. *Wilding*, [1900] 2 Ch. 315; *O'Rourke* v. *Darbishire*, [1920] All E.R. Rep. 1; *Minter* v. *Priest*, [1929] 1 K.B. 655. Referred to: *Moore* v. *Terrell* (1833), 4 B. & Ad. 870; *Llewellyn* v. *Baddeley* (1842), 11 L.J.Ch. 310; *Warde* v. *Warde* (1851), 3 Mac. & G. 365; *Ross* v. *Gibbs*, *Gibbs* v. G *Ross* (1869), L.R. 8 Eq. 522; *Westminster Airways, Ltd.* v. *Kuwait Oil Co.*, [1950] 2 All E.R. 596; *Conlon* v. *Conlons, Ltd.*, [1952] 2 All E.R. 462.

As to legal professional privilege, see 12 Halsbury's Laws (3rd Edn.) 39 et seq.; and for cases see 18 Digest (Repl.) 94 et seq.

Cases referred to:

H (1) *Hughes* v. *Biddulph* (1827), 4 Russ. 190; 38 E.R. 777, L.C.; 18 Digest (Repl.) 101, *854*.

(2) *Vent* v. *Pacey* (1830), 4 Russ. 193; 38 E.R. 778, L.C.; 18 Digest (Repl.) 94, *770*.

(3) *Bolton* v. *Liverpool Corpn.* (1833), 1 My. & K. 88; You. 378, n.; Coop. temp. Brough. 19; 1 L.J.Ch. 166; 39 E.R. 614, L.C.; 18 Digest (Repl.) 121, *1040*.

I (4) *Cromack* v. *Heathcote* (1820), 2 Brod. & Bing. 4; 4 Moore, C.P. 357; 129 E.R. 857; 18 Digest (Repl.) 95, *779*.

(5) *Anon.* (1693), Skin. 404; Holt, K.B. 76; 90 E.R. 179, N.P.; 18 Digest (Repl.) 135, *1190*.

(6) *Harrey* v. *Clayton* (1674), 2 Swan. 221, n.; 36 E.R. 599; 18 Digest (Repl.) 91, *751*.

(7) *Grimsford* v. *Grammar* (1809), 2 Camp. 9, N.P.; 22 Digest (Repl.) 405, *4354*.

(8) *Robson* v. *Kemp* (1803), 5 Esp. 52; 22 Digest (Repl.) 400, *4288*.

(9) *Brard* v. *Ackerman* (1804), 5 Esp. 119, N.P.; 22 Digest (Repl.) 212, *1993*.

(10) *Wadsworth* v. *Hamshaw and Aspinal* (1819), 2 Bröd. & Bing. 5, n.; 129 E.R. 858; 22 Digest (Repl.) 403, *4328*.

(11) *Cutts* v. *Pickering* (1672), 3 Keb. 2; Nels. 81; 3 Rep. Ch. 66; 84 E.R. 560; sub nom. *Cuts* v. *Pickering*, 1 Vent. 197; 22 Digest (Repl.) 405, *4349*.

(12) *Lord Say and Seal's Case* (1711), 10 Mod. Rep. 40; on appeal sub nom. *Lord Say and Seale* v. *Lloyd* (1712), 4 Bro. Parl. Cas. 73; 17 Digest (Repl.) 360, *1668*.

(13) *Studdy* v. *Sanders* (1823), 2 Dow. & Ry. K.B. 347; sub nom. *Staddy* v. *Sanders*, 1 L.J.O.S.K.B. 96; 22 Digest (Repl.) 58, *373*.

(14) *R.* v. *Watkinson* (1739), 2 Strange, 1122.

(15) *Doe d. Jupp* v. *Andrews* (1778), 2 Cowp. 845; 98 E.R. 1393; 22 Digest (Repl.) 418, *4512*.

(16) *Cobden* v. *Kendrick* (1791), 4 Term Rep. 431; 100 E.R. 1102; 22 Digest (Repl.) 403, *4327*.

(17) *Duffin* v. *Smith* (1792), Peake, 146, N.P.; 22 Digest (Repl.) 410, *4401*.

(18) *Wilson* v. *Rastall* (1792), 4 Term Rep. 753; 100 E.R. 1283; 22 Digest (Repl.) 399, *4284*.

(19) *Anon.* (1788), cited in 1 Mood. & Ry. at p. 5.

(20) *Clark* v. *Clark* (1830), 1 Mood. & R. 3, N.P.; 22 Digest (Repl.) 404, *4332*.

(21) *Williams* v. *Mudie* (1824), 1 C. & P. 158; sub nom. *Williams* v. *Mundie*, Ry. & M. 34, N.P.; 18 Digest (Repl.) 95, *780*.

(22) *Broad* v. *Pitt* (1828), 3 C. & P. 518; Mood. & M. 233, N.P.; 22 Digest (Repl.) 404, *4331*.

(23) *Bramwell* v. *Lucas* (1824), 2 B. & C. 745; 4 Dow. & Ry. K.B. 367; 2 L.J.O.S.K.B. 161; 107 E.R. 560; 22 Digest (Repl.) 405, *4355*.

Appeal from a decree of the vice-chancellor dismissing the plaintiffs' motion that certain books, containing entries and memoranda, and also papers and letters, should be produced by the defendant, a solicitor.

By an order made in March, 1831, in a suit for the administration of a testator's assets, a sum of £5,000 was directed to be lent and advanced to one Thomas Darwell out of the fund in court, on Darwell executing a bond for double the amount by way of security for the repayment. Under another order, dated April 26, a sum of £1,600 (being part of the said £5,000) was accordingly paid to a country solicitor, Gaskell, who received the money on Darwell's account, although, as was alleged, he was aware at the time that his client had not given the required security. The mistake was soon afterwards discovered and an order was made for the repayment of the money. On Darwell failing to obey that order, an attachment issued against him under which he was arrested. In these circumstances, application was made on his behalf to the plaintiffs who were ultimately prevailed on to join in signing and delivering to Gaskell a promissory note for £1,698 (which sum included a balance due for costs), and Gaskell, on receiving the note, advanced the money ordered to be replaced and his client was immediately set at liberty. Darwell became a bankrupt shortly afterwards and the present bill was then filed against Gaskell by the persons who had joined in executing the note, for the purpose of having it delivered up to be cancelled and for an injunction against legal proceedings in the meantime.

The bill alleged that the plaintiffs had been persuaded to execute the note at the pressing instance and solicitation of the defendant; that the more readily to induce them to sign it, the defendant had fraudulently concealed the fact that Darwell was then in a state of insolvency or had committed an act of bankruptcy, and had falsely represented his client's difficulties as being temporary only although, at the time the defendant made such representations, he well knew the contrary to be the truth; and that inasmuch as the note was given for the purpose of raising the money which the court had ordered to be replaced, and that money had been originally advanced under an order improperly obtained through the agency

A and management of the defendant, the defendant would himself have been held liable by the court, if Darwell had failed to repay it. The defendant was, therefore, to be considered, in equity, as the principal debtor for whom the plaintiffs were no more than sureties. The bill further stated a variety of facts tending to show that the defendant who for many years and throughout the whole of the proceedings in the administration suit and particularly on the orders already mentioned, had B acted as the solicitor of Darwell, must have fully known the real situation and circumstances of his client.

The defendant, by his answer, denied that the note in question had been executed by the plaintiffs at his instance or entreaty but he admitted that he had been aware of the situation and circumstances of Darwell at the time of the transaction impeached by the bill. In answer to a charge to that effect, he also admitted C that he had in his possession divers books containing entries and memoranda, and also papers and letters relative to the matters in the bill mentioned, and he set forth a list of them in a schedule. But he stated that such entries and memoranda were made, and such papers and letters were written, or received by him in his capacity of confidential solicitor for Darwell, for whom he had been professionally concerned for a number of years.

D

Sir Edward Sugden and *Koe* for the plaintiffs. The privilege which entitled solicitors to withhold a discovery of matters coming to their knowledge in the course of their professional business, was a privilege granted solely for the benefit of the client, and could never be allowed to shelter a solicitor who was sought to be personally charged with a fraud.

E

Pepys and *Spence* for the defendant.

Jan. 31, 1833. **LORD BROUGHAM, L.C.,** delivered the following judgment.—We are here to consider not the case which has frequently arisen in courts of equity of a party called on to produce his own communications with his professional advisers. How far he may be compelled to do so has, at different times, F been a matter of controversy; and in two cases before Lord Lyndhurst (*Hughes* v. *Biddulph* (1), and *Vent* v. *Pacey* (2)), and one since I sat here (*Bolton* v. *Liverpool Corpn.* (3)), the principle has been acted on that even the party himself cannot be compelled to disclose his own statements made to his counsel or solicitor in the suit pending, or with reference to that suit when in contemplation. The party has, however, no general privilege or protection; he is bound to disclose all he G knows, believes and thinks respecting his own case. The authorities, therefore, are that he must disclose also the cases he has laid before counsel for their opinion, unconnected with the suit itself.

Here the question relates to the solicitor who is called on to produce the entries he had made in accounts and letters received by him and those written (chiefly to his town agent) by him or by his direction, in his character or situation of H confidential solicitor to the party. I am of opinion that he cannot be compelled to disclose papers delivered or communications made to him, or letters or entries made by him in that capacity. To compel a party himself to answer on oath, even as to his belief or his thoughts, is one thing; nay, to compel him to disclose what he has written or spoken to others, not being his professional advisers, is competent to the party seeking the discovery, for such communications are not necessary to I the conduct of judicial business, and the defence or prosecution of men's rights by the aid of skilful persons. To force from the party himself the production of communications made by him to professional men seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it. But no authority sanctions the much wider violation of professional confidence and, in circumstances wholly different, which would be involved in compelling counsel or attorneys or solicitors to disclose matters committed to them in their professional capacity and which,

but for their employment as professional men, they would not have became possessed of.

As to them, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If, touching matters that come wtihin the ordinary scope of professional employment, they receive a communication in their professional capacity either from a client or on his account and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential and, it may be the most important of all communications, those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the court issued.

If it were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defence against attacks which he apprehends, although at the time no one may have resolved to assail him. But were it allowed to extend over such communications, the protection would be insufficient if it only included communications more or less connected with judicial proceedings; for a person often requires the aid of professional advice on the subject of his rights and his liabilities, with no reference to any particular litigation and without any other reference to litigation generally than all human affairs have, in so far as every transaction may by possibility, become the subject of judicial inquiry. "It would be most mischievous," said the learned judges in the Common Pleas, "if it could be doubted whether or not an attorney, consulted upon a man's title to an estate, was at liberty to divulge a flaw": *Cromack* v. *Heathcote* (4).

The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection; though certainly it may not be very easy to discover why a like privilege has been refused to others, especially to medical advisers. But it is out of regard to the interests of justice which cannot be upholden, and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings.

If the privilege did not exist at all, everyone would be thrown on his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun or intended or expected or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful or all proceedings superfluous.

From the terms in which I have stated the proposition, it is manifest that several cases may arise which, though apparently they are exceptions, yet do in reality come within it. Thus the witness, or the defendant treated as such, and called so to discover, must have learned the matter in question only as a solicitor or counsel and in no other way. If, therefore, he were a party and especially to a fraud (and the case may be put of his becoming informer after being engaged in a conspiracy), that is, if he were acting for himself, though he might also be employed for another, he would not be protected from disclosing, for in such a case his knowledge would not be acquired solely by his being employed professionally.

So if you examine the cases in which the protection has been refused until the recent nisi prius cases (of which I shall presently speak more in detail), you will find

A that they all range themselves within one or other of the following heads which are deducible from the proposition and in strict consistency with its terms. Those apparent exceptions are: where the communication was made before the attorney was employed as such or after his employment had ceased; or where, though consulted by a friend because he was an attorney, yet he refused to act as such, and was, therefore, only applied to as a friend; or where there could not be said, in any correctness
B of speech, to be a communication at all, as where, for instance, a fact, something that was done, became known to him from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally conusant (and even this has been held privileged in some of the cases); or where the matter communicated was not in its nature private and could in no sense be termed the subject of a confidential disclosure; or where
C the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted; or where the attorney made himself a subscribing witness and thereby assumed another character for the occasion and, adopting the duties which it imposes, became bound to give evidence of all that a subscribing witness can be required to prove.

D In all such cases it is plain that the attorney is not called on to disclose matters which he can be said to have learned by communication with his client or on his client's behalf, matters which were so committed to him in his capacity of attorney, and matters which in that capacity alone he had come to know.

I shall first advert to the cases which support the proposition and then show that those referred to as impugning it, previously to 1819, come plainly within its terms
E on one or other of the grounds I have just stated. In a case in SKINNER, *Anon.* (5), a nisi prius case but before HOLT, C.J., an attorney who had drawn an agreement between a sheriff and his under-sheriff was examined to prove it a corrupt one. HOLT, C.J., held him not bound to answer, and it is to be observed that the only ground there taken against the privilege was his not being a counsellor. HOLT, C.J.,
F said: "It seems to be the same law of a scrivener"; as, indeed, LORD NOTTINGHAM had laid down in *Harvey* v. *Clayton* (6) many years before, where he would not compel a scrivener to discover whose money he held in trust or for whom, saying that if he did, no man could hereafter employ him and that a man shall not be wounded through the side of his scrivener.

In *Gainsford* v. *Grammar* (7), LORD ELLENBOROUGH L.C., would not allow an
G attorney to be examined touching a proposal which he had carried from his client to the plaintiff, though no suit was then pending nor in existence for several months after. LORD ELLENBOROUGH gives apparently as a reason for considering that the witness was acting as an attorney, and not as an ordinary agent (the argument on the other side), that an attorney might be retained and confided in, in contemplation of a suit, but he appears to rely simply on its being a communication made to
H him while professionally employed as an attorney.

This was clearly the opinion of LORD ELLENBOROUGH in two other cases. In *Robson* v. *Kemp* (8), a solicitor being called who had been employed in preparing a warrant of attorney and who had subscribed it as a witness, LORD ELLENBOROUGH held him not bound to answer any question touching what passed at the concoction and
I preparation of the instrument, for those circumstances were confided to him professionally. He observed that, by subscribing as a witness, he had only pledged himself to give evidence as to its execution. Neither would he allow him to be examined as to its destruction, the attorney having become acquainted with that only in his professional capacity, and his Lordship concluded that the "one case was as much privileged as the other." So in *Brard* v. *Ackerman* (9), the same eminent judge would not allow an attorney to be examined as to the particulars of a bill of exchange which had come into his possession from his client. If it be possible that this bill might have been delivered to him post litem motam, it is at least quite clear in the

former case that the transaction had no connection whatever with any suit commenced or in contemplation, for no one can maintain without a great perversion of terms that the warrant to confess judgment referred to a suit in the sense in which the term is used throughout the present argument.

Cromack v. *Heathcote* (4) is the only other authority to which it is necessary to refer. It is clear and distinct and is the only decision in banc on the question. An attorney was there called to prove fraud in an assignment, he having been asked by the party against whom he was called to prepare the deed, which he had refused to do, and another had then been employed. The cases were all considered and the court held that because the party consulted the attorney professionally and instructed him as an attorney, although after receiving such communication the latter refused to draw the deed, yet the knowledge he had was obtained in his professional capacity and they were unanimously of opinion that there being no suit pending in any court made no difference as to the protection. RICHARDSON, J., expressly puts the case of an attorney consulted on title and says he never heard of the rule being confined to attorneys employed in a cause.

I have only adverted to such of the cases allowing the protection, as maintain the proposition in its largest extent and distinctly exclude the qualification of late partially introduced, of reference to legal proceedings. But it will now be satisfactory to examine the cases in which the protection has been refused and to find that down to *Wadsworth* v. *Hamshaw and Aspinal* (10), they afford no real exception to the rule but come within the description already given of exceptions only in appearance. Indeed, the greater part of them afford strong confirmation of it in the dicta of the judges as to how the decisions would have gone had the facts been otherwise.

In *Cuts* v. *Pickering* (11) where the defendant had disclosed to A. B. an erasure in a will to have been done by him, but disclosed it before A. B. was his solicitor, it was held he might be examined, but secus, had the disclosure been after his retainer. *Lord Say and Seal's Case* (12) was that of an attorney employed in levying a fine and called to prove that the deed to lead the uses was not executed till five months after the date. The court agreed that he could not be examined to prove his client's secrets but that the execution of a deed was a fact that he might know aliunde, and not a secret of his client's. Here, however, no distinction was taken as to matter disclosed in a suit or preparatory to or connected with a suit and other secrets or secrets otherwise learned. In *Studdy* v. *Sanders* (13), an attorney's clerk was allowed to identify the client as the person who put in an answer on the ground that this was a matter not confidentially disclosed to him.

An opposite decision was made in *R.* v. *Watkinson* (14), which was an indictment for perjury assigned in an answer in Chancery where the master who took it could not identify the defendant, the solicitor who was present when it was sworn was called and as the Chief Justice would not compel him to give evidence, the defendant was acquitted. Yet there the identity must have been known to many others and the putting in the answer, so far from being a secret disclosed, was in its very nature a matter of publicity. This case then I take not to be law at the present day. Indeed, LORD MANSFIELD, C.J., says in *Doe d. Jupp* v. *Andrews* (15), that he has known an attorney examined to prove that his client swore and signed an answer on which the latter was indicted for perjury.

In *Doe d. Jupp* v. *Andrews* (15), in consequence of an attorney who was an attesting witness to an agreement refusing to prove it, there was a nonsuit. But the court afterwards set aside the nonsuit, holding that the attorney was bound to give evidence on collateral points and that whoever becomes a witness to an instrument pledges himself to give evidence on it whenever called upon. There the attorney had been mixed up with the transaction and had acted not as a professional man; for though attorneys often witness deeds, that is accidental and they do so not as attorneys. He had made himself, as LORD ELLENBOROUGH says in one of the nisi prius cases, "a public man" as to proving the execution and not an attorney.

Cobden v. *Kendrick* (16) was the case of a communication from client to attorney after the action was compromised, and it was held not privileged. Clearly, because it was not made professionally but by way of idle and useless conversation, the words being: "I am glad it has been settled, for I only gave £10 and my note; it was a lottery transaction." Had this been confided with a view to some further proceedings or, without any regard to a suit, had it been communicated for a purpose of business, it would certainly have been protected. In *Duffin* v. *Smith* (17) usury in a mortgage was proved by the plaintiff's attorney who prepared the deed and who was called by the defendant to prove the consideration usurious. LORD KENYON in that case said (Peake, at p. 147):

> "When the attorney himself is as it were a party to the original transaction, that does not come to his knowledge in the character of an attorney, and he is liable to be examined the same as any other person."

It may be doubted if the attorney preparing the deed be not confidentially entrusted as an attorney in so doing. But LORD KENYON proceeds on the assumption that he is not; that on the contrary he is quasi party and he seems to liken the case to that of a co-conspirator where clearly there is no protection. Had he not deemed him the party acting, rather than the attorney entrusted, the principal rather than the agent, it is plain that his Lordship would have held him exempt from interrogation.

In *Wilson* v. *Rastall* (18), an attorney was held compellable to produce letters committed to him by the wife of another witness who had, he said, consulted him in his profession as a confidential person, both before and after the wife gave him the letters; the letters, though not given by him, were kept with his privity and consent, and the witness himself said that they were committed to him in consequence of the defendant consulting him professionally. But then he also said that he was undersheriff and had, on this account, refused to be employed as an attorney. Therefore, all that could be said was that he had been confidentially consulted by a friend who selected him for this purpose because of his professional knowledge. The court and particularly BULLER, J., put the decision on this ground, that the letters were not given to him in his professional capacity.

So stand the authorities on both sides or, I should rather say, all substantially on one side prior to 1819, the date of the first case I can find in which the rule was laid down with the qualification that the communication must relate to a cause. That is also the case in which the qualification is stated the most largely, or with the greatest effect on the rule. The case I allude to is a nisi prius decision of LORD TENTERDEN, C.J., *Wadsworth* v. *Hamshaw and Aspinal* (10), given in a note to *Cromack* v. *Heathcote* (4). The question was whether the defendants were partners at the time when certain goods were delivered, and their attorney was produced by the plaintiff to prove that they had called on him to advise them professionally respecting the dissolution of their partnership. The Lord Chief Justice considered that this was not a privileged communication, holding that the protection extended to those communications which relate to a cause existing at the time of such communication, or then about to be commenced. He cited a case from the Midland Circuit which came on motion into the King's Bench [*Anon.* (19)], a case to which he frequently referred on questions of this kind, and of which a better account is to be found in *Clark* v. *Clark* (20). LORD TENTERDEN, as I have often heard him say, was disposed to hold this privilege more strictly, that is, to allow it more sparingly than other judges. Indeed, he makes a similar remark in one of the cases reported but in none did he ever lay the rule down with so large an exception as here, and from what he afterwards says in *Clark* v. *Clark* (20), it can hardly be doubted that the report makes him restrict the privilege more than he intended.

It would follow from the decision in *Wadsworth* v. *Hamshaw and Aspinal* (10), if the words are to be taken literally, that a communication, however confidential, made to a professional man with a view to the client's defence against any proceedings which might be commenced, would be without protection because the disclosure

was not on the eve of the suit. The same doctrine is re-affirmed, though not perhaps quite so largely, in *Williams* and *Mundic* (21). That occurred a few years after *Wadsworth* v. *Hamshaw and Aspinal* (10) (in 1824), from which it only differs inasmuch as the attorney was consulted by the defendants relative to the commencement, and not to the dissolution of the partnership which, as before, was the matter in question. Here LORD TENTERDEN allowed the examination but stated the rule somewhat less strictly against the protection (Ry. & M. at pp. 34, 35):

> "I have invariably laid down that what is communicated for the purpose of bringing an action or suit relating to a cause, or suit existing at the time of the communication, is confidential and privileged, but what any attorney learns otherwise than for the purpose of a cause or suit he is bound to communicate."

It may be fairly said, taking these two cases together, that his Lordship would not have excluded communications made with a view to legal proceedings, though none such had either been commenced or were about to be instituted. LORD WYNFORD who, in *Broad* v. *Pitt* (22), adopts the doctrine, appears so to understand the case for he says it is enough if a proceeding is instituted or apprehended. In the case before him, however, though LORD WYNFORD approves of the rule, no decision can be said to have been made, for counsel for the plaintiff preferred proving their case by other evidence not open to the same objection and did not press for the disclosure, although the court had ruled that they might have it.

When a judge of such eminence as LORD TENTERDEN states that the question is one to which he has given great consideration (Ry. & M. at p. 35), even the contrary current of other decisions would leave the court under considerable anxiety in departing from so high an authority. It is, therefore, very material to inquire if the opinion ascribed to him has not been either reported by others or propounded by himself in the course of nisi prius proceedings, with somewhat of looseness or, which would be as satisfactory, to ascertain that he was subsequently disposed to modify that opinion, supposing it to have been accurately represented in the first instance.

In *Clark* v. *Clark* (20), the attorney was called to prove a communication with him when consulted on a transaction, for the purpose of showing that transaction to be fraudulent. A dispute had arisen between the parties but there were no proceedings pending nor, it would seem, in preparation or contemplated. The plaintiff only consulted his attorney as to his rights and put one of the documents connected with the transaction into his hands to get it stamped. LORD TENTERDEN held that the protection extended to this case. On that occasion, referring to the reports, he intimates an impression as existing in his mind that he had been made to state the rule more narrowly than he was likely to have laid it down. He allows that he has been more inclined to restrict it than other judges, and refers again to the case from the Midland Circuit [*Anon.* (19)] in a way which proves the case to have gone on the undeniable proposition that the communication, to be protected, must be made to the attorney in his professional capacity. He concludes by holding the communication in the case before him to be privileged, because it was made to the attorney in his professional character, with respect to a matter then in dispute, although no cause was in existence with respect to it.

However, the distinction here taken between dispute and no dispute having arisen cannot be found in the cases, and neither LORD TENTERDEN himself nor the rest of the Court of King's Bench, could have taken it into their consideration in *Bramwell* v. *Lucas* (23), for, if so, it would have put an end to the question there, and have precluded the necessity of a very difficult and nice inquiry as to the nature of the communication. The question related to an act of bankruptcy, and though bankruptcy when proceeded on may be considered as a suit, yet the act itself, out of which the proceedings may arise, is nothing of the kind; nor could any dispute be said to exist, for the fact happened before the parties to the dispute, the assignees and petitioning creditor, could have any existence. *Bramwell* v. *Lucas* (23) closes

A the examination of the authorities which I have felt called on to institute. It not only proves nothing against the general doctrine on which I have rested my opinion, but it comes distinctly within the principle stated and ranges itself with all the rest of what I have termed the only apparent exceptions. In *Bramwell* v. *Lucas* (23), an attorney of the name of Scott was called to prove his client's act of bankruptcy by relating that a meeting of creditors having been appointed, the client Noakes asked
B him: if he (Noakes) could safely attend without being arrested. Scott advised Noakes to remain in his office till he could ascertain that they would give him safe conduct and Noakes accordingly remained two hours there to avoid arrest. LORD TENTERDEN, in delivering the judgment of the court, says that the privilege is confined to communications made to an attorney in his character of attorney, and that this was a question which might have been asked of anyone else, and the information or advice might have been given by anyone else as well as by an attorney: "he
C recommended Noakes, not as a legal adviser, but as any agent or any friend might have recommended him, to stay where he was till a certain matter of fact could be ascertained." This decision, therefore, went on the ground that the communication which passed between the parties was not professional, as regarded the attorney. There may be some doubt whether the view of the fact taken by the court was not
D somewhat bottomed in a refinement,—whether the communication with Noakes was, in point of fact, in Scott's professional capacity. But the doctrine of law laid down in the case is free from all doubt; it is that the privilege shall be excluded where the communication is not made or received professionally and in the usual course of business.

E The great importance of this question, both in equity and at law, has induced me to go thus largely into it. The rules of evidence are the same on both sides of the [Westminster] Hall. The right which a party has on this side to a discovery from a defendant of what was communicated to him in his professional capacity, and the right which a party on either side has to obtain such information from a witness, are one and the same. Nor do I believe that there will be found any difference of opinion on the question in the different courts.

Appeal dismissed.

BRETT *v.* BRETT

[COURT OF ARCHES (Sir John Nicholl), July 24, 1826]

[Reported 3 Add. 210; 162 E.R. 456]

Statute—Construction—Meaning of particular phrase—Interpretation in connection with context.

Statute—Preamble—Reference to preamble to ascertain intention of legislature.

To arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute. It is to be viewed in connection with its whole context—meaning by this as well the title and preamble as the purview, or enacting part, of the statute. It is to the preamble, more especially, that we are to look for the reason or spirit of every statute, rehearsing, as it ordinarily does, the evils sought to be remedied or the doubts purported to be removed by the statute, so evidencing, in the best and most satisfactory manner, the object and intention of the legislature in passing the statute.

Notes. By the Wills Act, 1837, s. 2 of which repealed, among other enactments relating to wills, the statute of 25 Geo. 2, c. 6 (the Wills Act, 1751), all property may be disposed of by will (s. 3) and real estate and personal estate are thus placed on the same footing. A legacy, therefore, to a subscribing witness to a will of personalty would now be void (s. 15). To be valid a will must be signed by the testator in the presence of two witnesses at one time (s. 9).

Considered: *Emanuel* v. *Constable* (1827), 3 Russ. 436; *Salkeld* v. *Johnson* (1848), 2 Exch. 256. Referred to: *Ernest Augustus of Hanover (H.R.H. Prince)* v. *A.-G.*, [1955] 3 All E.R. 647.

As to construction with reference to other parts of statute, see 36 HALSBURY'S LAWS (3rd Edn.) 368, 369; and for cases see 44 DIGEST (Repl.) 234 et seq. For the Wills Act, 1837, see 26 HALSBURY'S STATUTES (2nd Edn.) 1326 et seq.

Case referred to:

(1) *Lees* v. *Summersgill* (1811), 17 Ves. 508; 34 E.R. 197; 44 Digest (Repl.) 239, *623*.

Decree issued on April 4, 1826, calling upon Rosamond Brett—administratrix, with the will annexed, of Elizabeth Crossman, deceased, by virtue of letters of administration (with the said will annexed) theretofore granted to her by the Prerogative Court of Canterbury, as the daughter and a next of kin of the deceased (the residue of whose personal estate was undisposed of by her will)—to answer to John Brett, a legatee of the said deceased, in the sum of £250, in a cause of subtraction of legacy.

A proctor appeared to this decree, for the party cited, alleging (on petition) that John Brett, the legatee promoting the suit, was a subscribing witness to the will—submitting, that by reason of this, and of the statute 25 Geo. 2, c. 6 (Wills Act, 1751), his legacy, being the very legacy sought to be recovered in this suit, was null and void—and praying, that his party, the party cited, might be dismissed, accordingly, from any further observance of justice in the suit.

In objection to this prayer, it was denied, by the proctor for the party promoting the suit, that the legacy sued for was null and void by the said statute; admitting the legatee to be a subscribing witness to the will. In support of that denial, it was submitted that

"the aforesaid statute was made to remove doubts that had arisen, who should be deemed legal witnesses within the intention of an Act passed in the twenty-ninth year of the reign of Charles the Second, for the prevention of frauds and

perjuries [Statute of Frauds (1677)]; and that, by s. 5 of such last-mentioned Act, it is declared, that such Act relates to the devises, and bequests, of lands or tenements, devisable, either by force of the Statute of Wills, or by that statute; or by force of the custom of Kent, or of the custom of any borough, or any other particular custom; and does not contain any enactment, or declaration, in respect to wills, or testaments, of, or concerning, personal estate only."

On these grounds it was prayed, that the court would reject the prayer of the party cited; and direct, or permit, the suit to proceed.

There were no affidavits exhibited on either side—there being no fact, or facts, in dispute between the parties. The question of law, as to the true construction of the Wills Act, 1751, now, after argument, stood for the judgment of the court.

SIR JOHN NICHOLL.—Rosamond Brett, administratrix, with the will annexed, of Elizabeth Crossman, is cited by John Brett, a legatee in the will, in a cause of subtraction of legacy. She appears to the citation, but prays to be dismissed - insisting, that the legacy is void, on the face of the will, inasmuch as the legatee is a subscribing witness. The legatee, in reply, admits that he is a subscribing witness, but denies that his legacy is void on that score; as the will neither disposes, nor purports to dispose, of real property. The question before the court is, accordingly, a mere question of law; for the parties are agreed as to the facts of the case. The shape in which that question presents itself is this: Is the Wills Act, 1751, in point of true construction, limited in its operation to wills and codicils of real estate; or does it extend to, and affect, all wills and codicils whatsoever.

The key to the opening of every law, is the reason and spirit of the law—it is the "animus imponentis," the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connection with its whole context—meaning, by this, as well the title and preamble, as the purview, or enacting part of the statute. It is to the preamble, more especially, that we are to look for the reason or spirit of every statute; rehearsing, this, as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the legislature, in making, and passing, the statute itself.

The particular phrase, "any will or codicil," occurring in the statute, upon which the present question depends, viewed thus in connection with its whole context in the statute, is not even difficult of interpretation, in my view of it. It is not, I think, to be taken in the general sense, which the phrase of itself, "any will or codicil," imports—on the contrary, it is to be taken in that limited sense of "any will or codicil of real estate," which the context satisfies me is the true interpretation or construction of the phrase.

The professed object of the statute, is to obviate doubts relating to the attestation of wills of real estate. This is manifest first and foremost, from the title of the Act, which is in these words:

> "An Act for avoiding, and putting an end to, certain doubts, and questions, relating to the attestation of wills, and codicils, of real estate, in that part of Great Britain called England; and in His Majesty's plantations and colonies in America."

As to this title of the Act. It has been said, this Act was penned by Lord Hardwicke: but Lord Hardwicke could never have used the phrase, "any will or codicil," in the sense of, "any will or codicil of real estate;" as Lord Hardwicke must have known that there were wills and codicils of personalty, as well: to which, equally with the other, it is sought to be inferred from this, that the phrase,

"any will or codicil," ought, in point of true construction, to be extended. I am not aware that the court is at liberty to go into any such extrinsic consideration, as this of who framed, or brought in, the bill—that the court is at liberty to travel, in any respect, out of the Act itself, for the true interpretation, or construction, of the Act. But if it be, the court may inquire, how could LORD HARDWICKE so misnomer the Act, as it obviously is misnomered, if the Act was meant, and must be taken, to affect wills of personal estate? The title of the Act, if this be the true construction, should, at least, not to say, must, have been different. But the title of an Act of Parliament, I may observe, is settled with some solemnity; and this, too, after it becomes an Act—that is, after the question put, whether the bill shall pass? and that question carried in the affirmative. This seems to imply, that in whatever sense the phrase "any will or codicil" was understood by the framer of the bill, the sense in which it was understood by the legislature, and in which the court, consequently, is bound to construe it, is that of "any will or codicil of real estate." At all events, it seems to me full as unaccountable, that this Act should be so entitled, if meant to affect personal estate, as that LORD HARDWICKE should have used the phrase "any will or codicil," in the sense of "any will or codicil of real estate"—limited, as the phrase is, to that sense, by its whole context.

So much for the title of the Act. Next, as to the preamble, which is in these words:

> "Whereas by an Act made in the 29th year of his late Majesty, King Charles II, entitled, an Act for prevention of frauds and perjuries [Statute of Frauds (1677)], it is, among other things, enacted, that from and after the 24th day of June, in the year of our Lord 1677, all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void, and of none effect, which hath been found to be a wise and good provision: but whereas doubts have arisen who are to be deemed legal witnesses, within the intent of the said Act; therefore, for avoiding the same, be it enacted," &c.

Such is the preamble, in which the self-same object, differently expressed, is specified, as in the title of the Act. As expressed in the preamble, it is to remove doubts "who are to be deemed legal witnesses within the Statute of Frauds." As expressed in the title, it is to remove doubts "relating to the attestation of wills and codicils of real estate." But the title and preamble strictly correspond, notwithstanding; as the only wills and codicils to the validity of which the attestation of subscribed witnesses is essential, by the Statute of Frauds, are "wills and codicils of real estate."

Its professed object, then, being devises within the Statute of Frauds, both according to the title, and the preamble, of this statute, I now come to the first, and principal, enacting clause (being that, in which the phrase to be construed "any will or codicil" occurs); and which is in these words. Therefore, for avoiding such doubts, be it enacted, etc., that

> "if any person shall attest the execution of any will, or codicil, which shall be made after the 24th day of June, in the year of our Lord 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting, any real or personal estate, other than and except charges on lands, tenements, or hereditaments, for payment of any debt, or debts, shall be thereby given, or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will, or codicil,

or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will, or codicil, within the intent of the said Act; notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will, or codicil."

Now it seems to me, that the phrase, "any will or codicil," in this enacting clause, is so limited by the avowed object, as expressed in the title and preamble of the Act, to devises—wills, or codicils of real estate—that it ought not to be construed to affect mere testaments - wills, or codicils, of personal estate only. The Statute of Frauds required the attestation of three, at least, competent witnesses, to every devise: so that if, of three subscribed witnesses to a devise, one, for instance, was a legatee, this rendering him, of course, on the score of interest, an incompetent witness, by a necessary consequence vacated the whole devise. The sole object of the Act in question, I think, is to remedy this evil—and this sole object it effects, I conceive, by annulling the legacy of every subscribed witness to a devise (and to a devise only), in order to restore the competency—preferring the sacrifice of a particular legacy, or of particular legacies, to that of the whole devise; of the whole will, so far as it relates to real property, inevitable under the Statute of Frauds, in the event of incompetency of any one of the three (there being only three) subscribed witnesses to the devise. This being so, the Wills Act, 1751, has, I should say, no reference whatever to a mere will of personalty, in true construction—that being an instrument not requiring the attestation of any subscribed witness (either by the Statute of Frauds, or otherwise, as will appear in the sequel), in order to give it legal force and validity.

This interpretation, or construction, of the first and principal clause, or section, of the Act, is fortified and confirmed to my mind, by what occurs in s. 10. I omit, or pass over, those sections intermediate between the first and the tenth, as not bearing upon the question, possibly, either way—only observing, however, that s. 2, plainly, relates merely to wills of realty. But to s. 10. Section 10 provides, that this Act is to extend to such only of the British colonies as have received for law the Statute of Frauds, or have made "Acts of assembly," requiring, as the Statute of Frauds does, the attestation of subscribed witnesses to devises, or wills, of lands. Hence, if this Act applies, in true construction, to wills of personalty, a legacy to one who is a subscribed witness to a will of personalty is void, in such of the colonies as have adopted the Statute of Frauds, or have made a similar law of their own; but it is a good legacy, in the other colonies. This could never, I think, be intended.

If the question, then, before the court, were "res integra," I should say, that this Act has no reference to a mere will of personalty, possibly, with little hesitation. But the contrary having been held at the Rolls, in a case similar to the present, that of *Lees* v. *Summersgill* (1), it is a conclusion, this, at which I venture to arrive, not without the greatest hesitation. [HIS LORDSHIP reviewed the cases on the statute, and continued:] Upon this showing, it is clear that the judgment in *Lees* v. *Summersgill* (1) proceeded upon a mistaken notion of the "understanding and practice" of these courts, as to the matter in question—a notion, however, but for which I repeat my conviction, that the statute in question might, very probably, have been differently construed in that case. And as, for this reason, on the one hand, I hold myself at liberty; so, on the other hand, I feel myself bound to pronounce, that it is competent to the legatee to proceed in this suit, notwithstanding the objection taken by the administratrix. And this I do, in consideration, not merely of the actual hardship (just, however, to advert to this) which a strict interpretation of the statute would, too frequently, inflict in individual cases; but in consideration of my strong view, and impression, of the legal propriety of expounding the statute liberally, and beneficially, on the grounds already suggested: especially, too, considering, the authority derived to this mode of expounding it

from the practice, here, in the two particulars to which I have adverted—a practice sanctioned, in one at least of the two, by adjudged cases: to which, sitting here, it is even, possibly, matter of legal obligation that I should conform, in my construction of the Act; although, under circumstances, it may have, elsewhere, received a different construction.

The above judgment of SIR JOHN NICHOLL was affirmed by the High Court of Delegates (GRAHAM, B., BAYLEY and PARK, JJ., and Doctors PHILLIMORE, LUSHINGTON, DODSON, BLAKE, HAGGARD and SALISBURY) on May 27, 1827.

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